



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Criminal Case 57 of 1995**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PATRICK CHEMOS NDIWA**

**JOHN CHAFU CHEMIAT**

**JOSEPH C. MARAUNI**

**ROBERT W. WEKESA**

**JAMES MUNGA MURUA**

**PAUL MWANGI KARIUKI**

**PATRICK E. EJORE.....ACCUSED**

**JUDGMENT**

The seven accused persons namely John Chechu Chemitai, Patrick Chemos Ndiwa, Joseph Marauni Chemiati, Robert Walela, Paul Mwangi, James Munga and Ekwom Ejore are charged with the offence of murder C/S 203 as read with section 204 of the penal code in that on the 9<sup>th</sup> day of March 1995 at Simatwet trading center Moi's Bridge in Tranz Nzoia District within the Rift Valley Province jointly murdered Juma Mulundu.

The accused persons who were represented denied the charge.

A total of 12 witnesses testified for the prosecution. All the accused persons gave unsworn evidence and called no witnesses.

The sum total of their evidence is that PW8 was a businessman who was buying and selling maize at Simatwet. He hired a store and employed 2 employees who used to assist him in the work. They were weighing and packing maize. He noticed spillages on a number of occasions and then 2<sup>nd</sup> accused who used to guard nearby premises offered to be guarding the premises of PW8. PW8 agreed to that arrangement and employed 2<sup>nd</sup> accused to guard the place. At the time of incident he had gone to Bomet his home area. When he came back he was told the stealing of his maize had led to the death of somebody and the matter was with the police.

The incident leading to these proceedings was sparked off by PW10 who is a son of the deceased who had been dropped at the center by his employer-PW5 George Tai to go and buy cigarettes before leaving for his home noticing movements with the store. He allegedly shouted that there was a thief in the maize store and his father who was a watchman of neighbouring premises and who resided in a room behind the shops answered the scream. He came out and also raised the alarm. The shouts of thief, thief attracted the trading center dwellers who came out to find out what was happening. When they came out they saw a trouser dangling in the veranda of that shop. The people who gathered commanded the thief to come out through the roof where he had gained entry into the store. When the thief came out it was discovered that it was the second accused.

It is alleged that there was disagreement as to what should be done to the thief; the deceased wanted him beaten while the 1<sup>st</sup> accused allegedly was opposed to that move. According to the evidence of PW10 and 11 this led to a disagreement between deceased and 1<sup>st</sup> accused. The deceased allegedly hit 1<sup>st</sup> accused with a stick on the head and the 1<sup>st</sup> accused started bleeding and he also hit the deceased with a stick. The 5<sup>th</sup> accused then said why has the deceased hit the 1<sup>st</sup> accused and hit him with a stick on the neck. The old man fell down and then crawled to his room behind the shops.

Apparently nobody touched him. But suddenly they changed their mind and decided to follow. By this time they had chased PW 11 away. PW11 allegedly was chased up to the road but then came back and hid near the butchery while PW10 hid among the many women who were near the tarmac road.

The accused person led by the 1<sup>st</sup> accused who had allegedly tied his injury with a lessa came to the house where the deceased had taken refuge and locked himself in PW11 says she was hiding at the butchery but could see the rear room where the deceased was while PW10 who was crouching between women on the road could also see the same house. The two allege that there was bright moonlight. They had no torches but they could see with the help of moonlight.

The 3<sup>rd</sup> witness who is PW9 stated that he was in the neighbouring room near where the deceased had locked himself in. When he heard a commotion he came out and in two minutes he saw the accuseds with one Kennedy who allegedly ran away trying to open the door of the deceased/removed him and started beating him. When he tried to intervene the accused persons threw stones at him and he locked himself in and he never went out again. The next day PW9 learned that the deceased had been killed. He became afraid and he ran away to Karara leaving his wife and children at Simatwet. He stayed away for some time and when he came back his wife told him that the police were looking for him but he PW9 did not report to the police. He had even seen the police visit the scene on 10.3.95 the day following after the incident but he never volunteered any information to the police. He was eventually arrested and taken to police station where upon he was released after recording a statement implicating the accused persons.

Meanwhile PW10 and 11 maintained that from their hideouts they could see the 2<sup>nd</sup> accused put in his hand to open the deceased's door and the deceased cut him and when he cried out that he had been cut his companions kicked the door which gave in. They dragged out the deceased who ran towards the butchery. They caught up with him, tripped him and he fell down and they set upon him with sticks, kicks, stones and as per evidence of PW11 the first accused knifed him in the neck and he died. After he had died PW10 went to call his younger uncle while PW11 took the children home and then came back.

Meanwhile PW5 George Tai who had dropped PW10 at the center he was on his way home after dropping friends. He saw a crowd of people at the center and wondered what it was all about, as he had not left them there when he dropped PW10. He came to near the butchery and saw logs and stones on the road and then reversed his vehicle and decided to report the matter to the police station. Although he denied it in the first instance he later accepted that he felt as if he had stepped on something at the center and he reversed and drove to the police station without stopping to check to find out what he might have stepped on.

Meanwhile 1<sup>st</sup> accused made efforts to go to look for George Tai's vehicle and when he missed it he went to look for Nyongi's vehicle PW6. The 1<sup>st</sup> accused narrated to PW6 what had transpired at the center.

They came to the center and then drove to the police station together with PW11 the wife of the deceased.

There is variance as to who reported first one version has it that PW5 reported to the police station that he had stepped on something at the center and that is why his vehicle was left at the police station when they went back to the scene while another version has it that on arrival at the police station PW11 reported that it is Chemiati and other accuseds who had killed the deceased and that is why the first accused was locked up. PW12 and 7 in the company of other police officers went back to the scene and collected the body and arrested accused 2, 3, 4 and 7 and took them to the police station. 4 days later they arrested the 5<sup>th</sup> and 6<sup>th</sup> accused persons and after investigations charged them with the offence. It is evident from the evidence of PW7 and 12 who are police officers that the accuseds were arrested on information from PW10 and 11.

After this police sought help of PW4 a Doctor in private practice who went to perform post mortem after the body had been identified to him by relatives of the deceased among them PW1 and in the presence of a police officer PW2. PW4 had not known the deceased before and he believed in the identification by the relatives. PW4 statement is that he noticed lacerations and bruises on the head and face. They were minor and or superficial and they could not make him open up the skull or face. There were no other injuries seen on the body like panga cuts, knife cuts or injuries made by sticks. PW4 was firm that if any other injuries apart from those noted had been there he could have noticed them. Internally he noticed that the spleen and liver had been ruptured causing the collection of blood in the chest cavity and abdominal wall. The cause of death was due to internal bleeding. According to him the injuries of the ruptured spleen and liver were caused by a blunt object but could not tell what it was. He PW4 conceded that pressure of a vehicle running over and then reversing on the body could cause such injuries. He also added that a fall on a hard object like a stone could also cause such injuries. PW4 replying to a question in cross-examination stated that if a person was a victim of mob justice he PW4 could have observed a lot of injuries.

The other evidence on the record is evidence from police officers. PW3 received exhibits in a carton to take to the government chemist which he did using exhibit memo form. He had intended to take blood samples for analysis also but when the carton was opened it was discovered that the syringe was empty. PW4 the Doctor said that he was not requested to take any blood samples from the body of the deceased. PW7 and 12 were on duty at Moi's Bridge police station when the report was made. They booked the report in the O.B. and then proceeded to the scene leaving the 1<sup>st</sup> accused at the police station. Acting on information from PW10 and 11 they arrested the suspects took them to police station and caused them to be charged.

The accuseds on the other hand gave unsworn evidence. The first accused stated he was woken up by a person who was saying that there was a thief. He came out and found people gathered. They wanted to beat up the thief but he told them not to take the law into their own hands. When he was hit. He started bleeding bend down and was attended to by the wife of his brother 3<sup>rd</sup> accused and Rose Akelo wife of deceased. He then decided to go to PW5's home to get a vehicle to take him to hospital but missed him and then went to the home of Nyongi PW6. He found PW6 explained what had happened and he came with him. On reaching the center they learned that somebody had been killed. They decided to go to police station to report. At the police station he was referred by police to the dispensary for treatment and when he came back he was locked up in the cells and he did not know why. That it was alleged that he had hit the deceased with a panga but had that been the case then the Doctor would have detected the panga cut on the body.

The second accused stated that he was inside the maize store he was guarding and he was told to come out. When he came out a person raised a panga to cut him and he raised his hand and the person cut him on the hand. When the person aimed a second time the 2<sup>nd</sup> accused ran away to his house and locked himself inside and remained there till the police came for him.

The 3<sup>rd</sup> accused was woken up by noise and when he came out he found his brother the first accused bleeding from the head. He attended to him by tying a lesa around his head and thereafter went back to the house where he remained till police came for him.

The 4<sup>th</sup> accused heard shouts of people. He came out stood at the door and then went back to the house and never came out.

The 5<sup>th</sup> and 6<sup>th</sup> accused came together, found people shouting at the center but never bothered about them. They just went straight to their house and slept. 3-4 days later is when they were arrested.

The 7<sup>th</sup> accused was arrested while asleep and he does not know why he was arrested.

After assessing all the evidence on the record it is clear that prior to the incident the deceased was alive. The incident was sparked off by a person making movements in the store of PW8. The 2<sup>nd</sup> accused had been employed to guard the store. Apparently the store was locked and accused gained entry through the roof. The 2<sup>nd</sup> accused admits to have been found inside the store. He does not say that he opened the store and went in and when he called he opened and came out. This confirms the evidence of the prosecution that he gained entry through the roof and when he was told to come out the way he had gotten in and he came out through the roof. PW8 said that the 2<sup>nd</sup> accused had no keys and obviously second accused broke into the store and he had definitely gone to steal.

When the second accused came out from the store there was controversy among those present as to what should be done to him. PW9, 10, and 11 confirm that many people reside on the center and when an alarm was raised they came out to find out what was happening. The deceased was one of those who came out and his suggestion was that the 2<sup>nd</sup> accused should be beaten. He had a panga which he wanted to cut 2<sup>nd</sup> accused with. The 1<sup>st</sup> accused Chemiati intervened and this annoyed the deceased. It is alleged that the deceased hit the 1<sup>st</sup> accused with a stick on the forehead and started bleeding. This has been confirmed by 1<sup>st</sup> accused and his brother 3<sup>rd</sup> accused save that they say they do not know who hit him. The sequence of what transpired after the 1<sup>st</sup> accused had been hit by the deceased is what has been narrated to court by his son PW10 and his widow PW11. Their version is that after the first accused had been hit by the deceased him and his group became annoyed and vowed to finish the deceased. The 5<sup>th</sup> accused apparently on the side of the 1<sup>st</sup> accused hit the deceased on the neck and caused him to crawl to his room and lock himself in. Apparently as he was crawling to his room nobody touched him but suddenly they regrouped and then went to the deceased's house and started kicking the door in an effort to get him out. It is alleged that the 2<sup>nd</sup> accused put his hand inside to open the door from inside and he was cut on the hand when he cried out in pain is when they all descended on the deceased's door and started kicking it. The door allegedly gave in and the deceased ran out towards the butchery where upon he was tripped, fell down and they started beating him. PW9 alleged that he came out when he heard the screams of the old man and asked them why they were beating him and dissuaded them to stop beating him when the group turned against him threw stones at him and he went back and locked himself inside and never came out. PW9 alleges that he was 20 meters away from the group and he had a glance at them for only 2 minutes. They were bending down. The next day he saw police visit the scene at 8.00 a.m. to interview witnesses. He did not volunteer any information to the police and instead he was afraid and ran away to his parents' home. He stayed here for some days leaving his family behind. When he came back his wife told him that police were looking for him. He did not go to police station till he was arrested by police detained and released after recording a statement. As submitted by the defence lawyers during summing up to the assessors PW9's evidence has to be treated with caution as he just glanced at the people at night which people were bending down beating the deceased, he had not torch and the time was at night though he says there was moonlight. He could not recall the clothes they were wearing which means visibility was not very clear. This coupled with the fact that he failed to volunteer information to police, ran away into hiding after the incident, refused to go to police on his own on learning that police were looking for him till he was arrested shows that he is not a person who could be trusted. Not everybody ran away from the center after the incident and PW9's conduct of running away tends to show that he knew more than what he was telling the court since he was not prepared to lose his freedom he could easily be tempted to lay blame onto others in order to earn freedom. His evidence cannot be trusted and it is therefore dismissed.

We are thus left with the evidence of PW10 and PW11. According to PW10 when he was noticed he was chased away. He alleges that there was bright moonlight. His mother PW11 who also alleges that there

was bright moonlight and he was standing near the butchery where the son alleged to have been standing also and yet he did not see her neither her him. PW11 agrees there were many people around but she could not name others around her besides the accused persons PW10 said that he was standing on the tarmac crouching among many women. He did not name any of those women. As submitted by the defence lawyers in their address to the assessors if there was bright moonlight PW11 and 10 could have identified those around. Evidence of invisibility was adduced through PW5 and 6 who come to the scene. They stated that it was dark at night and PW5 had to use his vehicle lights to see. In fact he did not see what object he had stepped on or appeared to have stepped on. PW6 also said that it was dark and he had to use vehicle lights to see a person lying down. The evidence of PW5 and 6 on the issue of visibility contradicts the evidence of PW10 and 11 on visibility. This coupled with the fact that there were many people around the scene the evidence of PW10 and 11 has to be treated with caution, as there could be a possibility of mistaken identity. This possibility of mistake is reflected on the evidence the two on the type of weapon each assailant had and the type of injuries inflicted on the deceased. According to the two the deceased was attacked with stones, sticks, kicks, pangas and according to PW11 he was also pierced by a Somali sword on the throat and died although she did not mention this in her statement. This assertion has been contradicted by Doctor's evidence. PW4 only detailed bruises and lacerations on the face and head. They were superficial and they could not make him open up the body in these region. There was no piercing of mob justice. There was no picking of the body. This variance in evidence of the account by PW10 and 11 on the injuries inflicted and the findings of the Doctor tends to cast doubt on whether the two witnesses witnessed the incident or saw what was happening. The Doctors evidence having ruled out injuries caused by pangas, kicks, stones, piercing sword, whips, and metals which weapons were allegedly used by the accused persons then it means that the accused persons did not inflict the injuries complained of by PW10 and 11 as none was found to be visible on the body of the deceased.

The cause of the deceased's death was found to have been bleeding into the chest cavity and abdomen caused by ruptured spleen and liver. In the Doctor's opinion a fall on a hard surface could have caused such injuries. Also pressure applied by an object pressing on these areas on the outside. It is on record from the evidence of the prosecution witnesses that it was alleged that George Tai had crushed the deceased. The deceased's body was lying on the road where George Tai was to pass and go home. HE himself alleges that he saw logs and stones in his path and on flashing his vehicle lights he saw a person lying on the road. He then turned and went to report to the police. When cross-examined he conceded though he had denied earlier on that he felt as if he had stepped on an object with his vehicle. Infact he told police so and recorded so in his statement. By his own admission he felt as if he had stepped on an object but he did not come out to find out what he had stepped on and upto now he does not know what he had stepped on. Infact it was after him reversing the vehicle that he was told he had crushed somebody and then drove to the police station to report. It was alleged that his vehicle was detained though this was denied by the police officers among them PW7 and 12.

Having ruled that the injuries allegedly caused by accused persons by weapons allegedly carried and used by them were not detected on the body of the deceased then these are only two possibilities left for the cause of death.

1. By a fall from a height. It was alleged he was tripped and fell on the road. A road is a hard surface and there is a possibility that deceased's tripping and falling on a hard surface could have caused the spleen and liver to rupture. It was alleged that 1<sup>st</sup> accused tripped him but having regard that the visibility was not clear and there could be a mistake then that evidence cannot be acted upon to hold the 1<sup>st</sup> accused responsible for that falling.
2. The second possibility is that deceased could have fallen down and become unconscious and then reversing on him of PW5's vehicle ruptured the spleen and liver causing the death.
3. The third possibility is that since it is admitted that there were other persons involved in the beating other than the accused persons there is a possibility that while PW10 and 11 were being chased away from the scene somebody else could have tripped the deceased to fall.

Having analyzed the facts of the case I now come to consider the legal principles applicable to such a

case. Herein a group of people has been charged. The general principle is that in order for them to be convicted for the offence of murder or any portion of them it must be proved that they had a motive or common intention to do harm which harm resulted in the death of the deceased or had a common intention to kill. The common intention can be formed prior or in the cause of the commission of the offence and it can also be deduced from the type of weapons used to cause the injury. As noted earlier on there is no evidence of the accused persons and others having sat down and planned to harm or kill the deceased. As noted earlier on the incident was sparked off by 2<sup>nd</sup> accused's conduct of having gone to steal maize from the store of his employer in the process of which PW10 heard noise in the store and raised the alarm and when 2<sup>nd</sup> accused eventually came out a disagreement arose as to whether he should be beaten or handed over to the police. The deceased was for beating while 1<sup>st</sup> accused was against it. Therefore there was no plan to kill the deceased.

On the second ingredient the intention to kill could have been formed in the cause of the execution evidenced by weapons used. This court has already found that weapons allegedly carried and used by accused persons as per evidence of PW10 and 11 were found not to have caused any injuries on the body of the deceased. So far there is no evidence of common intention in order to justify a verdict of murder.

The assessors returned a verdict of murder for first, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> accused persons and a verdict of not guilty for the 4<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> accused persons. The general principle of law is that the court is not bound by the decision of the assessors. It has to re evaluate the evidence on its own and reach its own conclusion either agreeing or disagreeing with the assessors. But where it disagrees with the assessors it has to give reasons. From what I have said about the facts on record I agree with the assessors with their verdict of not guilty for 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> accused. I however do not agree with their verdict of guilty for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> accused persons. The reasons for my disagreeing with them are as follows:

1. There was no common intention formed either before or in the cause of execution of the alleged transaction.
2. The weapons allegedly carried and used by the accused did not leave any injuries on the deceased's body as per evidence of the Doctor PW4 who said there was no evidence of injuries inflicted by mob justice using weapons such as panga, sword, sticks, kicks and stones. The only injuries noticed by the Doctor externally were superficial bruises and laceration on the face and head.
3. The Doctor was of the opinion that a fall on a hard surface or external pressure being applied to the areas could cause these injuries. There is evidence that the deceased was tripped and fell down and there is evidence that there is a possibility that PW5 George Tai reversed on the body of the deceased since he says that he felt like having run over something or object which object he did not turn around to see what it was.
4. The incident took place at night. Witnesses conflicted as to visibility. Some said it was dark and they had to use vehicle lights and others said there was bright moonlight. The allegation of there having been bright moonlight was ruled out by the court in view of the fact that PW10 and 11 were unable to name persons who were standing with them during the incident since visibility was not clear PW10 and 11 were not able to clearly see what was going on and that is why they alleged accused persons used weapons on the deceased whose injuries were not detected on the body of the deceased by the Doctor. It therefore follows that PW10 and 11 could also be mistaken in their allegation that 1<sup>st</sup> accused is the one who tripped the deceased causing him to fall.
5. It is on record that there were some other persons who also participated in the assault who could have inflicted the injuries complained of and they were not identified by PW10 and 11 save for one Kennedy who ran away.
6. The evidence of PW9 was disregarded because his conduct shows that he knew more than what he divulged to the court and there is a possibility that he could name anybody as having committed the offence in order to secure his own release.

When the foregoing factors are considered in their totality they raise doubt as to whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> accused persons are the sole cause of the deceased's death or if they caused it all although there is a possibility of an assault having been committed by them and others. The law is that where there is doubt it should be resolved in favour of the accused person. In the circumstances the doubt entertained by this court is resolved in favour of accused No. 1, 2, 3 and 5 for whom the assessors returned a verdict of guilty.

All the accused persons are therefore acquitted under section 215, CPC and ordered to be discharged forthwith unless otherwise lawfully held.

Dated at Eldoret this 4<sup>th</sup> day of May, 1998

R.NAMBUYE

JUDGE

4.5.98

Read and delivered at Eldoret this 23<sup>rd</sup> day of June 1998

R.NAMBUYE

JUDGE