



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 33 OF 2018

LESIT. J

REPUBLIC.....PROSECUTOR

VERSUS

NIVEL OGESA SIAMUNYU.....1ST ACCUSED

ANDERSON KIPSANG CHERUIYOT.....2ND ACCUSED

JUDGEMENT

1. NIVEL OGESA SIAMUNYU and ANDERSON KIPSANG CHERUIYOT, herein after the 1st and 2nd accused respectively are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that:

“On the 14th day of December, 2015 at about 1230 hrs at Githere Building House No. Z603 Sewerage Area, Eastleigh Section 111, Kamukunji Sub County within Nairobi County they jointly murdered “ABDINASSIR HAJI”

2. The prosecution called a total of 11 witnesses. The facts of the prosecution case are that the deceased lived on 6th floor, room 603 of a building in Eastleigh Section 3, near Biafra, with his uncle Omar (PW4), one Abdul Wahab and one Osman. PW4 testified that the deceased sent him to buy him fruits 200 meters from their building. It was 11:30 am. He testified that he returned accompanied by a neighbour, one Peter, they found two men, one in fatigue clothing, knocking forcefully on their door demanding that it should be opened. PW4 said that he passed their house and went with Peter to his room. Shortly later he heard his nephew shouting in Borana language that someone should call his mother, so he ran downstairs to first floor where she lived and met his niece, PW1. He told PW1 to run to the house of the deceased where some people were trying to arrest him, which information PW1 confirmed in her evidence.

3. PW1 ran up as PW4 went for the mother of the deceased. He found the mother and told her. He joined her as she also walked upstairs. They only reached third floor when they saw people walking downstairs. None told them anything. They all went down and outside the building where they saw the deceased lying facing up in a critical condition. It is PW4 who carried the deceased to a taxi, helped by some youths, and rushed him to Medina Hospital, not far from the scene. He died 15 minutes later.

4. The body was subjected to minimal post mortem on religious grounds, according to Dr. Peter Ndegwa, the pathologist. He was PW3. He formed the opinion that the cause of death was cranial cerebral injuries due to blunt force trauma consistent with fall from a height. His report was P. Exh. 1.

5. There was evidence from PW6, one of the two men PW4 saw knocking at their door. PW6 was an Administration Police Officer and was in uniform on the material day. He was the Duty Officer at the AP Post, Biafra. His duties included deploying officers for various duties within and outside the Camp. His evidence was that on the material morning, at 11:45 am, the 2nd accused, whom he knew and had worked with for one year approached him seeking to have him, PW6, assign two APs to assist him effect arrest at a building 50 meters from their camp. PW6 said that the 2nd accused was an Assistant Chief of Biafra area, with his office within the AP Camp. PW6 testified that since he had no officers left, he decided to accompany the 2nd accused to assist him. He said that the 2nd accused was at the time in company with the 1st accused. PW6 said that he knew the 1st accused as the aide of the 2nd accused.

6. PW6 stated that the three of them went to the 6th floor where they met the deceased in the company of PW7, in a single roomed house on that floor. PW6 said that he immediately held PW7 who was standing near him, handcuffed him and stood with him next to the door.

7. PW6 stated the two accused persons went for the deceased to apprehend him but that he resisted resulting in a struggle to contain the

deceased. He said that the deceased managed to free himself from the two accused persons, and that he ran towards the balcony with the two accused in hot pursuit. That five minutes later, the Assistant Chief, the 2nd accused returned quickly followed by the 1st accused. He said that he told him in the Swahili language ‘twende, twende, twende’ (meaning ‘let’s go, let’s go, let’s go’). They did not have the deceased with him. They all went downstairs and back to camp. He said that he took PW7 with him to the camp and later to Shauri Moyo Police station where he booked him for the offence of bhang smoking.

8. PW7 confirmed the evidence of PW6 in so far as his arrest was concerned. As to the events that took place in the room that day, PW7 testified that immediately after the two accused and PW6 entered, the two accused started searching the room without talking, while PW6 questioned them about an alleged bag which had cannabis sativa. PW7 confirms that he gave his hands to PW6 without resisting and he was handcuffed, but the deceased resisted leading to a commotion of pushing and shoving between him and both accused, inside the room and on the balcony. Like PW6, PW7 said he could not see the balcony clearly and so did not know what transpired outside there.

9. The accused persons, PW6 and PW7, the latter under the custody of PW6 all went downstairs and out of the building. When outside, PW6 and 7 said that they noticed a crowd of people surrounding a man who was lying on the ground. They did not approach the crowd but proceeded to the Chief’s Camp. The man that had been surrounded by the crowd of people outside Githere building was later identified as the deceased.

10. The 1st and 2nd accused each gave a sworn defence. The 1st accused stated that on the material date, he was at a construction site working as a foreman. At around 11am, he was asked by his employer to contact one Mr. Macharia (PW6) an Administration Police Officer who was to assist him in dealing with youths who were resisting to have sand poured at the construction site. The 1st accused stated that he called PW6 but he did not pick up. He said that PW6 later called him and asked him to join him at Githere building. He said that he proceeded there and arrival he met PW6 in company of the 2nd accused and another young man. Together they went up the stairs to the 6th floor where the young man identified a house to them and left.

11. The 1st accused stated that PW6 knocked on the door to the house identified by the young man and someone peeped through the window and later opened the door. On getting inside he smelt of bhang, and that PW6 enquired from the deceased and PW7 where the bhang was, which question they did not answer. The 1st accused said that PW6 arrested PW7 who cooperated by stretching his hands for him to be handcuffed whereas the deceased resisted arrest and started asking for a search warrant. The 1st accused stated that together with the 2nd accused, they tried to hold the deceased down but he proved to be too strong for them. He stated that the deceased walked over to the table, took up a substance and swallowed it.

12. The 1st accused stated that all of a sudden, the deceased changed, his eyes changed and he became excessively strong; and that he ran out the veranda door towards the rear door. He said that he followed him to the back but on checking out the balcony he did not find the deceased. The 1st accused said that he concluded that the deceased had jumped over the balcony. The 1st accused denied pushing the deceased over the balcony.

13. The 2nd accused in his defence testified that he was an Assistant Chief of Biafra area, Nairobi. He said that on 14th December, 2015 a caretaker of Githere Building approached him for the third time in several days, and made a report to the effect that there were youths disturbing residents in the area. The 2nd accused said that he recorded the report in a register. He identified a copy of the register where he recorded the complaints in court as DMF1. He did not bring the original record and since the prosecution objected to production of a copy, the court did not admit it in evidence.

14. The 2nd accused stated that together with PW6 who was the Duty Officer at the Chief’s camp and, accompanied by John the caretaker, they proceeded to Githere building. The caretaker identified a house on the 6th floor and took off as he feared the young men. He stated that together with the 1st accused, they tried to arrest the deceased but he overpowered them. He stated that he saw the deceased pick up something from the table and put it in his mouth and upon swallowing the same, the deceased became very wild and ran towards the back door.

15. The 2nd accused testified that he followed the deceased and checked the bathroom and toilet but he did not see him. The 2nd accused said that he suspected that the deceased must have jumped over the balcony. He stated that it was not possible to see downstairs from the 6th floor where they were. The 2nd accused said that he later heard people say that a young man had jumped and others say that the police had thrown the young man down. He stated that he was later visited by the IPOA who took his statement.

16. The accused persons are each facing a charge of murder contrary to **section 203** of the **Penal Code**. That section provides that:

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

17. Malice aforethought has been defined under **section 206** as follows:

“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;”

18. The burden of proof lies on the prosecution to adduce evidence to prove the three ingredients for the offence of murder, that is; that it was the accused who persons caused injury to the deceased by either an unlawful act or an omission; that the unlawful act or omission was perpetrated by malice aforethought and that the deceased died as a result of the injuries he suffered.

19. Having considered the evidence adduced by the parties herein, and the submissions by Ms. Onunga learned Counsel for the Prosecution, Mr. Apollo learned counsel for the 1st accused and Mr. Swaka learned counsel for the 2nd accused, I find that there are issues that are not in dispute in this case. It is not in dispute that:

- (i) **The accused persons were in company of PW6 and 7 when this incident occurred.**
- (ii) **The deceased met his death as a result of falling from the sixth floor of Githere building.**
- (iii) **The accused persons as well as PW6 did not check on the status of the deceased after they went downstairs from the flat where the deceased resided after the incident.**
- (iv) **When the 2nd accused made his way to the deceased house, his intention was to effect the arrest of the youths that were causing disturbance to the residents of that area.**
- (v) **That neither PW6 nor the 2nd accused made any report of this incident to the police for the necessary police action to be taken.**

20. The issues which demand determination in this case are:

- (I) Whether the prosecution has proved that the accused persons caused the death of the deceased.**
- (II) Whether the circumstantial evidence adduced by the prosecution points irresistibly to the guilt of the accused persons.**
- (III) Whether there were material contradictions in the prosecution case to render it discredited.**
- (IV) Whether the prosecution failed to call material witnesses.**
- (V) Whether the police carried out shoddy investigations in this case.**
- (VI) Whether the defence adduced by the accused persons is reasonable and plausible.**

Whether the prosecution has proved that the accused persons caused the death of the deceased.

21. Mr. Apollo urged that the prosecution failed to establish the elements of the offence for murder. Mr. Apollo's submissions that the prosecution did not prove that it was the accused persons' act or omission which caused the death of the accused, and that neither did the prosecution prove that the two accused had any malice against the deceased.

22. Mr. Apollo, counsel for the 1st accused urged that the prosecution failed in their mandate to prove their case as against the 1st accused because the two eye witnesses they presented before court could not adduce evidence to establish that the 1st accused pushed the deceased from the balcony of the house causing his fall six floors down. He urged that the two witnesses confirmed that the accused persons were trying to apprehend the deceased who was resisting arrest and made an attempt to escape. He urged that it was at that intervening period that the deceased jumped from the balcony of his house that was on the 6th floor and met his death.

23. Counsel urged the court to be guided by the facts that the prosecution failed to establish the elements of murder and further that the accused had been exonerated by the key prosecution witnesses. Counsel urged that the death of the deceased was proved and that he had fallen from a height, however the same had not been attributed to an unlawful act or omission on the part of the 1st accused person.

24. Mr. Swaka, learned counsel for the 2nd accused submitted that the prosecution had failed to prove the ingredients of the offence of murder. Counsel urged that the evidence that the prosecution had adduced was in variance with the particulars of the charge sheet. He urged that the evidence adduced did not demonstrate murder but it demonstrated that the deceased jumped out of the building while resisting arrest. Counsel urged that PW7 who was at the scene and was also being arrested did not resist arrest and neither did he see what happened at the balcony.

25. Mr. Swaka for the 2nd accused, submitted that in addition to the prosecution's failure to prove all the ingredients of the offence of murder, it adduced evidence that was at variance with the particulars of the charge. Learned Defence Counsel urged that the evidence adduced by PW6 and 7 demonstrated that the deceased jumped out of the building while resisting arrest, which was at variance with the charge facing the accused persons. Counsel urged that both witnesses (PW6 & 7) did not see what transpired when the deceased, followed closely by the two accused ran out of the bedsitter into the balcony of his single room. Counsel urged further that the prosecution did not prove bad intention on the part of the accused.

26. Ms Onunga for Learned Prosecution Counsel urged the court to find that the prosecution had discharged its burden of proof in this case. She urged that the prosecution had established facts which prove that the deceased death was traceable to the accused persons and that in the circumstances it should avail the accused persons nothing to show that the deceased death might have been prevented by proper care and

treatment. For that propositions counsel relied on a persuasive authority from England, **Rep. vs. Smith 1959 2All ER 193**.

27. Regarding malice aforethought, Ms. Onunga urged that the injuries which the deceased suffered were fatal grievous harm and that the same fell within **Section 206(b)** of the **Penal Code**. Counsel urged that the injuries were proof that the attack on the deceased was excessive and a clear indication of the accused person's intention to cause serious grievous harm.

28. Counsel urged that the conduct of the accused persons after the incident, to walk away without giving any aid to the deceased was a clear manifestation of malice on both their parts. Counsel urged the court to find that the accused persons demeanour of giving no assistance to the deceased even though they were involved in his death negates that the incident was either an accident or misadventure.

29. The ingredients of the offence of murder are clear and well settled. The question is whether the prosecution proved any of these ingredients, and to what effect. The very first ingredient was whether the prosecution proved that the accused persons caused injury to the deceased by either an unlawfully act or an omission.

30. The prosecution brought two eye witnesses of the incident, PW6 and PW7. Both of them were clear that even though they saw the two accused persons pursue the deceased into the balcony area of the material hose, they did not see what transpired outside there. PW6 in particular said that in the course of the deceased resisting arrest, he ran to the balcony closely followed by the 1st and 2nd accused. PW6 said that they were gone for 5 minutes after which the two accused emerged without the deceased.

31. PW7's account was the accused persons and PW6 entered the house in which he and the deceased was and straight away started accusing them of smoking bhang and having bhang in a bag. They went ahead to search the room and when they found nothing, PW6 handcuffed one of his hands. He declined to give his other hand as he did not understand the reason for the arrest. PW7 testified that the two accused then went for the deceased, pushed and shoved him trying to force his hands to be handcuffed together with his but the deceased resisted. PW7 said that they pushed and shoved him up to the balcony area, an area of one and a half square meters. He said he could not see what transpired at the balcony as PW7 had pinned him down, however the three of them took three minutes in the balcony area. PW7 said that he heard the 2nd accused say, 'the man has fallen and died and he was a temporary and useless man'.

32. There was another witness who literally saw the deceased fall down from up. He saw first some keys, then clothes only to realize it was a human being. He could not tell what had transpired that led to the deceased fall. Being an in Ophthalmic doctor he said that he ran for a stethoscope to check on the deceased vital and found him in a critical condition.

33. From the evidence of PW6, PW7 and PW8 none saw the accused persons throw the deceased out of the balcony to the ground. The action PW6 and PW7 saw does not amount to direct evidence of an act or omission that could have caused the deceased death.

34. The other ingredient is whether there was an unlawful act or omission, and if so, whether it was perpetrated by malice aforethought. I have found that the prosecution did not adduce direct evidence of an act or omission causing the deceased fall.

35. As to whether the deceased died as a result of the injuries he suffered. The defence did not make an issue of the deceased death. They did not challenge the fact of the deceased death, nor did they deny that his death was as a result of a fall from a height. PW3 established that death was caused by a blunt force trauma consistent with a fall from a height. This then is the only ingredient of the offence of murder which the prosecution has established. It is insufficient to rove the charge against the two accused persons.

Whether the circumstantial evidence adduced by the prosecution points irresistibly to the guilt of the accused persons.

36. Mr. Apollo, Learned Defence Counsel submitted that the circumstantial evidence adduced by the prosecution had broken chain of events and as such the inculpatory facts put forward by the prosecution were not cogently and firmly established. For that proposition Counsel relied on **Musili Tulo vs. Republic [2014] eKLR**. Counsel also cited **MUSOKE VS. REP. [1958] EA 715** in which the case of **Teper Vs. Rep. [1952] AL 480** was quoted thus:

“It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

37. Mr. Swaka for the defence urged that at best what the prosecution relied on was circumstantial evidence. Counsel urged the court to rely on the principle laid out in the celebrated case of **Rep. vs. KipKerring arap Koskei & others [1949] EACA 135** thus:

“In order to justify a conviction on circumstantial evidence, the inference of guilty, 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 and the burden of proving facts which justify the drawing this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

38. Mr. Swaka also relied on the principle set out in **Mohamed & 3 others vs. Republic [2005] 1KLR 722** thus:

“Circumstantial evidence means evidence that tends to prove either events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.”

39. Counsel cited **Simon Musoka vs. Rep. [1958] EA 71** which Mr. Apollo had also cited, and **Abanga alias Onyango vs. Rep. CA No. 32 of 1990 (UR)**. **Dhaley Singh vs. Republic CA No. 10 of 1997 (UR)** and **Sawe Vs. Republic [2003] KLR 354**, all which illuminate further

the principle of accusing when an inference of guilt can be drawn from circumstantial evidence.

40. Mr. Swaka concluded by urging the court to find that the circumstantial evidence adduced was based on suspicion and urged that by itself was not sufficient grounds even for prosecuting the accused persons.

41. For that proposition, Counsel relied on **James Tinega Omwenga vs. Repulic [2010] e KLR**.

42. Ms Onunga, Learned Prosecution Counsel urged that the prosecution fully discharged its burden and had proved circumstances which established that the accused actions were the reason the deceased met his death. Counsel invoked **Article 26** of the **Constitution** and urged that every person has a right to life, and that the accused had the duty, like all people of Kenyan, to respect, uphold and defend life and the dignity of the deceased. Counsel urged that in light of that **Article (26)** the law expects a greater measure of self-control in situations where the stake of human life is concerned.

43. Ms Onunga urged that even though the law supports the use of reasonable force when protecting oneself or property that force must be exercised within the limits and only where life or property is in danger. Counsel urged that the accused had a statutory burden under **Sections 111(1)** and **119** of the **Evidence Act** to give a reasonable and plausible explanation regarding events surrounding the death of the deceased. She urged the court to find that deceased was alive and well before both accused set upon him in an attempt to arrest him, and that in the circumstances, it is only they who know what happened to the deceased and should give a reasonable and plausible explanation.

44. Counsel urged the court to find that the statutory burden under that section was not discharged. To buttress her arguments further Ms Onunga relied on **Section 21** of the **Criminal Procedure Code**. **Section 21 (1), (2) and (3)** of the **Criminal Procedure Code** provides:

“1. In making arrest, a police officer or other persons making it shall actually touch or confine the body of the person to be arrested unless there be a submission to custody by word or action.

2. If a person forcibly resists the endeavour to arrest him or attempts to evade arrest, the police officer or other person may use all means necessary to effect arrest.

3. Noting in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.”

45. Ms. Onunga concluded by urging the court to find that there was nothing to justify the invocation of excessive force especially given the fact the deceased was not armed.

46. The court has found that there was no direct evidence in the prosecution case, of an act or omission caused by the two accused persons which could be attributed to the causation of the deceased death. The issue is whether there was any circumstantial evidence in this case, and whether it was sufficient to point irresistibly to the guilt of the accused persons.

47. The circumstantial evidence exists to the effect that the two accused persons left the room where PW6 and PW7 were, and entered the balcony area in hot pursuit of the deceased. The deceased was next seen lying on the ground, six floors below his room. PW6 said the two accused and the deceased took five minutes in the balcony struggling before the accused persons returned without the deceased. PW7 said they had taken three minutes. After that the 2nd accused was heard by PW7 saying that the deceased had fallen to the ground and had died. It is clear from the evidence of PW6 and PW7 that the struggling in an attempt to arrest the deceased continued in the balcony for few minutes.

48. Given the prosecution case, both accused were expected to give an explanation of what happened, and of how the deceased met his death. That is a statutory burden of proof under **sections 111(1)** and **119** of the **Evidence Act** as Ms. Onunga rightly put it.

49. What then was the explanation of the accused persons? The accused persons both said that they did not find the deceased in the balcony area or in the toilet which was at the far end of the balcony. Both said that they did not know where the deceased had disappeared to. That evidence was not a true statement because both PW6 and 7 heard the commotion between the deceased, the 1st and the 2nd accused persons at the balcony for at least three minutes. That is not a short time in the circumstances. Also, PW7 heard the 2nd accused refer to the deceased in a derogatory manner saying he had fallen and was dead.

50. Is the evidence adduced by the prosecution sufficient to prove the accused persons' culpability in this matter, and to irresistibly point to their guilt? The counsels have cited good authorities which demonstrate that the court should carefully weigh circumstantial evidence in order to satisfy itself that the facts of the case proving guilt are cogently and firmly established. **Teper Vs. Rep. [1952] AL 480** was quoted thus:

“It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

51. The court noted the evidence of PW6 during cross examination by Mr. Swaka for the 2nd accused was that he saw the deceased put something in his mouth, swallow it and that he turned wild. I found that piece of evidence a lie. First of all, PW6 did not give that evidence during examination-in chief but during cross-examination by the counsel for the 2nd accused. Secondly, that was such an important piece of evidence, yet it was given as an afterthought. Thirdly, PW7 who was present throughout the incident saw no such thing. I think that PW6 gave that evidence to try and assist the 2nd accused.

52. The Prosecution relied on **section 21** of the **Criminal Procedure Code** on how to effect arrest, and the need to exercise reasonable force while effecting arrest. That section applies not only to police but to any person effecting arrest, which in this case will include the 1st accused. The prosecution did not adduce any evidence to show whether the accused persons were touching the deceased and exactly what happened before the two accused returned to his room. There lacks therefore, any evidence to show that the deceased fall was as a result of excessive use of force on the part of the 2nd accused, or his co-accused as they attempted to arrest the deceased.

53. It is important to remember that the prosecution has the burden of proof in this case. And that the standard of proof should be beyond any reasonable doubt.

54. I find that it is clear the two accused struggled with the deceased as they tried to arrest him, and that they followed him to the balcony and were there with him for at least three minutes. I also find their explanation that they did not find the deceased at the balcony a lie. The totality of the evidence is such that the court cannot draw an inference of guilt as the evidence does not irresistibly point to the accused guilt. I find that from this evidence the court cannot rule out other existing circumstances which could weaken the inference of guilt. The possibility the deceased could have jumped out to resist arrest cannot be ruled out.

WHETHER THERE WERE MATERIAL CONTRADICTIONS IN THE PROSECUTION CASE TO DISCREDIT IT

55. Mr. Swaka Learned Defence Counsel raised other issues which are equally noteworthy from the evidence adduced in this case. In the first such issue, counsel urged that the prosecution evidence had material contradictions. Mr. Swaka cited several authorities the gist of which was to say that even where the evidence before the court was contradictory, the court can nevertheless ignore the contradictions if, in fact, they are immaterial, or do not affect the main substance of the prosecution case or if they do not go to the root of the material.

56. The authorities cited were **Dickson Elea Nzamba Shapwata and Another vs. Republic CA 92 of 2007**; **State of U.P.V. Naresh & Others SC India Criminal Application No. 674 of 2006**; **Philip Nzaka Watu vs. Republic [2016] eKLR**; **Njuki & 4 others vs. Republic [2002] 1KLR 771**; and, **Vincent Kasyula Kingo vs. Republic Nairobi CA No. 98 of 2014**.

57. Counsel referred to PW7 and PW8 as those who were together in the house where the incident occurred. Counsel obviously mixed up of the prosecution witnesses, making it difficult for the court to follow his argument. Counsel urged that whereas PW7 said he could see what transpired in the balcony with deceased and the accused persons, PW8 said he was unable to see anything. PW8 was never in deceased house at the time of incident. He was an eye doctor with a clinic on the same building where the incident occurred, and had just walked out of his clinic when he saw the deceased fall down from way above where he was. Counsel's submissions cannot hold.

WHETHER THE PROSECUTION FAILED TO CALL MATERIAL WITNESSES AND WHETHER THE POLICE CARRIED OUT SHODDY INVESTIGATIONS IN THIS CASE.

58. I have combined the two issues as they are related. Mr. Swaka submitted that the prosecution failed to call material witnesses, and that the police carried out shoddy investigations in this case.

59. Mr. Swaka urged that Sgt. Wanjohi who received sketch plans from PW11 was not called as a witness. Counsel also urged that PW10 the investigating officer of this case failed to carry out deep investigations in order to get to the bottom of the case. Counsel urged that all that PW11 did was to draw sketch plans of the scene after which he was directed to hand over investigations to the DCIO Buruburu. Nothing much was done thereafter, Counsel submitted.

60. The incident in this case took place on 14th December, 2015, yet the accused persons were not brought to court until 25th June, 2018. PW6 and the 2nd accused who were an Administration Police Corporal and Assistant Chief respectively admitted in their evidence that none of them reported the incident to the police. Each claimed the other was the one charged with the responsibility to make the formal report of the incident to the police.

61. PW9, a police officer based at Shauri Moyo Police Station told the court that he was on duty at the station when Officer in charge of Crime Section, one Inspector of Police Yahya Abdalla sent him to Medina Hospital in Eastleigh, where the body of a victim was lying, in order to get details of a scene of death within Eastleigh. He proceeded there and found the District Administration Police Commander, Mr. Bungei and one Inspector Mathenge. PW9 testified that he met the one who reported the matter to IP Yayha, one Ali Hassan Ali who took him to the spot where the deceased had fallen. Ali Hassan was not called as a witness. PW9 was not able to enter the building that day as the Caretaker had locked the gate to keep off crowds. PW9 stated that he also invited PW3 to carry out post mortem on the deceased, which he did in his presence and that of family members.

62. PW10 was the investigating officer of this case. He started investigations at 2pm of the day of incident. He testified that he interviewed the witnesses at different times, including PW6, PW7 and PW8. He also interviewed the 2nd accused. He visited the house scene but could not remember whether it was on the 21st or 22nd December, 2015. Two months later he said he was able to interview the 1st accused who also recorded his statement. PW10 testified that two months after he was asked to investigate the case, he had not concluded his investigations, and that his senior, the DCIO Buruburu called for the file.

63. PW11 Corporal Hassan from DCI took over the investigations of the case on 24th January, 2016, after the file was recalled from PW10. PW11 drew a sketch plan of the room and the area where the deceased was said to have fallen. The sketches were P. Exh. 4. He found that from house number Z603 where deceased lived to the ground was 16.5 meters. He said investigations file was complete when he took over so he forwarded it to his senior for a decision to be made as to charging.

64. The narrative of the investigations shows that the initial investigations were undertaken in a sluggish manner. Even though PW10 said he had not completed investigations, PW11 said that the investigations were complete when he took over the file.

65. PW11 testified that he read the OB under which PW6 booked PW7 and found it had not indicated the place it was alleged PW7 was arrested while having bhang. Further, even though the OB mentioned that PW7 was found with three rolls of half smoked bhang, none of it was produced by PW6 as an exhibit. This clearly shows that PW6 was both covering up where the incident occurred and gave scanty information, leaving out the incident of death all together. Absence of the bhang allegedly found with PW7 could also mean that allegation was a frame up. The bottom line is that there was an obvious attempt at cover up.

66. There was a failure to carry out proper investigations. By the time of the post mortem, PW4 was one of the witnesses who identified the deceased body to PW3, Dr. Ndegwa and PW9. PW9 was sent to oversee the post mortem by his boss PW10. PW10 was already aware of the allegation that the deceased and PW7 were found having smoked bhang. The issue is why he did not ask PW9 to request PW3 for the deceased blood for analysis to cogently establish whether or not the deceased was high on drugs, or in the very least whether he used drugs.

67. The investigations should have tried to uncover why PW6 and the accused persons went to the scene that day. In respect of PW6 and the 2nd accused, the best place to look was in the Occurrence Book of each of the agency they worked for to see if they had booked the event in it. If it was an official duty, then a formal entry in the OB should have been entered. PW10 did not look at these documents, a serious omission as it denied the court to know whether the two officers were on duty or were on a frolic of their own.

68. Over-all I find that the initial investigations carried out in this case were done in a sluggish manner, and that many gaps were left, most likely deliberately in the case. By the time PW11 came to the scene, time had gone and not much could be redeemed.

69. As to material witnesses being left out, Mr. Swaka mentioned Sgt Wanjohi. However, PW11 explained, which was acceptable, that the officer was undertaking a course at the Police College where they are not allowed to leave until the end of their course. Failure to call him was not adverse to the prosecution case in the circumstances.

70. The Caretaker of building where the incident took place was an important witness as he is the one alleged to have called for the arrest of the deceased and PW7. His evidence was critical for the added reason of his position as the Caretaker of the building. What makes this witness very important is the fact that PW6, the 1st and 2nd accused each have a different contradictory story of how they went to that building, and of how, why and where they met.

71. PW6 testified that he was the officer in charge of allocating duty to officers at Biafra AP Camp on the material day when the 2nd accused approached him and asked to be given two APs to assist him in arresting some offenders. PW6 said that since he had sent all the officers out, he decided to assist the 2nd accused personally. PW6 said that he met the 2nd accused at their camp and that he was accompanied by the 1st accused.

72. The 1st accused on his part testified that he called PW6 on phone while in his place of work and asked him to assist in arresting some youth who were preventing sand from being poured at a construction site. He said that his boss, Abdullahi is the one who gave him the phone number of PW6. The 1st accused said that PW6 asked him to walk to Githere building as he had some work there. The 1st accused said that when he went to the building, he found PW6 with the 2nd accused and the Caretaker.

73. On the other hand, the 2nd accused said that the Caretaker of the Githere Building approached him for the ninth time that morning reporting that there were youth who were abusing drugs and disturbing peace to residents at his building. The 2nd accused testified that he, PW6 and the Caretaker proceeded to the building from the Biafra Camp. The 2nd accused did not mention the 1st accused or where he came from until the point he started testifying of attempts to arrest the deceased. From the evidence of the 2nd accused why the 1st accused was present and what role he was playing does not come out.

74. The Caretaker would have helped discover why the three men were together that morning. And that is very crucial as I have said herein after as it would have helped the court decipher whether they were on any investigative duties or arresting mission, or theirs was a frolic of harassment to residents of that area. For that reason, failure to bring the Caretaker as a witness was a serious omission on the part of the prosecution.

75. There are other senior civil servants left out as witnesses. The Deputy-in-charge at the Biafra AP Camp to whom PW6 alleged he reported the incident. She was an important witness for purposes, if nothing else, of testing the credibility of PW6. The other was the boss of the 2nd accused. It would have been interesting to find out what kind of report he received from the 2nd accused after the incident, and to find out why he took no form of action into the matter.

76. I agree with Mr. Swaka that the investigations into the case were not conducted above board, and a lot of areas were not covered. I agree also that vital witnesses were left out who may have assisted the court to understand the case better and aided in arriving at the truth.

WHETHER THE ACCUSED PERSONS DEFENCE WAS REASONABLE AND PLAUSIBLE

77. I have already dealt with the accused persons defence at the stage where I considered the explanation they offered as required by statute. The accused had a statutory burden to revert a rebuttable presumption which arose by operation of **sections 111(1) and 119 of the Evidence Act**. This arose from circumstantial evidence adduced by PW6 and 7 that the two accused were the last to be seen with the deceased before he died. Specifically, that the two were trying to use force to effect the arrest which the deceased resisted courageously.

78. The defence of both accused under oath was that they did not find the deceased at the balcony when they went after him. That was however not true because PW6 and 7 both who were in the bedsitter outside of which both accused ran after the deceased both said that not only did both accused chase the deceased out there, but were with him for at least three minutes. PW7 was a victim and could not have lied. PW6 was a colleague of the 2nd accused and could have had a motivation to cover him. However, both gave corroborative evidence which

establishes without a doubt that indeed the deceased was still in the balcony when both accused followed him there, and stayed with him for a few minutes before he fell to the ground.

79. The other evidence which discredits accused persons defence that they did not find the deceased in the balcony is PW7's evidence that he heard the 2nd accused announce that the deceased had fallen down. I believed the evidence of PW7 about the censorious remark the 2nd accused made about the deceased and his fall.

80. The evidence of both accused persons was to the effect that just before the deceased ran to the balcony, they saw go to the table in the room, pick something which he put in his mouth and swallow. That immediately after he swallowed the thing, he turned wild and strong. The evidence of the accused persons that there was such a piece of furniture in that room was not true. PW6 and 7 were clear that the only thing in that room was a mattress on which PW7 was seated when PW6 and the accused persons entered. The story about a table and something picked from it by the deceased cannot be true. The accused explanation that the deceased took something which changed him is not true.

81. I find that the two accused persons lied in their defence about the incident. They know exactly what happened to the deceased. I must also state that the involvement of the 1st accused in the arrest exercise was not in order, especially because it is clear from how he and the 2nd accused executed the arrest that they were venturing in uncharted waters. Even the verdict to follow the deceased to the balcony, when it was clear he was not going to surrender, was a poor decision indeed. What was wrong in getting him at a later stage. Especially considering the offence he was alleged to have committed. What was the most important thing at that time, life or arrest? Not to mention the two accused and PW6 have nothing to show in the form of alleged bhang to prove that the deceased and PW7 were indeed found smoking bhang drugs.

82. That said, I find that the circumstantial evidence adduced by the prosecution in this case does not point irresistibly to the accused persons' guilt. Since the prosecution witnesses did not see the accused persons throw down the deceased, or cause his fall, the accused defence that they did not throw him down or cause his fall creates reasonable doubt in the veracity of the prosecution case.

83. In the result I do find that the prosecution has not proved the case against each of the accused persons to the required standard of proof beyond any reasonable doubt. Consequently, I give the two accused persons the benefit of doubt and acquit them for the offence of murder contrary to section 203 of the Penal Code, under the powers provided under section 322 of the Criminal Procedure Code.

SIGNED AND DELIVERED THIS 4th DAY OF FEBRUARY, 2020.

LESIT J

JUDGE