



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO 15 OF 1991

REPUBLIC.....APPELLANT

VERSUS

WILLIAM ADWERA OLIECH.....RESPONDENT

JOSEPHAT ODINGA ADWERA.....RESPONDENT

HEZEKIA AKUNO.....RESPONDENT

EDWARD KAMAU.....RESPONDENT

EZEKIEL KUTO.....RESPONDENT

JUDGMENT

There are four accused persons charged with murder contrary to section 204 as read with section 203 of the Penal Code. They are charged that on the night of 21st/22nd December, 1991 at Got Regea Sub Location North Gem Location in Siaya District, Nyanza Province the four accused persons jointly murdered Victor Okoth Jeje. The four accused are Josephat Odinga Adwera, Hezekia Akuno, Edward Kamau and Ezekiel Kuto. They were originally five with William Adwera Oliech who died in the prison custody before the hearing of this case started on 16th December, 1991 and the State has withdrawn the case against him. Since William Adwera Oliech was the first accused: I have continued to refer to the remaining four accused persons as the second, third, fourth and fifth accused respectively.

From the evidence William Adwera Oliech, to whom I may also sometimes refer simply as William was the father of Josephat Odinga Adwera. The other three accused persons were not relatives of William and Josephat. They were police officers and came to be involved in this matter, which started as William's family matter, because the three were police officers to whom a case of theft had been reported.

Evidence is that Victor Okoth Jeje, the deceased, was the son of John Jeje Oluoch a brother of William Adwera Oluoch. The deceased then a trainee at the Kenya Science Teachers College was at home during the holidays staying with his mother Patricia Ochieng Jeje and his elder brother Ayub Owuor Jeje. His father was away working at Nairobi. John Jeje Oluoch's home was adjacent to the home of his brother William Adwera Oluoch who was staying at that home with a number of his relatives who included his son Josephat Odinga Adwera and Crispo Oluoch Adwera.

William Adwera Oluoch lost some money Shs 2,000/-. He suspected the money had been stolen and during the evening on 21st December, 1990 he called into his house his sons who were with him at home to find out whether anyone of them had stolen the money.

During the inquiry, Crispo Oluoch Adwera, who has given evidence before this Court as PW2, was suspected and he subsequently admitted that he had stolen the money from his father's house. Having so admitted that theft, Crispo Oluoch Adwera, to whom I may also simply refer as Crispo, was required to produce the money. He had to be beaten by his elder brother, the second accused, before he could say that he had given the money to the deceased to keep.

The deceased was not present when Crispo was saying this. As a result the second accused, who was handling the matter under the instruction of his father since the second accused was the eldest son of William then at home Got Regea, decided with his younger brothers then present to go with Crispo to the home of the deceased to see the deceased with the aim of having the stolen money produced.

They went and met the deceased with his elder brother Ayub Owuor Jeje in the house of Ayub Owuor Jeje where the two brothers used to sleep. It was at night. When asked for the money, the deceased did not accept that he had been given the money by Crispo. The evidence is that while Crispo kept on saying that he had given the money to the deceased, the deceased kept on denying that he had been given the money. As the two could not agree, the second accused beat both of them so that they could produce the money. Evidence is that the second accused was using a stick to beat the deceased and Crispo at this stage. He beat them at intervals while inquiring from them to be told where the money was.

From Ayub's house the group which now included the deceased and Ayub, moved back to the house of William to report the progress to William. While in William's house the second accused administered more being produced. Some prosecution evidence would suggest that while in William's house only a hose pipe was used by the second accused to beat up the deceased and Crispo. That was from one of the witnesses. But most of the witnesses who were present said that the second accused used a stick before he started using the hose pipe. Some evidence would suggest that only one stick was used while other evidence suggests that more than one stick was used by the second accused before he started using the hose pipe. It was after the stick or sticks the second accused was using had got broken that he started using the hose pipe.

In the end it was decided to take the deceased and Crispo to a nearby Police Patrol Base at Got Regea. There is no evidence that the two were beaten on the way as they went to Got Regea Patrol Base that night. But evidence is that after they had reached the Police Patrol Base and the second accused had reported to the police why the deceased and Crispo had been taken to the Police Patrol Base, the three accused, police officers in this matter took the deceased and Crispo to some place under a tree in the compound and started beating the deceased and Crispo so that the deceased and Crispo could say where the money was. It is said that the three accused police officers were then on duty at Got Regea Police Patrol Base and that they all participated in beating up the deceased and Crispo.

In the process the police appear to have had some information from Crispo that the stolen money had been kept in the roof inside Ayub's house. That made the policemen to decide to go with the deceased and Crispo to Ayub's house that night so that the stolen money could be recovered from the roof where the money was hidden.

Evidence is that while on the way going to Ayub's house, the police were occasionally beating the deceased and Crispo. The second accused and his brothers were present. They all proceeded to Ayub's house. The deceased and Crispo still failed to produce the money. That made the police continue beating the deceased and Crispo to make the deceased and Crispo produce the money. Since the money was not produced, the prosecution evidence is that the policemen, that is the third, fourth and fifth accused persons continued to beat the deceased and Crispo for hours - while in Ayub's house. Some prosecution witnesses said that the period taken was from about midnight to 6.00 am or 5.00 am and that the beating was interrupted with periods of interrogation. Two policemen would be engaged in beating at a time so that one whipped the deceased while the other whipped Crispo as the third policeman looked on ready to relieve one of his two colleagues needing a relief.

There is prosecution evidence to the effect that when the deceased and Crispo were being taken to William's house by the third, fourth and fifth accused persons, the deceased looked weak. Some

witnesses have said that the deceased was crawling while others have said that he was walking while bending and other evidence is that he had even to be supported in order to walk.

The police did not beat the deceased and Crispo while in William's house. But there is evidence that the deceased could not walk up to the Police Patrol Base and he had to be pushed on a wheelbarrow for the remaining part of the journey.

No evidence of further beatings from that morning until the time the deceased was seen to have died in the afternoon that same day 22nd December, 1990 at the place where he had been left to rest at the Police Patrol Base.

The matter was reported to Yala Police Station under which Got Regea Police Patrol Base falls and the body of the deceased was eventually taken to Siaya District Hospital Mortuary where a post mortem was performed before the body was collected by John Jeje Oluoch for burial. Subsequently the accused persons were charged with the murder of the deceased.

In their defence, the third, fourth and fifth accused persons elected to say nothing. It was the second accused only who elected to say something in his defence. He gave an unsworn statement of defence. He gave the account of events one after the other as a person who was clear in his mind and had a good grasp of all that took place.

In effect what the second accused said in his defence does not in substance differ from what his brothers, namely Crispo Oluoch Adwera, Phillemon Okoth Adwera and Charles Adwera Oluoch told the Court. The second accused was however closer to the Police Officers at Got Regea Police Patrol Base than were his brothers Phillemon and Charles except that he was not a victim of the beatings as Crispo was.

From his statement of defence, the second accused could at some stages talk to the police asking them not to do certain things. While at the house of Ayub, the second accused could be allowed to sit inside the house in the sitting room for some time while his brothers including Ayub were told to be outside the house. In the afternoon on 22nd December, 1990 he went on sitting with the Police Officers playing draughts before they realised that the deceased had died.

The second accused became the first suspect in the murder of the deceased and he was arrested on the very day the deceased died only that he was released a few days later before he was re-arrested in April, 1991. Since I have said the substance of his defence is same as the evidence of his brothers, I do not think there is need to go into the details of his statement of defence.

The doctor who examined the four accused persons found that each accused was an adult, mentally fit and had no recent injuries.

This was Dr Johnstone Wandieri who also examined Crispo Oluoch Adwera who, according to the evidence, had been beaten with the deceased. Dr Wandieri found that Crispo Oluoch Adwera was 16 years old. He had healing bruises on the left thigh and both ankle regions. The examination was done about 2nd January, 1991 and the doctor gave the approximate age of the injuries as two weeks. He said that the injuries were probably caused by a blunt object and he assessed the degree of the injuries to be harm.

Dr Wandieri examined Crispo after Crispo had been treated about 22nd/23rd December, 1990 and did not say what treatment Crispo had received. But Crispo himself told this Court that when he was taken to hospital he was not admitted. He was treated and released and he does not appear to have had any serious health problem after that.

According to the post mortem report of the deceased Dr Owuor who performed the examination formed the opinion that the cause of death was shock due to pain caused by beating. The deceased had bruises all over the body including the head.

There were also swellings. Internally there was congestion of the lungs with pericardial effusion on the thoracic cavity. There were dilated small lung vessels. Other systems of the body were essentially normal. The cause of death was shock caused by pain due to beating. The doctor explained that severe pain from bruises leads to malfunctioning of the nervous system and as a result the functioning of the brain and the heart is impaired bringing about shock which causes death. He said that the type of bruise he saw could have been caused by a blunt object like stick. A hippo whip can also cause such bruises depending on the intensity of the force applied. If there is much force such a whip can even cut a deep wound. The doctor did not find any fracture. He said the history given by the police gives him the direction where to start. If he does not find anything to that effect he goes on to look for other causes of death including natural causes of death. The congestion he found in the lungs were not due to natural diseases like tuberculosis and bronchitis. No evidence of hypertension. The doctor did not get the history of the deceased. But the relatives of the deceased were before the Court and nobody bothered to attempt to bring out such evidence. All that is left is for the Court to assume that the deceased was in normal health before the incident.

That medical evidence talks of beating in general yet from the evidence the deceased was beaten several times. Comparing the injuries found on Crispo to the injuries found on the body of the deceased, it is evident that the deceased suffered more than Crispo did. He was 21 years old. Thus being bigger than Crispo and perhaps from the fact that he was denying knowledge of the money when Crispo was insisting that he had given the money to him (the deceased), the deceased may have received more blows and heavier ones than the blows Crispo received. This could happen whether the deceased was being beaten by the second accused or by the police and although the learned counsels for the third, fourth and fifth accused tried to bring in an element of bad blood relationship between the family of William Adwera Oluoch and that of his brother John Jeje Oluoch, it appears that bad relationship if any, did not play a part in this matter. This can be detected from the behaviour of Patricia Ochieng Jeje and her son Ayub Jeje during the eventful night of 21st/22nd December, 1990. Their attitude was not in any way antagonistic to or different from the attitude William and his sons had concerning the question of the stolen money which question the whole family wanted to solve. Everyone wanted to know where the money was so that it could be recovered.

With that in mind I consider the evidence that the second accused beat the deceased together with Crispo. This was done before the matter reached the police and before it had been decided to report the matter to the police. It was being done in an effort to settle the matter at home.

The size of the stick the second accused used to beat the deceased and Crispo is not easy to ascertain from the evidence. According to Ayub the second accused used more than one stick. He speaks as if more than one stick was used; one being used at a time after the other had got broken. Even from his statement to the police, that is what comes out. This witness was not asked to say how big the sticks were and therefore from his evidence the Court would have no idea how big the sticks were.

He however told the Court that while in his house, the second accused beat the deceased and Crispo for upto about three minutes only and that it was while in the house of William that the beating took long. Generally that agrees with what the other eye witnesses said except that Ayub said that the beating in William's house took about two and a half hours. That includes the period during which a hose pipe was used after the sticks had all been broken.

Ayub told the Court that the second accused was beating the deceased and Crispo all over the body. He was beating them anyhowly. At one stage the deceased and Crispo fell on a table after they had been tied together by the second accused. Ayub could not say whether it was the deceased or Crispo who knocked the table before they fell down. He claimed that as the second accused was beating the deceased and Crispo, the deceased started sweating although the night was cool. He said that he saw the deceased had become weak and was not speaking properly – although he could still stand up and walk normally and the deceased was able to walk while going to the Police Patrol Base. Ayub also told the Court that the second accused did not only tie the hands of the deceased and Crispo but he also tied other parts of their bodies and had even the rope passing under their crotches in such a way that could result into a constriction of the body of the deceased and the body of Crispo. Ayub also said that the tip of the hose pipe used to cane

the deceased and Crispo got broken while the second accused was using it.

Ayub was the deceased's brother. It should therefore be noted that he has told this Court some of the things the other eye witnesses have not told this Court about what the second accused did and its effect on the deceased before the deceased and Crispo were taken to the police. It should also be noted that the other eye witnesses are brothers of the second accused. These relationships should be taken into account when considering the weight to be put to the evidence of each of these eye witnesses.

The other eye witness is Crispo Oluoch Adwera (PW2). According to this witness the beating of the deceased by the second accused while in the house of Ayub was only twice. Once on the legs and once on the hands, and that was all. They then went to his father's house. While there the second accused beat the deceased once and beat Crispo once. The stick the second accused was using got broken. This witness was asked and gave the size of the stick as about half an inch thick and about three feet long. From his evidence only one stick was used and when it got broken, the second accused started using a hose pipe – similar to the one produced before this Court (exhibit 9). It is a one inch hose pipe. The stick had got broken because the second accused hit a chair as he tried to hit the deceased again.

Crispo said that the second accused used the hose pipe to hit Crispo on the hands and legs only. He could not speak for the deceased. He said that it was normal for a member of the family to be chastised with a stick and hose pipe in the way the deceased and him were punished on that day and that the caning he received on that day was not different from the caning he had been receiving on previous occasions.

Crispo said they were beaten with the hose pipe three times each and after that it was decided to take them to the police. They were tied their hands only. At first this witness did not accept that when the second accused used the hose pipe the tip of that hose pipe got broken. But later under pressure of cross examination he accepted that the hose pipe got broken and stated that (Exh -9) in this Court does not have that broken tip because it was cut off so that the hose pipe could be properly used for watering. He saw the broken piece which was cut from the pipe.

Phillemon Okoth Adwera (PW3) said that the size of the stick the second accused used to beat the deceased and Crispo was about the size of his finger - about 3/4 of an inch thick and about two feet long. This witness also said the caning in Ayub's house took about three minutes. In his father's house the caning took five to 10 minutes and the stick got broken. He said caning was at random but was only from the waist going towards the feet. Like Crispo, Phillemon Okoth Adwera's evidence is that only one stick was used. When it got broken, the second accused started using a hose pipe (exhibit 9). The hose pipe was used for about 15 minutes broken by intervals of interrogation. According to him, the punishment the second accused was administering was normal in the family. This is what Crispo also said. Like Crispo, this witness also said that only the hands of Crispo and the deceased were tied at the time the two boys were being taken to the police. Unlike Ayub and Crispo, this witness - Phillemon did not accept that the hose pipe got broken.

Another eye witness is Charles Adwera Oluoch (PW5). This is the

witness who said that the stick the second accused used to beat the deceased and Crispo was called "Powoo" in Dholuo language. This is a kind of a stick which though can easily bend is not easily broken. It is said to have a hard wood. Like his brother Crispo and Phillemon, this witness Charles said the stick was about half an inch thick. But unlike the others, he said the length was one foot. He said he is the one who went and collected the stick and took it to the second accused to use. Only one stick was used to beat the deceased and Crispo. Unlike Ayub, Crispo and Phillemon, this witness - Charles told the Court that the second accused did not beat the deceased and Crispo while in the house of Ayub. Charles also said that the "Powoo" stick was not used to beat the deceased. He said it was used to beat Crispo and got broken at the time Crispo was being beaten while in the house where he used to sleep. According to this witness, the deceased was beaten by the second accused only when they were in William's house and only the hose pipe was used. That happened for periods of 10 minutes. He does not remember how many times. The deceased and Crispo were then tied and taken to the Police Patrol Base.

But under pressure of cross examination by Mr Olago-Aluoch, Charles said that the second accused used “Powoo” once on the deceased and that was at the stage when they were on the way from Ayub’s house to William’s house. That is when the stick got broken. He does not agree that since “Powoo” does not break easily, the second accused must have struck the deceased very hard in order to get the stick broken.

Under further pressure of cross examination by Mr Wasilwa, the witness started speaking as if “Powoo” was even used in William’s house. He said the deceased and Crispo were seated on chairs while the second accused was beating them indiscriminately and they would use their hands to shield off the blows. But he claimed that the second accused aimed at beating the legs using the short “Powoo” stick. Charles did not however see the second accused bend in an effort to hit the legs of the deceased and Crispo.

That part of the evidence of Charles is inconsistent. But the most important thing is that, like the evidence of the other eye witnesses, the substance of his evidence as whole is that the second accused administered some beatings to the deceased and Crispo before it was decided to take the deceased and Crispo to Got Regea Police Patrol Base.

The second accused himself is not in dispute over that. I have said the substance of his defence is not different from the substance of what his brothers, Crispo, Phillemon and Charles told this Court. He told this Court that he was the eldest son of his father’s sons who were at home on 21st December, 1990 and that his father who could not chastise the children because he had lost a wife and he was still in the funeral, instructed him to chastise Crispo and the deceased on his behalf and that he obliged. At first he used a stick to beat the boys. But when the stick got broken his father instructed him to use a hose pipe and he used the hose pipe to beat Crispo and the deceased while at the same time asking them to say where the money was.

From his defence, the impression is that although the second accused caned Crispo before they went to the house of Ayub Jeje and also caned Crispo while in the house of Ayub Jeje, he did not cane the deceased while in that house. He started caning the deceased at the time he was caning Crispo in the house of William Adwera. The stick got broken when the second accused missed Crispo and hit a chair. At that stage the second accused had caned or beaten the deceased only once. That was on his legs. When the second accused used the hose pipe, he also hit the deceased only once. This time on the hands. He had done the same to Crispo. He stopped to talk to them. He asked Ayub also to talk to them. When the boys still repeated what they had been saying, William Adwera instructed the second accused to administer further beating to the boys. When the second accused refused as he was reluctant to administer further beatings, William Adwera instructed him to take the boys to Got Kokwiri (Got Regea) Police Patrol Base and he accepted to do so. His beating of the boys had ended.

From the evidence of Ayub Jeje the beating of the boys, especially the deceased, by the second accused was serious. But the evidence of Crispo, Phillemon and Charles as well as the statement of defence of the second accused play that seriousness down.

It should be remembered that Ayub is the brother of the deceased while Crispo, Phillemon and Charles are brother to the second accused. The tendency in what these brothers: Crispo, Phillemon, Charles and the second accused told the Court is therefore to throw the whole blame for the death of the deceased to the third, fourth and fifth accused persons. Ayub’s evidence attempts to show the part the third, fourth and fifth accused persons played in the episode without absolving the second accused of his share of the blame. In other words, according to the evidence of Ayub, all the four accused are to blame for the death of the deceased.

The evidence of Patricia Ochieng’ Jeje, the mother of the deceased, put the blame for the death of her son on the third, fourth and fifth accused persons. This witness did not see what the second accused did. But she saw part of what the police officers did and she bases her views on what she saw.

Looking at the evidence against and for the third, fourth and the fifth accused persons, I will start with the evidence of the witnesses who went with the deceased to Got Regea Police Patrol Base and this will include the evidence of Crispo, Phillemon and Charles.

To begin with they all told the Court that the deceased had no problem walking from William Adwera's house to the Police Patrol Base, a distance estimated to be 25 minutes walk. No beatings on the way. At the Police Patrol Base it was the second accused who reported the case of theft of his father's money to the police officers then present and the police re-arrested the deceased and Crispo in connection with that theft.

According to the evidence of Crispo, the policemen who were handed over the case were three and they took the deceased and Crispo to a tree where the two boys had their hands tied up so that their legs could hardly step down. Police officer's started beating him and the deceased using a hippo whip. The police were beating all over the body of Crispo and the deceased. He said that the third accused caned the deceased while the fourth accused caned Crispo and the third officer he said was the fifth accused, was looking on but they could exchange positions. Crispo said he could see what was happening because of the torch lights from the torches of the police. Each police officer had a hippo whip. None was before the Court but exhibit 8 looked like a piece of one of the whips. He said that they were beaten for about 20 minutes as the policemen wanted to be told where the money was. When Crispo told the police that he had given the money to the deceased who had kept the money in the roof of the house where the deceased slept, the police handcuffed the two boys and went with the two boys to Ayub's house where the deceased used to sleep so that the money could be produced. As they went the police were caning the boys on the buttocks and legs telling the boys to run.

In the house of Ayub, the money was looked for but was not found even from the roof where the money was said to have been kept. The police started beating the deceased and Crispo again and at some stage the police ordered the boys to remove their trousers and continued beating the boys, first while the boys were standing and later while the boys were lying down. At the same time the police continued asking for the money. Crispo was telling the deceased to produce the money while the deceased was in turn asking Crispo to produce the money. As the money was not being produced, the police continued beating the boys and at one stage the police poured water on the buttocks of the boys and continued caning the boys. Crispo said that all the policemen were involved in the caning as the one who was resting would take over from anyone of the other two who felt he wanted rest. Crispo claims the beating started at about 11.00 pm and went on until 6.30 am in Ayub's house.

From Ayub's house the police took the deceased and Crispo to William Adwera's house. By then the deceased was complaining of stomach ache and head ache. Crispo said he also felt dizzy and one of his brothers held his hand while Charles supported the deceased.

On their way from William Adwera's house to the Police Patrol Base the deceased was unable to continue walking and had to be carried on a wheelbarrow to reach the Police Patrol Base where he subsequently died the same day.

Crispo said that while in Ayub's house, the police first used their torches before Ayub took a lantern to the house.

The evidence from Phillemon Okoth Adwera is that at the Police Patrol Base the police interrogated the deceased and Crispo on the money stolen and started beating the two boys so that the boys could say where the money was. It was in the darkness and Phillemon was about 40 metres away as the police officers were flashing their torches. Although he could not see, because his eyes are not good, he could hear the sound of canes and the screaming of the deceased and Crispo.

Like Crispo, this witness also said that they went with the police officers to the house of Ayub and that on the way the police would beat the buttocks and legs of the deceased and Crispo. Phillemon also said that the policemen beat the deceased and Crispo when the two boys failed to produce the money while in the house of Ayub. Phillemon and his brothers including the second accused and Ayub were first in the sitting room when the police started beating the deceased and Crispo in the bedroom. The door of the bedroom was open. Phillemon and his brothers could therefore clearly see that the police were beating the deceased and Crispo although Phillemon could not say which police officer was beating who. But he claims all the police officers were participating.

Later the police told Phillemon and his brothers to go outside the house. They went outside and stood near the house. The door got closed and the beating went on. Phillemon could hear sound of the canes and screaming of the deceased and Crispo. The beating was being interrupted with interrogation. He also talks of the torches the police officers had, a lamp which was later brought by Ayub and water which was brought by Ayub. The police came out of the house with the two boys; went to a tree in the compound. Spent there some time talking before they went into the house of the mother of the deceased. They came out and went back into Ayub's house and the beating resumed. The police were using whips which Phillemon could not identify.

After sometime the police and the two boys came out of Ayub's house to go to William Adwera's house. According to Phillemon, by that time the deceased could not walk. He could only crawl. Crispo could only walk while bending and Phillemon claims that Josephat supported the deceased to walk to William's house. The deceased had asked for water and was given by his mother to drink. They went to William's house at about 4.00 am and Phillemon left them there when he went to sleep as the deceased was lying on the floor complaining of stomachache.

Phillemon said beating of the deceased and Crispo by the police at Ayub's house continued from about 1.00 am to about 4.00 am interrupted by periods of interrogation and that nobody intervened to tell the police to stop.

What Charles Adwera Oluoch and the second accused Josephat Odinga Adwera told the Court concerning the police officers is more or less what Crispo and Phillemon told the Court. Charles and the second accused said that the police officers used hippo whips to cane the deceased and Crispo. They talk of beating by the police both at the Police Patrol Base and at Ayub's house. All the three police officers participated. They all entered Ayub's house and were in the sitting room when the police started beating the deceased and Crispo in the bedroom as the two boys had failed to produce the money. Later the police told them to go out so that the police remained with the two boys only in Ayub's house. Here the second accused appears to be saying that he was the only one the police allowed to remain in the sitting room for some time after his brothers had been told to go outside. The second accused therefore claims to have seen more of the boys' beating by the police while in Ayub's house than what his brothers saw before they went outside the house. There were police torches being flashed. Later Ayub brought a lamp.

Charles claimed the police beat the deceased from about 10.00 pm to about 6.00 am. He claimed that when the police were taking the deceased and Crispo to William Adwera's house, the deceased could not walk by himself and he had to be supported by Phillemon and one of the police officers. Phillemon himself told the Court that the deceased was supported by Josephat. But Josephat himself did not talk of any support. He said that the deceased could not walk while straight and he complained of stomach ache and head ache and could not sit on a chair in William's house. He lay on the floor. That is similar to what Crispo said.

Charles went with Zablon and a wheelbarrow to carry the deceased on that wheelbarrow to the Police Patrol Base when the deceased was unable to walk further. Charles said that when he and Zablon left the deceased at the Police Patrol Base that morning 22nd December 1990, the deceased was lying down and was not speaking. He had apparently talked when he asked for water to drink on the way. He was given water from a nearby house and he took the water. It was between 7.00 am and 8.00 am. Charles left the deceased and Crispo and the three police officers at the Police Patrol Base.

The policemen had a rifle and each had a hippo whip.

From what the second accused told this Court, at the Police Patrol Base the hands of the deceased were tied and held up on a tree by the police before the police started beating the deceased and Crispo. The second accused was able to see that before he was ordered to move away – because he had tried to protest that the boys could be hurt. Where he stood he was able to see and hear the police beating the two boys as the police flashed their torches.

They went to the house of Ayub at about midnight and beating went on until 5.00 am. The second

accused saw the police officers beat the boys in Ayub's house. He talked of water having been poured on the buttocks of the deceased and Crispo while they were lying on the floor. They were then beaten. The second accused saw that before he was told to go outside the house to join his brothers. While there he continued to hear the police beat the boys. He could hear caning and the boys crying.

The second accused said that after the police had taken the deceased and Crispo to the house of the mother of the deceased and returned to Ayub's house and as the police continued to beat the two boys, the mother of the deceased asked the second accused to plead with the police to leave the boys. The second accused did so but the police refused saying the boys were in the hands of the police who knew what to do.

At 5.00 am Patricia Ochieng' Jeje started screaming. That made the policemen come out with the two boys. The deceased could not now walk while straight. He was complaining of headache and stomachache. They went to William Adwera's house. As the deceased and Crispo could not sit on chairs, they were lying on the floor. They stayed in that house until 7.00 am when the three policemen started returning to the Police Patrol Base with the deceased and Crispo.

The second accused also talked of a wheelbarrow which was collected later to go and carry the deceased who had become unable to walk further upto the Police Patrol Base.

At about 1.00 am the second accused went to the Police Patrol Base to see the process and it was while he was there that the police and him discovered that the deceased had died. The second accused said he was shocked to learn of the death of the deceased and he sat at the Police Patrol Base helplessly.

Ayub Owuor Jeje and his mother Patricia Ochieng' Jeje had not gone to the Police Patrol Base during the night of 21st/22nd December, 1990. But the police in the company of the deceased and Crispo as well as the second accused and his brothers went to Ayub and Patricia's home and that was when Ayub and Patricia met the police. Ayub had more time with the police than Patricia had.

However, what they told the Court about the policemen who were with the deceased and Crispo during that visit is substantially the same as what Crispo, Phillemon, Charles and the second accused said. What I may add here is that one of the policemen hit Ayub and ordered Ayub to sit down as Ayub opened the door for the policemen in the company of the deceased and Crispo. Ayub said this in this Court and the second accused also said it adding that he had to intervene before Ayub was further punished.

Later when Ayub was taking water and a lamp into the house, he was seeing the deceased and Crispo lying on the ground being caned by a policeman who was using a whip and Ayub thought a piece of a whip produced (exhibit 8) looked like a piece of the whip he saw being used by the fourth accused as the third and fifth accused looked on. Thereafter he went out of the house and could only hear the caning and the screaming of the deceased and Crispo as the door of the house was closed.

The beating continued from midnight to dawn. There were periods of interrogation and moving from Ayub's house to a tree in the compound and to the house of Ayub's father and then to William's house.

According to Patricia, she had to scream and complain before the police stopped beating her son, the deceased and took them to William's house. At the time the deceased looked weak and was staggering as if drunk. It was about 5.10 am.

Having said the above, it is proper at this stage to know the police officers who are said to have beaten the deceased and Crispo. The identity of Josephat Odinga Adwera, the second accused, is not in dispute. The identity of the police officers who beat the two boys is however in dispute as the prosecution witnesses have been asked whether they attended identification parade and the dock identification of accused three, four and five has been challenged.

I will start with the witness Patricia Ochieng' Jeje. From her evidence it would appear she only got close to the police officers who were with the deceased and Crispo at night. Only two of the three police

officers entered her house. It is not clear what time she had to observe them. In the circumstances I think her claim to the identification of any of those police officers may be ignored and her dock identification of two of the accused police officers is of no useful consequences.

Ayub Owuor Jeje's meaningful contact with the police officers was also during the night. He definitely had more time with them than his mother had. At the time they hit him on the shoulder he may not have seen them as they had just entered the house in which no lamp had been lit. But he later took a lit lamp into the house where the policemen were with the deceased and Crispo. He then took water to the policemen twice. Outside the house there is no evidence of light. It is not clear from his evidence whether he went to the house of William Adwera at the time the police went to that house in the company of the deceased and Crispo. It is not also clear whether he saw the policemen again after that night of 21st/22nd December 1990. His evidence of identification of the policemen is therefore weak and cannot stand alone.

Crispo Oluoch Adwera was one of the victims and therefore was very close to the policemen right from the time he was taken by Josephat to Got Regea Police Patrol Base during the night of 21st December 1990 upto the evening of 22nd December, 1990 when he was taken away from that Patrol Base. He saw three policemen through their touch lights, through the light of the lamp which was lit in the house of Patricia Ochieng' Jeje, through the light of the lamp which was in the house of William Adwera and through day light on 22nd December, 1990 as they walked from his father's house back to the Police Patrol Base and as they stayed in the compound of the Base the rest of the day. No doubt Crispo had very good opportunity to identify the police officers that were beating him even if he had not seen them before. He told the Court that the police officers were the third, fourth and fifth accused persons. Evidence is that the Patrol Base was manned by three police officers only.

Then there is the evidence of Phillemon Okoth Adwera, Charles Adwera Oluoch, Assistant Chief Samwel Kefa Dindi and Chief Inspector David Kimaiyo.

Phillemon and Charles walked with the police officers throughout the night. They were all in the house of Ayub when Ayub took a lamp into the house. They were all in the house of William Adwera where there was a lamp. They had the opportunity of seeing the policemen during the day time on 22nd December, 1990 as policemen left William's house to go back to the Patrol Base with the deceased and Crispo. Later Charles had to go with a wheelbarrow to carry the deceased and Charles therefore walked with the police officers for sometime during that morning, between 7.00 am and 8.00 am to the Police Patrol Base and had sometime to stay around with the policemen before he left for home.

Assistant Chief of Got Regea Sub Location told the Court that he knew the third, fourth and fifth accused as the only three policemen manning the Patrol Base. This was confirmed by Chief Inspector David Kimaiyo who was the then the OCS Yala Police Station under which Got Regea Patrol Base is. He was the one who had posted the third, fourth and fifth accused to Got Regea Police Patrol Base and they were the only police officers at the base on 21st/22nd December, 1990. He personally knew him.

Chief Inspector Kimaiyo as the OCS Yala Police Station received news of the death of the deceased from the third accused and proceeded to Got Regea Police Patrol Base where he found the fourth and fifth accused and collected the body of the deceased.

What the second accused told the Court about his knowledge of his co-accused should be ignored first because it was not on oath and could not therefore be tested by cross examination and secondly because it came from a co-accused trying to escape blame.

But from what Crispo, Phillemon, Charles, PW6 and Chief Inspector Kimaiyo told the Court there is evidence that the third, fourth and the fifth accused persons were the three policemen who were at Got Regea Police Patrol Base during the night of 21st/22nd December, 1990 and are the ones to whom the theft case involving the deceased and Crispo was reported by the second accused and that the three policemen are the ones alleged to have beaten the deceased and Crispo. In the circumstances therefore, there was no need for an identification parade as that could perhaps have been necessary only if there were other police officers stationed at or posted to the Police Patrol Base that night of 21st/22nd

December, 1990.

Going back to the evidence about the beating of the deceased, what conclusions are there? There can be no doubt that the deceased was beaten first by the second accused and later by the third, fourth and fifth accused. The evidence before this Court does not show the extent to which the beating of each of these accused persons injured the deceased. That evidence does not show which accused caused which injury. That evidence does not show whether there was any one particular injury which caused the death of the deceased. The result is the conclusion that the deceased died from the cumulative effect of all the injuries he received from beating by all the four accused persons. There has been attempt in the defence of the second accused to shift the blame to the third, fourth and fifth accused persons while at the same time there has been attempt in the defence of the third, fourth and fifth accused persons to shift the blame to the second accused. In that regard therefore the brothers of the second accused, as well as the second accused himself have tried to minimise the seriousness of the beatings effected by the second accused while at the same time they may have tried to magnify the seriousness of the beatings effected by the third, fourth and fifth accused. It should be noted however that the evidence of Ayub Owuor Jeje on the beating by the second accused comes out in a different light. It shows that the effect of the beating by the second accused on the deceased was serious. Ayub said that as a result of the beating by the second accused, the deceased looked weak, was sweating although the climate was cool and the deceased could not speak properly.

Noted that Ayub was the brother of the deceased, but it should also be noted that he was the only eye witness who was not the brother of the second accused. They were cousins. Like the other eye witnesses Ayub was not related to the third, fourth and fifth accused and there is no evidence that he had known any of the three police officers before the 21st December, 1990. He had therefore no reason to favour any of the police officers – by saying what he said about the second accused.

On the other hand what the second accused said about the third, fourth and fifth accused persons, though it should be taken into account in his defence, presents a difficult problem with regard to his co-accuseds. This is because the second accused elected to make his defence statement unsworn. That statement has not therefore been tested by cross examination. The problem does not stop there as it is compounded by the fact that the substance of what the second accused said in his unsworn statement of defence about beating by the police is the same substance that is contained in the evidence of the eye witnesses called by the prosecution.

It would appear therefore that the evidence of these prosecution eye witnesses gives an assurance that the substance contained in the unsworn defence statement of the second accused as to beatings by the police be accepted as against his co-accused.

But I have not been able to find a relevant authority to support my thinking on those lines. The case of *Rex v Ndaria s/o Kariuki & others* (1945) 12 EACA 84 which dealt with the statements or evidence of co-accused unfortunately stopped before it covered the problem I am facing here. In that case it was stated:

“If at the trial A makes a statement implicating fully himself and also B, it is in the same position as an extra-judicial confession to similar effect against B in the same way as accomplice evidence.”

In relation to an extra judicial confession the Court had stated:

“If A makes an extra-judicial confession implicating unequivocally both himself and B, that confession is admissible and may be taken into consideration as against B as well as against A, subject, of course, to the conditions as to admissibility contained in the Evidence Act. But as against B, it has to be borne in mind that it is accomplice evidence involving the question of corroboration ..”

The unsworn defence statement the second defendant made in this case does not implicate fully the second accused and his co-accused. In fact it tries to exculpate the second accused while implicating his

co-accused. Moreover the second accused is not an accomplice. At the same time that statement can be said to be corroborated by the evidence of prosecution eye witnesses. That situation is not covered in the *Rex v Ndaria* case.

In the circumstances, I think it better to ignore that statement, in so far as it tries to implicate the third, fourth and fifth accused persons in the beating of the deceased.

There was evidence that the police had a rifle. But there was no good evidence that they ever used that rifle to beat up the deceased. Evidence has been on a hippo whip or hippo whips. Only exhibit 8, a piece of a hippo whip, was clearly mentioned. Chief Inspector David Kimaiyo who produced that exhibit said that it was given to him at Got Regea Police Patrol Base by the third accused who told Mr Kimaiyo that that was the only whip the third, fourth and fifth accused had. It was in its full length then about two feet. The thickness at the base curved end was about one inch. The thickness decreased as the length went towards the tip. By the time Mr Kimaiyo was given exhibit 8 none of the three accused policemen was a suspect but they were assisting in the investigations of this case as junior officers under Chief Inspector Kimaiyo.

Since the evidence is that each accused policeman participated in the beating, sometimes two acting at the same time, they may have had more than one whip.

The second accused used a stick and a hose pipe. Ayub talked of more than one stick. The stick is said to have been about the thickness of the fifth finger of Crispo, a little more than half of one inch or about the thickness of the fifth finger of Phillemon, about three quarters of an inch, and about two and a half or three feet long. The hose pipe was one inch diameter.

In any case the weapons used would appear to have been of small sizes. These weapons produced bruises and the few swellings. But those bruises and the few swellings caused the death of the deceased. Dr Mark Owuor explained the position as already stated elsewhere above.

Otherwise before the deceased was beaten I assume, he was healthy and in normal life.

The question now is what was the intention of the accused persons? From the evidence the aim throughout appears to have been to make the deceased and Crispo produce the sum of Kshs 2,000/- which Crispo had stolen from his father William Adwera.

Since the two boys were not producing the money the boys had to be beaten to make them surrender and produce the money. The intention as can be detected from the evidence was to beat the two boys in order to get them to produce the money.

The next question is whether the intention to beat or chastise the deceased and Crispo so that they produce the stolen money was a common intention shared by all the four accused persons at the time they were beating the two boys.

Section 21 of the Penal Code states as follows:

“What two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

Kenny's Outline of Criminal Law (17th Edition at p 20) states:

“Thus if one person were engaged in murderously beating another to death and a stranger, without being requested were to rush in and add some more blows so that the victim's death were more speedily brought about, both would be guilty of murder and the first man could not be allowed the defence that it was the second assailant's strokes that finally ended the victim's life.”

There is no evidence that the four accused persons sat somewhere and agreed to beat the two boys to make the boys produce the money. But such a common intention can be inferred where more than one person are acting together at the same time. When the third, fourth and fifth accused persons were beating the deceased and Crispo therefore a common intention must be inferred.

On the other hand, it is difficult to extend that inference of common intention between the third, fourth and the fifth accused persons to include the second accused. His beating of the deceased and Crispo stopped at the house of William Adwera after it had been decided to take the two boys to Got Regea Police Patrol Base. There is no evidence that the second accused beat the boys any time after that decision had been made.

By the time the second accused stopped beating the deceased and Crispo, the third, fourth and fifth accused were not and could not be aware as they were not at William Adwera's house at that time. They were not even aware the case existed. Some 20 or more minutes or perhaps an hour had to pass before the second accused and the two boys as well as Phillemon, Charles and Zablon reached Got Regea Police Patrol Base and the second accused reported the theft case to the third, fourth and fifth accused. There is no evidence that the second accused's report to the policemen included information that he had beaten the deceased and Crispo at home. The only evidence adduced is that the second accused reported theft of his father's Shs 2,000/- involving the deceased and Crispo – as suspects.

But even if the second accused had informed the policemen that he had beaten the deceased and Crispo at home, there is no evidence that he had told them what to do. He was around and was witness to what the policemen did but there is no evidence that he was encouraging or assisting the policemen in their commission of the offence.

The third, fourth and fifth accused persons were police officers used to receiving reports of crimes, like this one, sometimes with suspects under arrest by members of the public. In such circumstances it is common knowledge that police officers never act under the direction of members of the public. The policemen take over and decide independently what to do with the suspect. The second accused handed over the case to police officers and not to the civilians. That was in accordance with the law and the second accused cannot even be said to have aided or abetted the third, fourth and fifth accused. His may be said to have been a passive attitude while a crime was being committed by the policemen. He may be said to have acquiesced in what was happening. But he cannot be said to have been an accomplice in what the third, fourth and fifth accused person did as the offence he committed got completed before he started taking the deceased and Crispo to the Police Patrol Base. I think this explains why his brothers, Phillemon, Charles and Zablon who went with him and the deceased and Crispo to the Police Patrol Base and can also be said to have handed the deceased and Crispo over to the policemen and subsequently in fact witnessed what the policemen did at the Police Patrol Base, went with the policemen to Ayub's house and witnessed what the police did there were never charged with this offence.

In the case of *Wanja Kanyoro Kamau v Republic* [1965] EA 501 the deceased and his wife the appellant and one Ngugi were at a place when the appellant struck the deceased on the back of the neck with a *panga*. Then Ngugi struck the deceased three times on the head with a *rungu*. The deceased fell down and both Ngugi and the appellant struck him again. The deceased got up and ran into the bush pursued by Ngugi and the appellant. Ngugi and the appellant were charged with murder. From the evidence there was nothing to show as to who between the appellant and Ngugi had delivered the fatal blow and the doctor could not say in his post mortem report the cause of death.

It was held that there was no common intention at the time when the appellant struck the first blow. If the appellant had subsequently gone away or dissociated herself from the subsequent acts of Ngugi there would be no basis for holding that there was ever a common intention. Since however after Ngugi had assaulted the deceased, the appellant had struck further blows, that was evidence of a common intention at that stage.

In that case the mother of the appellant was present and saw all that happened. Her conduct indicated that she was in sympathy with the criminals. She was the only eye witness. The Court rejected the argument

that she was an accomplice stating that a passive attitude while a crime is being committed or following the commission of a crime will not ordinarily make a person a principal offender in the former case, or an accessory after the fact in the latter case. She had not reported the crime to authorities.

In a Ugandan case *Dracaku s/o Afia and Another v R* [1963] EA 363, the first appellant struck the deceased one blow on the head with a stick and the deceased fell to the ground. As the first appellant ran away the second appellant picked up a stick and hit the deceased on the head as the deceased lay on the ground. The medical evidence did not establish which blow caused the fatal injury or that both blows were fatal.

It was held that there was no common intention and the second appellant could not even be regarded as an aider and abettor of the first. It was stated:

“the principle applicable to aiding and abetting is that the person accused thereof must be present encouraging or assisting at the time of the commission of the offence and as the crime of the first appellant was complete before the second appellant struck, the two incidents must be regarded as separate offences.”

A similar case is *Tindira and another v R* (6) (1951) 18 EACA 180. Here the second appellant hit the deceased and the deceased fell down on his hands. As he was trying to get up the first appellant hit him over the head with a heavy pole and the deceased fell to the ground unconscious.

It was held there was no common intention.

In *Wanjau's* case, *Dracaku's* case and *Tindira's* case the second attackers in each case struck the deceased within seconds of the first attacker's blow and probably each attacker saw the other in action. Time was not long enough to be counted in minutes. Yet in *Dracaku's* case and *Tindira's* case it was held there was no common intention. In *Wanjau's* case when Ngugi struck his first blow after Wanjau had first struck there was no common intention. But this statement in *Wanjau's* case is difficult to understand bearing in mind the extract already quoted above from page 20 of *Kenny's Outline of Criminal Law* (17th Edition). It is however understood when it is explained that if the appellant had subsequently gone away or dissociated herself from the subsequent acts of Ngugi there would be no basis for holding that there was ever a common intention. The point seems to be that after the first person has struck he has to go away or otherwise dissociate himself from the act of the second strikers so that it can be held that there was no common intention. That was clear in *Dracaku's* case because when the second appellant struck the first appellant had struck and was running away and it was held his act had been completed before the second appellant struck. That situation is not so clear in *Tindira's* case where it is not stated whether or not the second appellant who had struck first blow had remained around as the first appellant struck.

In the case of *Rex v Okute s/o Kaliembi and Gadimba s/o Oumo* (1941) Vol VII Eastern African Court of Appeals Report p 78, the first appellant and the accused persons who had not appealed had on arresting the deceased taken him to the place where the meat of the stolen cow had been buried and ordered him to uncover the meat. Since he was reluctant the first appellant had struck him three times causing injuries assessed as grievous harm. The other accused persons also assaulted the deceased but not as seriously as the first appellant had done. They then started taking the deceased to Gombolola Prison. On the way while they were at Muruka Chief the second appellant appeared armed with a heavy knobbed stick and poked the deceased twice causing him further grievous harm when the deceased was already in a weak state as a result of the first assault.

It was held that there was no common intention between the assailants in the two assaults.

Here a longer period than the period in the other three cases had elapsed between the first assault and the second assault and the circumstances with regard to the duration between the two assaults almost look like the circumstances in the instant case before me.

The conclusion is that there was no common intention between the second accused on the one hand, and

the rest of his co-accused persons, on the other, to beat the deceased and Crispo. But there was a common intention between the third, fourth and fifth accused persons to beat the deceased and Crispo.

I have stated that the intention of the accused persons in this case was to beat the deceased and Crispo to make the two boys produce the money. The question now is whether that intention to beat amounted to an intent to cause the death of the deceased. Did it amount to an intention to kill the deceased?

That question is not easy to answer from the evidence before this Court. The Court has not been given clear evidence of an intention to kill the deceased. But if there is evidence of an intention to do grievous harm that will amount to an intention to kill. There is evidence of the intention to beat the deceased and Crispo to make them produce the stolen money. The injuries which were found on Crispo were assessed by Dr Wandieri to be harm. Those were injuries whose degree of seriousness was less than grievous harm.

From the evidence of Dr Mark Owuor who performed the post mortem examination on the body of the deceased, all he found were bruises and some small swellings. Although he has also talked of congestion of the lungs with pericardial effusion in the thoracic cavity, he does not give light as to whether there was grievous harm or only harm. The evidence of other witnesses does not improve the situation as the witnesses talk of a small stick or small sticks, a hose pipe and hippo whips which look like normal weapons used in chastising children in cases where there is no intention to kill – but to correct the bad behaviour of the children. Whether that is lawful or unlawful is a different matter.

There is evidence of beating for a long time particularly on the part of the policemen although there were intervals for interrogation and other things. But there is also the evidence that despite all the long beatings, Crispo came out with injuries which Dr Wandieri assessed to be harm only. On the other hand the deceased came out with injuries from which he died. There is no evidence that when the deceased was taken to Got Regea Police Patrol Base, the third, fourth and fifth accused knew that he had been beaten before he was taken there and that he was in bad shape looking sick. Had there been such evidence, according to what Chief Inspector David Kimaiyo told this Court, the accused policemen would have been expected to take the deceased to hospital for treatment first before they proceeded dealing with him to investigate this case. If they would have failed to take the deceased to hospital, that would have been wrong.

I should think that had there been such evidence and the third, fourth and fifth accused persons instead of taking the deceased to hospital proceeded to administer the canes that they are alleged by the witnesses herein to have administered, perhaps that would have been a situation similar to that of the second appellant in the case of *Rex v Okute s/o Kaliebi (supra)* where the Court stated that the injury inflicted by the second appellant had supervened upon the weakness of the victim who had already been weakened by the injuries he had received from the first appellant and his co-assailants. The Court held the second appellant responsible for murder of the deceased even though that injury by the second appellant would not by itself have killed a healthy person. There would however have been the problem here of the lack of a clear intent on the part of the accused policemen to cause either grievous bodily harm or harm only at the time the canes were being administered.

The totality of that evidence is that it is difficult to say whether the intention to beat the deceased to make him produce the stolen money amount to an intent to cause grievous harm or only amounted to an intent to cause harm. This is true whether we consider the evidence against the second accused or consider the evidence against the rest of the accused persons.

If there was an intention to cause grievous harm, murder would have been committed. If there was an intention to cause harm only, murder would not have been committed. But perhaps a lesser offence like manslaughter or assault causing actual bodily harm would have been committed.

Manslaughter is committed where a person by an unlawful act or omission causes the death of another person without having formed an intention to kill that other person.

An assault is the unlawful laying of hand on another person. It is the doing of a corporal hurt to another. There is evidence that the accused persons beat the deceased in this case. What each accused did was unlawful because under the law none of these accused persons was permitted to beat the deceased as it happened in this case.

In the case of *Wanja Kanyoro Kamau (supra)* it was held that neither the appellant nor Ngugi was liable to be convicted of murder with intent to cause him grievous harm or that one had sided and abetted the other in such an attack with the like intent. Since it was found that there was a common intention to attack the deceased with intent to cause him grievous harm, it was held the conviction of the appellant of murder was proper and the appeal was dismissed.

In the case of *Dracaku s/o Afia (supra)* where the medical evidence did not establish which blow caused the fatal injury or that both blows were fatal, it was held that each appellant was guilty of assault occasioning actual bodily harm contrary to section 228 of the Penal Code (Uganda) and a conviction was entered under that section. Section 228 was the same as section 251 of our Penal Code in Kenya.

In the case of *Tindira (supra)* the two appellants were convicted of murder before the High Court of Tanzania. The blow inflicted by the second appellant with a bamboo stick had left the deceased with a cracked skull and there was haemorrhage. When the first appellant then hit the deceased over the head with a heavy stick, he inflicted a wound skull deep fracturing the skull and there was bleeding from the brain. The cause of death was haemorrhage from this latter fracture. The doctor gave his opinion that the effect of the fracture was necessarily fatal and that the crack over the temple (inflicted by the 2nd appellant who struck first) if left untreated would also have proved fatal and that it accelerated death in conjunction with the fracture.

Since it was found that there was no common intention it was held that the first appellant was deemed to have caused death.

It was further held that the degree of culpability of the second appellant must be separated from that of the first appellant.

The first appellant's appeal against his conviction of murder was therefore dismissed while the second appellant's appeal was allowed and a conviction for manslaughter substituted.

Here the degree of culpability of each appellant could be ascertained and the Court was able to say that it was the first appellant who struck the fatal blow. There was no common intention between the appellants but each was convicted; one of murder and the other of manslaughter according to their degree of culpability.

In the case of *Rex v Okute s/o Kaliebi and Gadimba s/o Oumo (1941) Vol VIII (supra)* the appellants appealed from a conviction of murder, the deceased having died from shock resulting from injuries received in two separate and independent assaults. The first assault was made by the first appellant and three others who were convicted of manslaughter did not appeal. The trial Court held that in this assault the first appellant intended to cause grievous harm but that the other assailants had not so serious an intention. Although the injuries inflicted in this assault were serious there was no evidence that they were sufficient of themselves to cause death. After the first assault and independently of it the second appellant acting in a manner which clearly showed his intent to cause grievous bodily harm at the least committed a second and independent assault upon the deceased who was in a weakened condition as a result of his prior beating and caused a fracture of his breast bone which was one of the injuries from the cumulative effect of which the deceased had died.

It was held:

“(1) The second appellant having with intent to cause grievous bodily harm, inflicted an injury on one who was already in a weak state was properly convicted of murder since death resulted from this injury supervening upon the weakness of the victim even though that injury would not by

itself have killed a healthy person.

(2) That since on the evidence it should have been held that the injuries caused by the first appellant and the other parties to the first assault might possibly have caused death only by reason of the further injury inflicted subsequently by the second appellant and in the absence of any evidence of a subsisting intent in common with the second appellant in the second assault, the first appellant and the other parties to the first assault ought not to have been convicted of murder or manslaughter.”

The appeal of the first appellant was allowed. The appeal of the second appellant was dismissed. Convictions of manslaughter against the other parties to the first assault were set aside notwithstanding the fact that they had not appealed. The learned Judges of the Court of Appeal for Eastern Africa left it open to the Crown to take such proceedings against the first appellant and against the other accused, who had not appealed but had had their conviction of manslaughter quashed, as could be deemed proper.

The evidence before the Court does not show whether the deceased died from the blows inflicted by the second accused or from the blows inflicted by the three policemen. As between the three policemen it would have been enough had the evidence shown that the deceased died from a blow administered by one of the policemen. In that case the other two would become aiders and abettors since the three were all present during the beating by the police and there is evidence that they all participated, sometimes alternatively, in beating the deceased. Each would be taken to have committed the offence the other policemen committed.

The end result of this analysis of the evidence is that the evidence does not enable me to apportion the blame between the second accused on the one hand and his co-accused on the other nor does that evidence enable me to say whether the beating was intended to cause grievous harm or whether that beating was intended to cause harm only.

Two of the three assessors in this case have returned a verdict of guilty of the offence of manslaughter in respect of each of the four accused persons. The reason they gave for that decision is that there was no common intention to kill.

The third assessor’s decision was that the second accused is guilty of assault causing actual bodily harm while the third, fourth and fifth accused persons were guilty of manslaughter. He explained that he reached that decision after consideration of the evidence of the mother of the deceased as that evidence was more against the third, fourth and fifth accused persons than it was against the second accused.

This is, in my view, a difficult case. From the evidence adduced before this Court and in the light of the case authorities referred to herein, I find, like all the assessors have done, that the offence of murder against the accused persons has not been proven. I differ from what the assessors said in relation to the offence of manslaughter in that that offence has not also been proved as there is no clear evidence that the injuries from which the deceased died constituted grievous harm from which death followed without the accused persons having intended the occurrence of that death.

I have said that that evidence does not enable me to say whether the beating was intended to cause grievous harm or whether that beating was intended to cause harm only. But I am convinced that at least the injuries amounted to harm. There was the unlawful laying of hands on the deceased. That was the doing of corporal hurt to the deceased. There is sufficient evidence that the deceased was beaten by each accused person. I therefore find that a much lesser offence of assault causing actual bodily harm contrary to section 251 of the Penal Code has been proved beyond reasonable doubt.

Furthermore, if in the case of *Rex - Okute s/o Kaliebi* and another where the first appellant intended to do grievous harm to the deceased and his executed intention was the striking of three blows resulting into grievous harm, the first appellant could not be convicted of manslaughter, I do not see how any of the accused persons in the case before me should be convicted of manslaughter. The case before me does not appear to be stronger than the case of *Rex v Okute s/o Kaliebi and another* - in which the intention on the

part of the first appellant to do grievous harm to the deceased was clear. The first appellant appears to have escaped conviction of murder or manslaughter because there was no evidence that the injuries he inflicted, even if taken together with the injuries inflicted by his co-assailants, were sufficient of themselves to cause death. But the learned Judges of the Court of Appeal for Eastern Africa left it open to the Crown to take such proceedings against the first appellant as could be deemed proper. That means all was not lost by the Crown when the conviction of the first appellant on murder was quashed by the Court which also said he could not be convicted of manslaughter. I dare say that what the Court meant here was that other lesser charges like assault causing actual bodily harm could be preferred. Such was the result in the case of *Dracaku s/o Afia (supra)* where each appellant was convicted of assault occasioning actual bodily harm.

From the above therefore I now by virtue of the provisions of section 179(2) of the Criminal Procedure Code reduce the offence of murder herein facing the accused persons to the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code and convict each of the four accused persons with that offence of assault.

Dated and delivered at Kisumu this 17th day of February, 1992.

J.M KHAMONI

JUDGE