

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIAMBU**  
**CRIMINAL CASE NO. E003 OF 2020**

**REPUBLIC.....**  
**PROSECUTOR**

**VERSUS**

**BRIAN EBOSO TSALA OGANDI.....**  
**ACCUSED**

**JUDGMENT**

**A. INTRODUCTION**

- 1.The accused person was charged with the offence of murder contrary to **section 203 as read with section 204 of the Penal Code (Cap 63)** of the Laws of Kenya. The particulars of the offence were that on or about the 5<sup>th</sup> day of February 2020 at Premier Bag Estate in Juja sub county, within Kiambu county murdered **Samuel Mwethia Ngure**.
- 2.The accused person was arraigned before court and took plea on 19<sup>th</sup> February 2020. He denied the charge faced and pleaded not guilty. The case proceeded to full trial with the prosecution calling four (4) witnesses in support of their case.

**(B) PROSECUTION CASE**

**3.PW1 Alexias Mulwa Matheka**, testified that at the time of the incident, he used to work as a supervisor at Marshalls Guards Limited, who at the material time, had been contracted by Premier Bags Estate to provide security services therein. On the material night, he was called by one of their guards, known as Mrs Gina Kamanda , who informed him that a thief had been arrested within the said Estate. He immediately took his motorcycle and when he reached the Estate gate met his boss, One Mr Micheal Mutuku, whom he gave him a lift to the incident scene, where they found someone lying down, surrounded by a crowd.

4. He inquired from the crowd, what had happened, and the accused person had emerged from the crowd and stated that the person lying on the ground was a thief who had stolen his chicken and four rabbits. He observed that the person lying down did not have a visible injury on his body, but by then had already started to foam from his mouth, while next to him was a sack containing Maize cobs. He called the Deputy OCS, who instructed him to take the alleged thief to Juja Police station, and he in turn instructed the accused to go report this incident.

5. The accused person came back after one hour and informed him that the police had told him that they should take the injured thief to hospital first, before taking him to the police station. They thereafter got a motor cycle, carried the deceased and went to Juja Police station, where

the deceased was placed outside the cells as they recorded the incident in the OB, and by the time they finished, the policemen on duty told them the thief had died. PW1 clarified that the deceased had been carried on the first motor cycle by the accused and his friends, while he had followed them riding his motorcycle, and after it was confirmed that he had passed on, all of them (four persons) were detained to assist in the investigation's. He was later released after being held for three days later.

6. PW1 further stated that, while being held at the police station, he had got to learn that the accused and the deceased were housemates and had fought on the material day, but were not persons known to him before. Under cross examination he reiterated that, it was the accused who had told him that he was housemates with the deceased and that they had fought because the deceased had stolen his chicken. He further confirmed that he did not see the accused assault the deceased nor was he aware of what caused, the deceased death.

**7.PW2 Victoria Wanjiku Kimani**, confirmed that the deceased was her husband and had on 10<sup>th</sup> February 2020 gone to General Kago Hospital Mortuary together with her brother in law, Mr Patrick Mwangi and her sister Irene Kimani to identify her husband's body before the post mortem examination was carried out. After completion of the said process, the doctor had told them the deceased died due to

injuries caused by blunt force trauma to his head. She also confirmed that she did not know the accused person.

8. **PW3 Dr John Mathaiya** the Kiambu County Consultant Pathologist confirmed that he did the autopsy on the deceased body at General Kago Hospital Mortuary and his findings were that the body was soiled with blood on the face, Scalp and on both upper arms. The head was swollen and had multiple bruises associated with percolation of blood under the Scalp. The main injuries were a fracture of the skull on the right side of temporal and parietal scalp-diagonal fashion extending to the ear. This had caused heavy bleeding within the brain and he certified the cause of death to have been caused by blunt force trauma to the head consistent with homicide. He had issued the family with the burial permit and also produced the post mortem report as an exhibit before court.
9. **PW4 Chief Inspector Peter Kaibiru** testified that on 05.02.2024 at 12.40hrs, a report was made at Juja Police Station through phone call by (PW1), who informed the duty officer that a suspected thief had been arrested at Premier bag Estate and he requested that a police vehicle be dispatched to pick the said thief. He was informed that there was no police vehicle which was available and after about 30 minutes, PW1 and the accused physically went to the police station and formally reported the incident, and were asked to go bring the thief, who had been arrested.

10. They went back and came with the alleged thief and the incident was formally book in the station OB, where the accused indicated that the alleged thief had stolen his 4 rabbits and 2 chicken. The officers on duty noted that the alleged thief was gravely injured and since the station Motor vehicle was back, assigned one police officer, to take the alleged thief to Gachororo health center, where he was pronounced dead on arrival. The matter was then handed over to the DCI and the accused and two other suspects were detained for interrogation.

11. He took over the investigations, interrogated the accused herein, who told him that he was asleep at his house at Premium bag Estate, when thieves, came to steal his rabbits and chicken. He had woke up and upon realizing what was happening, had shouted for help, forcing the said thieves ran away but the deceased, who was amongst them fell and remained behind as he was completely drunk and could barely walk. Further he had spoken with Mr John Mungai, who was the accused immediate neighbour and he had told him that due to the commotion, he had woken up and found the accused standing next to the deceased, who was lying down already injured. Further, the said Mr John Mungai had also been categorical that the accused did not rear chicken or rabbits as alleged.

12. PW4 further stated that he had also interviewed Mr Joseph Waribe, a night duty security guard within the said Estate, who stated that he heard some commotion and decided to

go check its source and when he arrived found the accused, and Mr John Mungai standing outside in front of the accused house, while the deceased was already on the ground. Mr John Mungai had informed him ( Mr Joseph Waribe) that he had found the accused burning some items behind his house, which items were later established to belong to the deceased. The accused had also requested Mr John Mungai to help him drag the suspect away from the scene, so that it could be seen that he was injured elsewhere and not by the accused person house.

13. After completing his investigations and establishing the cause of death, he did recommend that the accused be charged with the offence of Murder. Under cross examination, PW4 confirmed that he relied heavily on the witness statements recorded to infer the accused guilt as it was established that he was the person found with the deceased. It was also his finding that the deceased had not been subject to mob justice as it was the accused who had assaulted him and thereafter had requested Mr John Mungai to help him move the injured suspect away from his house. Under reexamination, PW4 reiterated his earlier evidence and confirmed that the circumstantial evidence incriminated the accused as the guilty party who had fatally injured the deceased and had attempted to cover his tracks by alleging that the deceased had stolen from him.

14. The prosecution closed their case at that point and the accused was placed on his defence and opted to give sworn evidence.

### **C. DEFENCE CASE**

15. The accused gave sworn evidence and stated that prior to his arrest, he worked as a businessman selling Chiwawa-dogs, rabbits and chicken within Juja Premier Estate and that the deceased was not his friend but was an acquaintance as they resided within the same area. Regarding the incident, he was at his house on the said night, when at about 11.00pm he heard his dogs bark and proceeded outside to check on what was happening. He bumped in a group of three persons, who had opened the door to where he kept his animals and instinctively raised alarm and called out on his neighbors to come assist in apprehending the thieves.

16. One of his neighbor's, Mr John Muigai came out with a metal bar and they managed to arrested the deceased, who was too drunk to run away, but his two colleagues managed to run away. Thereafter they took a motor cycle and went to reported this incident at Juja Police Station but were advised to go back and bring the thief to the police station as the police motor vehicle was not available at that time. They thereafter went back to the scene, took the deceased to the police station, using their motor bike's and handed him over

to the police, where he was immediately booked in and placed in the cells. It was the accused contention that they did not beat up and/or injury the deceased, but immediately he was placed in the cells, he heard him screaming for help as he was being assaulted.

17. After a while, the OCS directed them to take the injured thief to Gachororo Hospital, using the police vehicle, where unfortunately he was pronounced dead on arrival. The hospital administration refused to remain with the deceased body and upon returning to the police station, tables were turned on them and they were arrested on trumped up charges of murder, yet they had not assault the deceased. They were later taken to the scene, where the police took photographs and recovered one gunny bag- which had Maize. The accused reiterated that he did not assault the deceased and had been wrongly charged with the offence before the court.

18. Under cross examination he reiterated his earlier evidence, that he had found three persons red handed, as they were stealing his animals and with the help of his neighbors, had managed to arrest the deceased, who was amongst said thieves, but did not assault him. Further he had gone to the police station to seek assistance and when he came back, he found that the mob had assaulted the deceased, but not gravely as he was not bleeding. He insisted that the deceased was fatally assaulted at the police station and was

pronounced dead, when they arrived at Gachororo Health center.

**19. DW2 John Mungai Chonge** confirmed that the accused was his immediate neighbor within Premier Bag Estate and he confirmed that the accused person kept rabbits, chicken and other pets within his compound. On the material night at about 8.00pm to 9.00pm he was within his house, when he heard noise emanating from outside his house and went to check what was happening. He found that the deceased had been arrested and his hands tied behind. He found a crowd of about 50 people and they had intimated to him that the deceased was a thief, and had been arrested while stealing the accused pets.

**20.PW1** came and advised them to go report this incident at Juja Police station, and he had accompanied the accused to go do so, but were advised by the duty officers to go pick the thief and bring him to the station as they did not have station motor vehicle. They went back to the scene, and used two motorcycles to transport the deceased to the police station, where he was booked and placed in the police cells. While still outside the said police station, they heard the deceased cry/wail within the cells as he was being assaulted and later, when the police vehicle came back, the OCS directed them to escort the deceased to hospital, where unfortunately he was pronounced dead on arrival.

**21.**The following day they were arrested to assist in the investigations, but he was later released, while the accused was charged with the offence he faced before the court. DW2 was categorical that neither him nor the accused assaulted the deceased, but also confirmed that when they had initially rushed to the police station, the deceased had been subjected to mob justice by the crowd that remained behind. Under cross examination, DW2 reiterated his earlier evidence as to what occurred on the material night.

**22. DW3 Monica Keya**, the accused mother testified and stated that, she too resided with Premier estate, but in a separate house from the accused person, who reared and sold chicken, rabbits and Chiwawa for a living. On the material night she was at her house, when she heard sounds of people shouting, “Mwizi, Mwizi” and upon going outside, found that the deceased had already been arrested, but his fellow thieves had managed to escape and ran away. The company security guards came and the accused was advised to go report the incident at Juja police station. She returned to her house and on the following day the accused and other suspects were arrested to assist with investigations. Under cross examination, she insisted that the mob did not assault the deceased nor did she see her son assault him either.

#### **D. DETERMINATION**

23. I have considered the evidence on record and submissions filed by both parties, and the question that arises before this court is whether the prosecution has proved beyond reasonable doubt that the accused person herein participated in the murder of **Samuel Mwethia Ngure**, the deceased herein.

24. **Section 203 of the [Penal Code](#)** defines the offence of murder as follows:

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

25. In the case of **Republic v Okwara (Criminal Case E015 of 2023) [2024] KEHC 1360 (KLR)** the court stated as follows;

***“Mens rea in murder causes takes the form of malice aforethought, and the elements are set out in section 206 of the Penal Code. They relate to intention and knowledge. Intention to kill or cause grievous harm or to commit a felony. Knowledge that the act or omission causing death could cause such death, and being indifferent to the consequences of the act or omission. Intention and knowledge are mental elements. One forms an intention, in their mind, to do or not to do something, and***

***has knowledge, within his mental faculties about something. So, the mental element for the offence of murder is either intention or knowledge.***

***Has the prosecution adduced evidence to establish such intention or knowledge, that the accused had formed an intention to kill or cause grievous harm or to commit a felony, or knew that whatever he was doing was likely to cause death, but remained indifferent to the consequences? Well, the mens rea of an offence is usually to be inferred from conduct or action, being a mental element, unless the intention is voiced by the perpetrator.”***

26. The Court of Appeal at Nyeri in **Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR**, summed up the elements of the offence of murder as follows: -

- a. the death of the deceased and its cause;***
- b. that the accused committed the unlawful act which caused the death of the deceased;***
- and***
- c. that the accused had malice aforethought.***

**27.** In **Joseph Kimani Njau vs Republic (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that

Court (but differently constituted) in **Nzuki vs Republic (1993) KLR 171**, held as follows: -

***Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -***

***i. The intention to cause death;***

***ii. The intention to cause grievous bodily harm;***

***iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.***

***It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See***

**Hyman vs. Director of Public Prosecutions (1975) AC 55”.**

28. I will now proceed to interrogate each issue.

**(i) The death of the deceased and its cause.**

29. Every homicide is unlawful unless authorized by law or is excusable under the law. **See Sharma Pal Singh [1962] EA 13, see also Guzambizi Wesonga v Republic [1948] 15 EACA 63** where the court held:

***“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defense or in defense of property.”***

30. It is common ground that **Samuel Mwethia Ngure**, died on the night of 05.02. 2020 as a result of fatal injuries sustained from an Assault. This was confirmed by all the witnesses and especially by the evidence of Dr J.N Mathaiya (PW 3), the pathologist who conducted the post mortem on 10.02.2020. He confirmed that the deceased main injury was injuries to the head, which had a fracture of the scalp on the right side diagonally extending to the ear canal. The deceased also had defensive injuries to his hands. He formed an opinion that the cause of death was due to head injuries caused by blunt force

trauma, which is consistent with homicide The post mortem report was produced into evidence as Exhibit 1.

31. This court therefore finds as a fact that the deceased died as a result of the said extensive injuries sustained as enumerated above.

**(ii) Whether it has been proved that the accused committed the unlawful act which caused the death of the deceased:**

32. PW1 was called to the scene as the supervisor of the guards assigned to guard Premier Bag Estate and when he arrived , it is the accused who volunteered and stated that the deceased was amongst a group of three thieves, who were trying to steal his chicken, and rabbits and that while two of the said thieves had managed to escape, the deceased was too drunk and had been apprehended. He did not see the accused assault the deceased but by the time he arrived the deceased was already lying down and was **“foaming from the mouth”**. It was his further evidence that when they eventually managed to take the deceased to Juja Police station, he was placed, **“outside the cells”** and as they recorded the incident on the OB, one of the policemen came and told them that the thief had already passed on.

33. The duty officers had then summoned the station motor vehicle, who took the thief to Gachororo Hospital and it was confirmed that he had already passed on and upon return to the police station, they were detained to assist with investigations. Under cross examination PW1 reiterated his earlier evidence and further stated that though he did not see, the accused who harmed the deceased, the accused person had told him that he had fought with the deceased on the fateful night.

34. PW4, during his investigation interrogated DW2, who told him that he heard commotion on the material night and when he came out of his house, he found the accused and the deceased alone, and by then the deceased was already lying down and the accused had informed him that the deceased was amongst the group of thieves, who had broken into his animal pen and he had caught them red handed steal his chicken and rabbits. It was his further evidence that DW2 told him that the accused had requested him to help him drag the body away from his house so that it could be seen that he was injured elsewhere and not by his house.

35. In defence, the accused denied assaulting the deceased and insisted that he was assaulted at the police station and was being framed for an offence he had not committed. DW2 confirmed that the accused was his immediate neighbor, and he kept rabbits, chicken and other pets within his compound. On the material night, he heard noise and on

coming out found that the deceased had been arrested by his neighbour's and his hands had been tied on allegations of stealing the accused chicken and rabbits. They eventually took the deceased to the police station, where once placed inside the police cell, they heard him cry for help as he was being assaulted.

36. While still at the Police station, the police car came and they were instructed to escort the deceased to hospital, where he was pronounced dead on arrival. DW2 affirmed that he did not see the accused assault the deceased, but also admitted that the deceased was subjected to Mob justice, while they had initially gone to report the incident at the police station.

37. From the evidence adduced, nobody saw the accused harm the deceased but the circumstantial evidence gathered laid a strong basis to support an inference of his involvement in the said crime. Be that as it may, where the said evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged.

38. In the case of **R v Hillier (2007) 233 A.L.R 63,**  
**Shepherd v R (1991) LRC CRM 332** the courts observed that:

***“The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant’s guilt beyond***

***reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual stand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."***

39. Similarly, the Court of Appeal in **Simon Musoke v R 1 EA 715** held that:

***"In a case depending exclusively upon circumstantial evidence, he (the judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."*** (See also **R V Kipkering Arap Koske 16 EACA 135, Musili Tulo v R (2014) eKLR**).

40. Also in **Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR**, the same court further stated as follows, where reliance was placed on circumstantial evidence:

*“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -*

68. In summation, of the aforestated case law, it is thus required that before any conviction based on circumstantial evidence is reached, the said evidence adduced must be adequate to prove the case to the required standard of beyond reasonable doubt. In that regard, the court will admit circumstantial evidence if it meets the following criteria;

**a) Evidence that is logically connected to the case.**

**b) The evidence must prove or disapprove a fact relevant to the case.**

**c) The evidence should be reliable, and trustworthy with minimal chance of falsehood.**

**d) Its potential to influence a decision should not outweigh the probative value.**

**e) The evidence should not be hearsay.**

**41.** PW1 in the court's assessment was a straight forward and honest witness. Even though he did not witness the incident, he confirmed that the deceased was already injured at the scene of crime and had died before being placed inside the police cells, which discounts DW1 and DW2 version of what transpired at the police station.

**42.** The accused also confirmed to PW1, that he was the first person to encounter the deceased, which fact was confirmed by DW2 and PW4 who interrogated various witnesses. To this extent the accused person had an obligation to give a logical explanation as to what transpired and why the deceased was already foaming on his mouth but failed to do so. As already stated above, the defence raised by the accused is untruthful, escapist and does not displace the prosecution evidence, which unerringly points an accusing finger on him as the one who inflicted the fatal blow on the deceased head, but even if he did not do so was amongst the group that assaulted the deceased for stealing resulting in him sustaining the said fatal injuries

**43.** It is trite by the letter of the law that anybody who individually and/or jointly embark on committing a felony intending to use some form of violence should bear the consequences of the outcome. Having established that the accused person was present when the deceased was assaulted, under the doctrine of common intention, there was no obligation on the prosecution to demonstrate that it

was the appellant who inflicted the fatal blow. Indeed, there was no need to even demonstrate that he inflicted any blow at all. The requirement was to demonstrate that he was acting in concert with a group of others and that they were pursuing a specific unlawful purpose which led to the commission of the offence. See **Ismail v. Uganda Cr. Appeal No. 6 of 1978 & Abdi Ali v Republic 1956 EACA 573.**

44. Therefore in totality, when all the evidence presented is considered, the veracity of the prosecution evidence forms a complete chain of events that unerringly points at the accused as the guilty party who had a hand in the murder of “ **Samuel Methia Ngure**” and leads to the inescapable conclusion that within all human probability, the murder which occurred was without doubt committed by him and or him with others not before court, but who had one common intent to do so.

**(iii) Malice Aforethought**

45. Having found that the prosecution has proved **actus reus**, the other issue for determination is whether malice aforethought can be inferred from the prosecution's evidence presented. The offence of murder is complete when “**malice aforethought**” is established. **Section 206** of the **Penal Code**, provides that:

**“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

***(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c) An intent to commit a felony;***

***(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

46. It is sufficient to say that the mental element required by **section 206 of the Penal Code** can be equated to broad guidelines set out in the case of **Tubere s/o Ochen vs. Republic [1945] 12 EACA 63:**

***“The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death***

***of the deceased must ensue from the bodily harm intentionally inflicted.”***

47. In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered as to whether the appellant foresaw the real or substantial risk and the consequences of targeting the part of the body that may result in the fatal injuries suffered by the deceased.

48. A similar statement of Law was made in the persuasive authority of **S. vs. Sigwahla 1967 4 SA 566** in which the court stated:

***“The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such a result. This form of intention is known as a dolus eventualis as distinct from dolus directus.”***

49. The deceased was severely assaulted by the accused and/or the accused and other members of the public and as a result sustained multiple bruises/abrasion on his face, arms, Scalp, abdominal viscera and on the chest, walls leading to contusion of both his lungs. Further the deceased had multiple cerebral and cerebella contusion

leading to subdural and subarachnoid hematomas. According to PW3 Dr J Mathaiya, the main injuries suffered by the deceased were on his head where he suffered a fracture of the skull on the right side, diagonally extending to the ear.

50. From the above analysis of the injuries inflicted, it is clear that the accused did not have any other intention other than to inflict grievous harm upon the deceased. It is my finding that the accused person knew or ought to have known that his action would result in death, and it can be safely inferred from the nature of injury inflicted on the deceased that the accused person's action was premeditated.
55. In the circumstances I am persuaded beyond reasonable doubt that the prosecution has proved their case and specifically the presence of malice aforethought on the part of the accused too has been proved.

### **G. DISPOSITION**

56. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the Information of murder against the subject herein, **BRIAN EBOSO TSALA OGANDI** beyond reasonable doubt and convicted him accordingly under section 215 of the Criminal Procedure Code.

57. Sentencing will await the filing of a pre-sentence report by the probation and aftercare services department, within the next 21 days.

58. It is so Ordered.

**Judgment, signed at KIAMBU this 7<sup>TH</sup> day of JANAURY, 2025.**

**FRANCIS RAYOLA OLEL  
JUDGE**

**Judgment read and delivered in open court on this 7<sup>TH</sup> day of JANAURY 2025.**

**In the presence of:-**

.....Accused

.....For O.D.P.P

.....Court Assistant

ORIGINAL