



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL CASE NO 14 OF 2014**

**REPUBLIC**

**VERSUS**

**SAMUEL MBOI PAUL.....1<sup>ST</sup> ACCUSED**

**MWANZIA PAUL.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**INTRODUCTION**

1. The Accused persons herein, Samuel Mboi Paul and Mwanzia Paul, were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that :-

**“On the 7<sup>th</sup> day of June 2014 at an unknown time at Kasokoni Market within Taita Taveta District within Taita Taveta County, jointly murdered MULWA KIMEU.”**

2. Kasango J took the evidence of John Mandela Mulwa, Paul Ngei Munyao and Rose Joyce Chawucha alias Rose Ibrahim (hereinafter referred to as “PW 1”, “PW 2” and “PW 3” respectively). When the parties appeared before this court on 11<sup>th</sup> November 2015, they requested that the matter proceeds from where it had reached.

3. On 4<sup>th</sup> July 2016, the State filed its Written Submissions relating to the question of whether or not the Accused person had a case to answer on even date. The Accused persons filed their Written Submissions dated 11<sup>th</sup> July 2016 on 12<sup>th</sup> July 2016.

4. Having considered the said Written Submissions, on 25<sup>th</sup> July 2016, this court found that a *prima facie* case had been established against the Accused persons to warrant him being put on his defence. Their defence case was heard on 21<sup>st</sup> November 2016.

5. At the conclusion of their case, the State filed its Written Submissions dated 31<sup>st</sup> January 2017 on 6<sup>th</sup> February 2017. On their part, the Accused persons filed their Written Submissions dated 28<sup>th</sup> February 2017 on even date.

**THE PROSECUTION’S CASE**

6. The Prosecution called a total of seven (7) witnesses to demonstrate the following ingredients of

murder outlined in Section 203 of the Penal Code Cap 63 (Laws of Kenya) :-

**a. Proof of the fact and cause of death of the deceased;**

**b. Proof that the deceased met his death as the (sic) result of an unlawful act or omission on the part of the accused; and**

**c. Proof that the said unlawful act or omission was committed with malice aforethought.**

7. In demonstrating proof of fact and cause of the deceased's death, the Prosecution contended that the testimonies of all the Prosecution witnesses was cogent and consistent. It averred that PW 1 and PW 3 saw the 1<sup>st</sup> Accused person and Mulwa Kimeu (hereinafter referred to as "the deceased") fighting at the bar known as "Kwa Rose" (hereinafter referred to as "the bar") owned by PW 3. PW 1's evidence was that the fight was started by the deceased and subsequently taken outside the bar.

8. It was its contention that despite PW 2's intervention who was the Accused person's father to break up the fight, the Accused persons did not stop fighting until the deceased fell to the ground. It further stated that despite there having been no weapon that was recovered, Dr Duncan Amani Chao (hereinafter referred to as "PW 5") confirmed that the rupture of the spleen could occur as a result of an assault and that a human fist could serve as a blunt object.

9. It stated that the Accused person's assertions that PW 2 did not pass by the said bar materially contradicted PW 2's evidence who testified that he did actually pass by the bar and that PW 1 and PW 3 had testified that they saw PW 2 at the said bar on the material night. It pointed out that the 1<sup>st</sup> Accused person contradicted PW 2's evidence who testified he was fighting with the deceased person at the material time because he contended that he ran outside the bar where the deceased started chasing him. It also pointed out that PW 2's evidence on what transpired on 8<sup>th</sup> June 2014 was materially different from what the Accused persons said.

10. It was therefore its submission that the evidence on record had proved beyond reasonable doubt, that the Accused persons were responsible for the deceased's death.

### **THE ACCUSED PERSONS' CASE**

11. Both Accused persons adduced sworn evidence but did not call any witnesses. On their part, they submitted that there were several contradictions in the evidence that was adduced by the Prosecution witnesses rendering their evidence unreliable and lacking in credibility.

12. They pointed out that PW 1's evidence contradicted that of PW 2 in that the former contended that the fight was between the deceased and them while the latter stated that the fight was between the deceased and the 1<sup>st</sup> Accused person herein.

13. They also said that PW 2 averred that the 2<sup>nd</sup> Accused person was not at the scene of the fight while PW 3 said that the 2<sup>nd</sup> Accused person was present. They added that Inspector George Ochieng (hereinafter referred to as "PW 7") contradicted PW 3's evidence when he testified that the 2<sup>nd</sup> Accused person was drunk while PW 3 said that he was not. They were emphatic that the court cannot act on assumptions or presumptions to find that a *prima case* had been established against them because PW 7 did confirm in his evidence that there was some guesswork in charging them with the offence herein.

14. They questioned why PW 2 was not charged with abetting the fighting if PW 3's evidence that he had blocked other people from stopping the fight was anything to go by. It was their contention that the Prosecution did not demonstrate malice aforethought on their part and that what transpired on the material night was bad luck and was not planned as had been averred by PW 1 and PW 3.

15. They argued that since no one saw them hit the deceased, it was difficult to conclude that the ruptured

spleen was caused by any form of physical assault because they did not have any form of weapon and that in any event, PW 5 did not exclude the cause of a rupture of a spleen due to a fall.

16. They urged this court to take the following facts which were generally as follows:-

- a. **That none of the Prosecution witnesses saw what happened when the fight moved to a dark area;**
- b. **There were contradictions in PW 1's, PW 2's and PW 3's evidence as shown hereinabove.**
- c. **PW 5 did not conduct any tests to check the levels of alcohol.**
- d. **PW 7 confirmed that no tests to check the deceased's levels of alcohol which could have formed an essential part of the investigations were conducted and that he had also confirmed that there were inconsistencies in charging the Accused persons and his charging them was based on "guess work."**

17. They placed reliance on the case of Abanga alias Onyango vs Republic vs Rep Cr A. No 32 of 1990 (UR) cited in the case of Solomon Kirimi M'rukaria vs Republic [2014] eKLR where the Court of Appeal rendered itself as follows:-

**"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

18. The Accused persons were categorical that the presence of the 2<sup>nd</sup> Accused person at the material time was not established. It was their argument that the Prosecution evidence was weak to support the charge facing them and that the circumstances of the case were that no inference of guilt could be inferred on them.

19. They further argued that there was not an iota of motive that was proven by the Prosecution and there was no evidence that was adduced to demonstrate that there was any reason whatsoever that they would have wanted the deceased dead.

20. They submitted that the deceased died as a result of too much consumption of alcohol and lack of sleep for two (2) days as had been contended by PW 1 and that there was doubt as to whether they did or failed to do anything that would have resulted in the deceased's death.

21. They also referred this court to the case of Moses Kabue Karuoya vs Republic [2016] eKLR when the court held as follows:-

**"Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty."**

22. They therefore urged this court to acquit them of the charge that was facing them.

## **LEGAL ANALYSIS**

23. According to PW 1, he knew the Accused persons and the deceased. His evidence was that in the

early part of the evening of 7<sup>th</sup> June 2014, he was sitting on the same table with the deceased at PW 3's bar when at some point the 1<sup>st</sup> Accused person left his table. However, when the 1<sup>st</sup> Accused person came back, the deceased blocked him from accessing his seat and that when the 1<sup>st</sup> Accused person asked the deceased to let him pass, the deceased asked him why he was being harsh. This led to an exchange of words between the deceased and the 1<sup>st</sup> Accused person and they made as if they wanted to engage in a physical fight.

24. PW 1's testimony was that he separated them and they each continued drinking on separate tables. However, the 1<sup>st</sup> Accused person later came to their table and asked the deceased why he had threatened him yet there was nothing he could do to him. A fight ensued which was taken outside the bar. It was then that he found the 2<sup>nd</sup> Accused person outside the bar assisting the 1<sup>st</sup> Accused person to beat the deceased.

25. His further evidence was that PW 2 came and tried to stop the Accused persons from fighting. He said that he stayed at the scene of the fight for about two (2) minutes by which time the fight between the 1<sup>st</sup> Accused person and the deceased moved in a dark area, about fifteen (15) metres from the bar. It was his testimony that when he moved to where they were, he found the deceased on the ground with PW 2 and the Accused persons standing above him. However, he concluded that the deceased was sleeping as he had told him he had eaten miraa and had not slept for two (2) days.

26. During his Cross-examination, he said that he did not know where the 2<sup>nd</sup> Accused person, who did not drink alcohol, came from. He was emphatic that the fight was between the Accused persons and the deceased but the same was not intended or planned as fights normally break out in bars due to alcohol consumption.

27. PW 2 said that he had come from another bar when he found the 1<sup>st</sup> Accused person and PW 1 fighting outside the bar. From his evidence, it appeared that he found the deceased fighting with the 1<sup>st</sup> Accused person as his evidence was that he separated them and ordered the 1<sup>st</sup> Accused person to go home. He was categorical that the 2<sup>nd</sup> Accused person was not at the scene of the fighting, a fact that he reiterated during his Cross-examination.

28. PW 3 was categorical that the deceased did not order any alcohol from her but that she served the 1<sup>st</sup> Accused person and PW 1 each three (3) Kane Extra bottles of alcohol. She was also emphatic that the 2<sup>nd</sup> Accused person was not in the bar at the time of the fight but that when she went outside she found the 2<sup>nd</sup> Accused person outside the bar where he had been seated alone in the makuti verandah.

29. She reiterated that PW 1's evidence about the altercation between the deceased and the Accused persons in the bar of how the deceased blocked the 1<sup>st</sup> Accused person accessing his seat and how the fight was taken outside the bar. She stated that she came out of the bar and found people chasing each other. It was her further evidence that she saw the deceased running round the corner of the bar but she did not see the Accused persons where she had left them seated. She then decided to close the bar. Her further testimony was that as she was going home at about 10.00 am, she saw the Accused persons, PW 2 and other people standing about twenty (20) metres from her bar and the deceased was lying on the ground but she did not see any injuries on him.

30. She said that when she asked the 1<sup>st</sup> Accused person what happened, he told her that the deceased just fell and that there was no need of reporting the matter to the Village elder as the deceased would be in her bar asking for alcohol. The 2<sup>nd</sup> Accused person then asked her to give him sugar but he did not say what it was for. She left for home after telling the 1<sup>st</sup> Accused person to ensure that he and her employee by the name of Mbulisho put the deceased in the verandah so that he could not be rained on. It was her testimony that the 2<sup>nd</sup> Accused person was not present at that time and that received information of the deceased's death the following morning.

31. In her Cross-examination, she stated that the 2<sup>nd</sup> Accused person only chewed miraa and never drank alcohol. She also said that she never sold the deceased and PW 2 any alcohol. She averred that she had never seen the 1<sup>st</sup> Accused person and the deceased fight and his death was due to bad luck.
32. No 86053 PC Erickson Kiptoo (hereinafter referred to as “PW 6”) confirmed having visited the scene of crime and took the deceased’s body to Taveta Hospital Mortuary. He stated that he did not find any weapon at the scene. On his part, Simon Mtei Mbela (hereinafter referred to as “PW 4”) who was the deceased’s cousin did not witness the fight but he was present at the time the postmortem examination was being conducted by PW 5.
33. PW 5 averred that it was unusual for the spleen to rupture due to blunt injuries which he said could be caused by fists, bottles amongst other objects and from his examination, he concluded that the deceased’s death was caused by intra-abdominal bleeding due to a ruptured spleen as a result of a blunt abdominal injury.
34. In his Cross-examination, he was emphatic that the spleen was a solid fixed organ that did not shift position like the intestines. It was his assertion that it was possible that a spleen could be ruptured if a person fell from a height but from his experience rupture of a spleen was most likely caused by forceful trauma by both penetrative and blunt objects.
35. PW 7 reiterated PW 1’s, PW 2’s and PW 3’s evidence. In his Cross-examination, PW 7 testified that he was not directly involved in the investigations of the case herein and was therefore not aware any tests on the level of alcohol consumption by the deceased were done. He opined that the Accused persons overpowered the deceased thus causing his death and there was therefore no guesswork in having charged them with the deceased’s death. However, the Accused persons appeared to have misunderstood his assertion as they contended that he charged them with the offence of murder based on guesswork.
36. In his sworn evidence, the 1<sup>st</sup> Accused person said that the deceased beat him up because he was nagging him about money the deceased owed him. Despite asking him to refund him his money, the deceased refused to give him the same. He also alluded to the altercation about the seat. He stated that PW 2 found them fighting inside the bar and directed him to go home. He was emphatic that the 2<sup>nd</sup> Accused person was not present at the time of the fight.
37. He said that as he was going home on his motor bike, PW 3 called him to pay the bills. He went to the counter and paid the same. He said that it was while he was leaving that the deceased caught his shirt and taunted him that there was no one to assist him because PW 2 had already left. He stated that the deceased beat him and he ran out but the deceased started chasing him and. His evidence was that as he turned round a corner, he heard a thud. He went back and found the deceased lying on the ground.
38. He contended that he heard some people mention that the deceased had chewed miraa for two (2) days and that he had not slept for two (2) days, a fact PW 1 had stated in his evidence. He also reiterated PW 3’s evidence about him placing the deceased in the verandah to sleep so as not to be rained on. He said that he was arrested the next morning following the deceased’s death.
39. In his Cross-examination, he was emphatic that the 2<sup>nd</sup> Accused person was not aware he was going to the bar and that they were seated on different tables. He said that he saw the deceased drinking alcohol.
40. In his sworn evidence, the 2<sup>nd</sup> Accused person said that on the material date he went to the bar and sat at a separate table from his brother, the 1<sup>st</sup> Accused person herein and ordered for a Sprite so that he could finish chewing his miraa. He said he left to purchase cigarettes after the waiter told him that they had no cigarettes and on returning to the bar, he found many people looking at someone who was lying on the ground. He denied ever having seen the 1<sup>st</sup> Accused person in the crowd of people who had gathered there.
41. On enquiring about what happened, he was told that the 1<sup>st</sup> Accused person and the deceased had

been chasing each other round the bar when the deceased fell. He said that he overheard PW 1 telling PW 3 that the deceased had stayed awake for two (2) days chewing miraa. He remarked that the deceased would wake up from his drunken stupor and go home. He then left and went home.

42. It was clear from PW 1's, PW 2's and PW 3's evidence that in the early part of the material night, both the 1<sup>st</sup> Accused person and the deceased engaged in a fight that moved outside the said bar. It was also evident from their testimony as well as that of the Accused persons that the 2<sup>nd</sup> Accused person was not involved in the fight between the 1<sup>st</sup> Accused person and the deceased.

43. Indeed, both PW 1 and PW 3 were categorical that the 2<sup>nd</sup> Accused person was not in the bar when the fight broke out. They both saw the 2<sup>nd</sup> Accused person outside the bar. In fact, PW 3 said that she found the 2<sup>nd</sup> Accused person where the deceased lay on the ground but did not see him fight the deceased. The fact that the 2<sup>nd</sup> Accused person asked her for sugar and she found him standing over the deceased was not proof that he had hit the deceased or caused his death.

44. Notably, only PW 1 said that the 2<sup>nd</sup> Accused person was involved in the fight between the deceased and the 1<sup>st</sup> Accused person. In view of the fact that PW 2 and the 1<sup>st</sup> Accused person were also emphatic that the 2<sup>nd</sup> Accused person was not present at the time of the fight, this court was persuaded to conclude that the 2<sup>nd</sup> Accused person did not participate in beating the deceased and that in fact, his version of how he found himself in the verandah was corroborated by PW 1 and PW 3 who said they found him outside the bar.

45. In fact, this court was hesitant to accept PW 1's evidence hook, line and sinker as PW 3 had testified that he was drunk and that she had in fact sold him three (3) Kane Extra bottles of alcohol. In any event, the fight had moved to a dark area making it difficult to see the 2<sup>nd</sup> Accused person beating the deceased.

46. As was rightly pointed out by his counsel, no inference of guilt could be inferred on the part of the 2<sup>nd</sup> Accused person. Indeed, the Prosecution did not adduce any evidence to demonstrate that the 1<sup>st</sup> Accused person communicated with him so that he could go outside the bar and assist the 1<sup>st</sup> Accused person as PW 1 was clear in his evidence that the 1<sup>st</sup> Accused person and the deceased were fighting as they were going outside. The fighting outside the bar could not therefore have been said to have been planned with a view to causing harm to the deceased. It happened in the course of the fighting.

47. This court found that there was sufficient evidence to demonstrate that the 1<sup>st</sup> Accused and the deceased fought on the material date and that the deceased died as a result of a ruptured spleen. This court took note of PW 5's observations that the rupture of the deceased's spleen was caused by a forceful trauma due to being hit by a blunt object. He ruled out that the said rupture could be caused by a fall on a flat surface such as that on which the deceased fell. No witness mentioned of there having been a high surface.

48. As PW 5 had opined that the rupture of the spleen could be caused by a fist and the 1<sup>st</sup> Accused person was fighting with the deceased immediately before the deceased fell on the ground, the only rational inference that this court could make was that the injuries the deceased sustained were caused by the 1<sup>st</sup> Accused person.

49. Despite this case having been based on circumstantial evidence as there was no direct evidence of any one having seen the 1<sup>st</sup> Accused person hit the deceased, his evidence that he heard a thud as the deceased was chasing him round the bar was not supported by the scientific evidence that was adduced by PW 5 because PW 5 was clear that the spleen was not a mobile organ that could be ruptured without there having been forceful trauma caused either by a penetrative or blunt object such as a fist.

50. Having said so, it was clear that the deceased's death occurred as a result of a fight. Evidently, the deceased had provoked the 1<sup>st</sup> Accused person when he blocked him from accessing his seat and alcohol

that the 1<sup>st</sup> Accused person had taken was a good catalyst for a fight.

51. The common law standard is that an act is not culpable unless the mind is guilty. In other words, criminal responsibility must consist of both *mens rea* and *actus rea*. Looking at the circumstances of the case herein, however, this court agreed with both PW 1's and PW 3's evidence that the 1<sup>st</sup> Accused person did not intend to cause the deceased's death.

52. Both the Accused persons did not run away from the scene. The 1<sup>st</sup> Accused person was present when PW 3 asked that he be assisted by Mbulisho to move the deceased to the verandah so that he could not be rained on. On his part, the 2<sup>nd</sup> Accused person went to get sugar from PW 3 perhaps with a view to waking up the deceased. Indeed, both PW 1 and PW 3 admitted that the deceased's death was caused by bad luck. In addition, PW 1 and PW 3 did state that when the deceased fell on the ground, PW 2 and the Accused persons stood above him.

53. Appreciably, the *actus rea* may have been present in the unlawful causation of the deceased's death. However, the *mens rea* appears to have been absent. In the absence of such *mens rea*, malice aforethought would definitely not have existed. As there were co-existing circumstances that weakened or destroyed the inference that the Accused persons were guilty of the murder of the deceased herein, this court found and held that the ingredients of murder as envisaged in Section 203 of the Criminal Procedure Code were absent in the circumstances of the case herein.

54. Having said so, when the evidence was considered in its totality, this court found that the 1<sup>st</sup> Accused person engaged himself in a dangerous act as anything could have happened in the fight. In this case, the result was the deceased's death. Despite the deceased's death having occurred following an unplanned fight in a bar, the 1<sup>st</sup> Accused person was liable for unlawfully causing his death as he acted negligently.

55. In the mind of this court, the 1<sup>st</sup> Accused person's actions amounted to manslaughter as contemplated in Section 207 of the Penal Code Cap 63 (Laws of Kenya). The said Section provides as follows:-

**“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”**

56. The question that would arise in the mind of this court is whether this court could substitute the charge and convict the Appellant for the said offence. Indeed, in Section 179(2) of the Criminal Procedure Rules Cap 75 (Laws of Kenya) provides that a court may convict a person on a charge he was not initially charged with.

57. Section 179(2) of the Criminal Procedure Code provides as follows:-

**“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”**

58. Accordingly, having considered the evidence by both the Prosecution and the Accused person's evidence, their Written Submissions and the respective law that they each relied upon, this court came to the firm conclusion that the Prosecution proved its case to the required standard, that of, proof beyond reasonable doubt in respect of the 1<sup>st</sup> Accused person but only on the charge of manslaughter.

59. This court was not satisfied that the Prosecution had adduced evidence to demonstrate that both Accused persons had common intention. Appreciably, apart from PW 1, who this court noted was under the influence of alcohol at the material time, none of the other witnesses mentioned the 2<sup>nd</sup> Accused person as having been engaged in the fight with the deceased person.

60. The Court of Appeal dealt with the question of common intention in the case of **Njoroge vs Republic**

**[1983] KLR 197** when it expressed itself as follows:-

**“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”**

61. In the circumstances foregoing, this court found and held that the Prosecution did not present any evidence before this court to prove beyond reasonable doubt that the 2<sup>nd</sup> Accused person was guilty of either the murder or manslaughter of the deceased.

### **DISPOSITION**

62. In the premises foregoing, the upshot of this court's decision was that as the evidence adduced by the Prosecution could not sustain a conviction against the 2<sup>nd</sup> Accused person herein, this court hereby acquits the 2<sup>nd</sup> Accused person under the provisions of Section 322(1) of the Criminal Procedure Code and orders and/or directs that he be set free forthwith unless he be held for any other lawful cause.

63. However, for the same foregoing reasons, the charge of murder against the 1<sup>st</sup> Accused person is hereby reduced to manslaughter contrary to Section 207 of the Penal Code. Accordingly, this court hereby finds the 1<sup>st</sup> Accused person guilty of the offence of manslaughter and convicts him of the said offence in line with Section 322 (2) of the Penal Code.

64. It is so ordered.

### **SENTENCING**

1. I have heard the submissions by Mr Oduor for the 1<sup>st</sup> Accused person and Miss Anyumba for the State on the 1<sup>st</sup> Accused person's mitigation. The 1<sup>st</sup> Accused person is a young man aged twenty four (24) years and must have been twenty one (21) years of age at the time of committing the offence. He is remorseful for what transpired on the material date.

2. Mr Oduor has pleaded with this court to consider a non – custodial sentence as the 1<sup>st</sup> Accused is a young man and the sole bread winner of his elderly parents. Counsel has urged this court to consider that we have a duty to integrate young people back into the society and that the 1<sup>st</sup> Accused person has already been in custody for three (3) years during which time he has had time to reflect on his actions.

3. On the other hand, Miss Anyumba has submitted that although the 1<sup>st</sup> Accused person was a young man who was not drunk and was fighting an elderly drunk man, he had a choice of walking away. He did not so do but instead engaged in a fight that led to the deceased's death. She prayed that this court delivers justice to the deceased's family.

4. I note that the Accused person has been in custody since 16<sup>th</sup> June 2014. It has been almost three (3) years since he appeared in court. He applied for bail which Kasanga J rejected on 11<sup>th</sup> June 2015. Her argument was that the 1<sup>st</sup> Accused person was at liberty to apply afresh after the close of the Prosecution case. The Prosecution case was closed on 10<sup>th</sup> February 2016 and it took almost nine (9) months before the 1<sup>st</sup> Accused person gave his defence leading to the delivery of judgment today.

5. In essence one can say that he has actually been incarcerated for three (3) years for an offence this court believes could have attracted imprisonment a lower sentence than three (3) years. However, due to the fact that there was no Resident Judge at the High Court of Kenya Voi, it has taken this long to hear and determine the case herein.

6. It is the view of this court that a lower sentence would have been sufficient to punish the 1<sup>st</sup> Accused person as he was young and impressionable and was likely to make poor choices especially under the influence of alcohol and after being provoked, by the deceased.

7. It would be a great travesty and miscarriage of justice to penalise him heavily. It is true that the deceased passed away but this was due to a fight. There was no malice aforethought on the part of the 1<sup>st</sup> Accused person and he actually did not run away from the scene of the incident. Instead, he assisted in placing the deceased at the verandah so that he could not be rained on. The deceased was an elderly man who also made bad choices by engaging in a fight with a young man.

8. Bearing in mind the circumstances of the case herein and the fact that the Accused person is a first offender, it is my considered view that a non-custodial sentence would be sufficient to give some reparation to the deceased family and also to set him apart from the 2<sup>nd</sup> Accused person who had also spent three (3) years in custody but who I have found not guilty of the offence of murder or manslaughter.

9. Accordingly, I hereby sentence the 1<sup>st</sup> Accused person to serve community service for a period of two (2) months at a centre to be determined by the Probation Office at Taveta Sub County. I hereby direct that the 1<sup>st</sup> Accused person be escorted forthwith to the Probation Office Taveta Sub County so as to comply with this order.

10. Orders accordingly.

**DATED and DELIVERED at VOI this 4<sup>th</sup> day of MAY 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

Oduor holding brief for Mrs Isika – for Accused

Miss Anyumba - for State

Josephat Mavu – Court Clerk