



**Chege & 3 others v Republic (Criminal Appeal 23, 34 & 35 of 2022
(Consolidated)) [2023] KECA 466 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KECA 466 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 23, 34 & 35 OF 2022 (CONSOLIDATED)
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 28, 2023**

BETWEEN

**NAFTALI CHEGE 1ST APPELLANT
CHARLES WANGOMBE MUNYIRI 2ND APPELLANT
BARAKA BULIMA 3RD APPELLANT
JOHN PAMBA 4TH APPELLANT

AND

REPUBLIC RESPONDENT**

*(An appeal from the conviction and sentence by the High Court of
Kenya at Mombasa by delivered by E. Ogolla on 15th November,
2021) in the Information (HC Criminal Case No. 34 of 2018)*

JUDGMENT

The Information

1. Vide the information dated July 19, 2018, Naftali Chege, hereinafter the 1st appellant, Charles Wangombe Munyiri, the 2nd appellant, Ishmael Baraka Bulima, the 3rd appellant and John Pamba, the 4th appellant were charged with one count of Murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that the appellants, on the May 19, 2012 at Diani location, Msambweni Sub-County within Kwale County, jointly with others not before the court, murdered Alexander John Runan Monson, herein after the deceased.

The inquest

2. The appellants were charged following a Public Inquest into the death of the deceased held at Diani Chief Magistrates Court, Inquest No.3 of 2015, instituted under section 386 of the *Criminal*



Procedure Code. The Executive Officer of Mombasa Chief Magistrates Court, PW31, Maina Kabiru, produced the Court File, Chief Magistrate Inquest File No. 3 of 2015, comprising a certified copy of proceedings with exhibits thereto, Included in the proceedings was the ruling of the Hon. Richard Odenyo delivered by Hon. Richard Nang'ea, on his behalf on June 28, 2018. The court ordered the appellants face murder charge for the deceased death.

3. A joint plea was taken on July 19, 2018 in which each of the four appellants pleaded not guilty to the charge. The trial commenced in earnest before Ogola, J at Mombasa High Court where the prosecution called 32 witnesses, and each of the appellants gave sworn defence, none calling any witness.

First Appeal

4. This is a first appeal. In a first appeal such as this, the Court is under obligation to reconsider, reanalyze and reevaluate the evidence adduced before the lower court and come to its own conclusions thereon. In *Okeno v Republic* [1972] EA 32, the Court of Appeal for East Africa expressed this principle thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses...” (See also *Jonas Akuno O'kubasu v Republic Kisumu Criminal Appeal No. 69 of 1999* [2000] eKLR.)

The facts of the prosecution case

5. PW1, Hilary Martin, the mother of the deceased, testified that at 5.00am on the May 19, 2012, she received a phone call from her friend one Enrico, who informed her that her son was being held at Diani Police Station following an arrest for bhang smoking. That her attempts to have him released from Diani Police Station cells proved futile since the OCS was not available at the time. At around 9.30am on the same morning, PW1 received another call from one Joy that her son was rushed to Palm Beach Hospital in Diani. PW1 immediately took a flight from Nairobi to Diani to attend to her son. She arrived in Diani at 4.30 pm and found the deceased in a coma supported by ICU machine, while chained to the hospital bed. The deceased however passed on within the hour of her arrival.
6. According to Dominic Kenneth Martin, PW4, the uncle of the deceased and brother to PW1, the doctor at Diani Hospital informed him that the deceased suffered from drug overdose. PW4 arranged for a post mortem examination by a government pathologist, one Dr. Mbuuko and the pathologist hired by the family, Dr. Ngulungu.
7. Chelestino Ngari Kamami (PW 26) was the Mortuary Attendant at Pandya Hospital Mortuary. He was on duty at the mortuary on 22nd May 2012, when the postmortem was carried out on the body of the deceased by Dr. Mbuuko and Dr. Ngulungu in the presence of relatives of the deceased and police from Diani Police Station.
8. Dr. Mbuuko, PW13, was a Consultant Pathologist based at Mombasa Coast General Hospital. He conducted the post mortem on the deceased body on 22nd May 2012, in the presence of, among others his colleague Dr. Ngulungu, PW 20, and PW4. His Report was P. Exh. 1. Resulting from his



examination, he formed the opinion that the cause of death was consistent with increased intracranial pressure due to brain contusion following blunt injury to the head.

9. PW13 found hematoma on the head measuring 8x7x1 cm, evidenced by a bruise on the head, which was 4x4 cm and brain congestion caused by blunt force trauma. He also noted fresh injuries on the body of the deceased, which he opined occurred just before his death. This included grazing injury of the left elbow about 1x1 cm, caused by scratching on rough surface; bruises on the dorsum of the left hand; bruises on the scrotum; and, swelling on the left side of the hand measuring 4x4 cm.

The doctor testified that these injuries were on the left side of the body consistent with falling whether forced or self-involving. As for the injury and swelling on the head, the doctor opined a wide blunt object caused it. PW13 took urine and harvested the stomach, liver and kidney for toxicology, at the request of PW4.

10. Dr. Ngulungu, PW20 was present at the post mortem of the deceased as the family pathologist. In his Report dated 22nd May 2012 and produced as P. Exh. 2, he formed the opinion that the cause of death was head injury due to a blunt force trauma attended by brain concussion and raised intracranial pressure. He formed the opinion that the mechanism of death was depression of cardio-respiratory drive due to increased intracranial pressure. He ruled out toxicological reasons as the cause of death.
11. PW14, George Opello Ogutu was a Government Analyst working in Mombasa. He produced a Report as P. Exh. 6 which was prepared by his colleague Dr. Njenga who had since retired. PW14 said that the Government Chemist Department received from Sergeant Issa Wachifa samples for analysis. The samples were in a bottle with some liquid, a tablet, a bottle with 4 tablets, butts of smoked cigarettes, and packets of white papers all accompanied by an exhibit memo form marked P. Exh. 7. The exhibit memo form indicated the samples were in the person of the deceased.
12. PW14 also identified the exhibit memo form P. Exh. 8 dated 19th May 2012 that accompanied: Plastic marked 'A' containing stomach content and intestines, and; 'B' containing one kidney. He said that Sergeant Issa handed over the samples to their laboratory on 25th May 2012.
13. PW14 produced the report prepared by Dr. John Njenga after he conducted the analysis of the exhibits. He said that the liver, kidney and stomach contents were tested for Benzodiazepines, a drug that can cause hallucinations and cannabinoids and any other drugs. The result came out negative for those narcotics. The results confirmed that no narcotics were present in the deceased body, and that the only drugs present were ketamine, which is an aesthetic, Viagra, Diazepam that is a sedative. The witness testified that the body did not have cannabinoids, and that the sample of packets of white paper labeled A5 is what had cannabis.
14. PW27. Dr. K. N. Mandalya, a medical doctor and pathologist, carried out tests on the urine, blood and tissues specimen collected from the body of the deceased at post mortem, for purposes of a toxicology analysis. He said that PW4 requested him to do the toxicology after the post mortem. The result of the analysis was normal. His report was P. Exh. 14. He identified P. Exh 15, which he explained is a Batch sending the urine specimen to Pathcare in Nairobi, which he did personally. The result was P. Exh. 16, and the results were normal. He testified that in South Africa the urine specimen was divided into two; one sample was tested and found positive for cocaine, centrism, and some element of drug abuse. While the second sample was tested and found to have traces of cocaine, benzodiazepine, morphine TXC and cannabis.
15. In 2015, the deceased mother engaged John Jesse Payne- Janes (PW 25), a forensic specialist from the United Kingdom, as part of investigations. PW25 retrieved background information from the family, namely, postmortem reports, toxicology reports, any accounts or statements of witnesses available,



- copies of medical records, IPOA statement, Palm Beach hospital medical records, Postmortem and Toxicology Reports, copy of the Occurrence Book from Diani Police Station, and background information from IPOA and National Police Service. PW25 then produced a report on 24th January 2015, based on those documents. His findings were that the deceased's condition including his unconsciousness was not consistent with drugs or intoxication.
16. He opined that until about 3.00 a.m. or 3.30 a.m. the deceased's condition was good or normal. However, from 5.00 am and onwards there was considerable evidence that the deceased was unwell according to the available statements. By 8.00 a.m. his condition changed drastically and there is no information why medical assistance was not sought for a person who was for all intents and purposes unconscious. There was no toxicology or drugs in the body. That any samples which states otherwise may not have come from the deceased since the pathological evidence showed that the deceased had sustained at least one blunt injury to the head. PW25 testified that any weapon could have caused this, including police baton or part of a gun, which he said he was familiar with. Regarding the allegation of the deceased having been dropped by the police inside the cell, PW25 stated that the deceased was already unconscious when he was dropped to the ground, and therefore the fall was not the cause of the injury. According to PW25, the injury occurred before the police in the cells dropped him. The deceased was certainly well up to around 2.30 a.m. He said that the injuries on the head, the scrotum and the arm were all injuries which occurred before death because post mortem showed clots of blood underneath the skin which could only have occurred before death. That the deceased could not have suffered the injuries before he went into custody, but after 2.30 a.m.
 17. PW11, Francis Kamau Wamboi, spent the evening with the deceased and PW6 at Tanduri Bar and Restaurant, as from 8.00 p.m. He said that the deceased took WhiteCap beer and that he danced on the dance floor and played pool with PW6 and other people. PW11 said that when he wanted to leave with his girlfriend, the deceased offered to drive them home. They entered his car but did not leave immediately since the deceased wanted to smoke something. That suddenly a short man arrived at the window of their car. The place was dimly lit. The man started arguing with the deceased, accusing him of smoking weed. PW11 and his girlfriend left the car so that they could go home. PW6 and the deceased remained in the car. PW11 said that the deceased did not smoke anything that night, even by the time the man arrived at his car. PW11 did not see the deceased being manhandled in any way.
 18. PW6, Andrew Simiyu Bowy was with the deceased for the better part of the afternoon on 18th May 2012. He and the deceased were arrested at Tanduri Bar parking lot, and taken to Diani Police Station. He said that he and the deceased did not resist arrest, that they cooperated fully with the police and everything seemed fine. He testified that the police did not molest them, and apart from the deceased who was fatigued, none of them were drunk. He said that the deceased used to smoke cigarettes, and that at the Tanduri Bar parking lot where they were arrested, he did not see the deceased smoke any cigarettes. He also stated that nobody smoked bhang that evening and that the deceased was normal as far as he was concerned as at 2.30 a.m. when he left him at the cells. PW6 said that the following day he received a call from a friend, one Jerri Oakley who broke the shocking news that the deceased had passed away while in hospital.
 19. PW5, Richard Khamala Bowy, was the father of PW6. He negotiated and bailed out PW6 from the police cells at about 2.30a.m. He was able to speak with the deceased at the police cells at 2.30 a.m. and formed the opinion that at the time, he was in perfect health.
 20. PW7, Erico Madella Amadei (Kiko) was a friend to the deceased. The two had planned to meet the evening the deceased and PW6 were arrested. PW7 made a call to the deceased but they could not talk. The deceased called him back same evening at about 2.00 a.m. to inform him that the father of PW6 had managed to have PW6 released from police cells. PW7 rushed to the police station at 2.30 a.m. and



- found two police officers at the front desk. He was able to speak to the deceased, who peeped through the grill of the cells to speak to him. He said that the deceased stood at 6 feet 2 inches and that to be able to peep through the cell window, he must have been standing on his toes. PW7 said he saw the face and eyes of the deceased as they talked. That the deceased sounded well and that he stated as much. The following day he saw him in bad shape and handcuffed to a hospital bed, with bruises on his left arm.
21. PW12, Seif Mwalim Makope was an arrested person who shared the cell with the deceased at Diani Police Station on the night of 18th May 2012. They were six men in the cell. The deceased was sitting in front of him and that he told him that bhang was the reason of his arrested at Tanduri Bar. PW12 said that when tea was brought to the cellmates at 6.00 a.m. the next morning, he tried to wake up the deceased but he was just snoring. At around 9.00 a.m. police officers requested PW12 to help them bring out the deceased to the Report Office Area as he continued to sleep. At 10.00 o'clock PW12 paid Kshs. 500/= to the police for his release, but that no receipt was issued for the payment. PW12 testified that he did not see anything out of the ordinary that night.
 22. PW15 – Yusuf Salim Matumizi was arrested and placed in the cell where the deceased was held at the Diani Police Station. He said that the deceased looked drunk because soon thereafter he fell asleep facing the wall. He confirmed the evidence of PW12. The only variation being that three police officers sought to wake him up, one held him on the right hand and one on the left hand. They tried to raise him up three times each time releasing him and letting his head hit the floor. He said that at about 10.00 a.m. when he paid for his cash bail of kshs.500/- and was released, he left the deceased at the police station, still snoring near the Report Office desk.
 23. PW16 – Shaban Swaleh Mwadrashi evidence was to the effect that on the night of 19th May 2012 he went to the Report Office at Diani Police Station to bail out his six employees, which he did not succeed. He was asked to go the next morning, which he did at 8 a.m. He said he saw a white man seated against the wall at the reception area, who was snoring. He learnt later from PW12 that the white man died.
 24. PW17 – Mohamed Salim Mwandarashi was also a cellmate of the deceased on the material night. He confirmed that the deceased failed to wake up for morning tea at 6.00am. PW17 said that the deceased never left the cell from the time he was brought into the cells at about 3.00 a.m. on the 18th and 19th May 2012, until the time he was lifted up by police in the morning. The witness testified that police officers did not carry the deceased and that those who carried him were five cellmates, who did not drop him in the process.
 25. PW18 – Abdalla Sofian Mwakupigwa was also a cell mate on the material night. His evidence was similar to that of PW12, PW15 and PW17. The only variation being he placed the time the deceased entered the cell as about 4.00 a.m. He said that he complained that it was hot. He said that later that morning two police officers entered the cell in civilian clothes, and that they asked for help to carry the deceased, after a failed attempt to do so. There was no talk of the deceased being dropped. he testified that during the time they were in cell, there was no commotion or struggle.
 26. PW8, Justice Okari Aminga worked at the Diani Palm Beach Hospital. He authorized the release of the ambulance that picked the deceased from Diani Police Station. Later on after the deceased died, he instructed the ambulance to take the body to Pandya mortuary.
 27. PW9, Emmanuel Shadrack Bondora was a nurse on duty at Palm Beach Hospital at the general department. He was in the ambulance that picked the deceased from Diani Police Station in the morning of 19th May 2012. PW9 said that the deceased was unconscious, frothing and sweating and his limbs numb when they picked him up from the Police Station. PW9 explained the treatment administered to the deceased, under the instructions of a medical doctor, as the hospital attempted



- to resuscitate the deceased. The doctor ordered PW9 to administer Atropine to un-dilate the pupils. They also administered hydrocortisone to resuscitate him, and put him on a drip. PW9 attended to the deceased from morning up to around 4.00 p.m. when his condition appeared to be worsening. That they administered cardiac shock three times to energize the heart. They stopped when it did not work. At that time, PW1 had arrived. The doctor took her aside and informed her that the deceased had died. PW9 then prepared the body, and using the same ambulance took it to Pandya Hospital Mortuary. PW9 testified that the deceased got the best attention at the hospital.
28. PW10, Moses Kithei Wambua worked at Palm Beach Hospital as a biomedical Engineer responsible for maintenance and repair of machines. He was with PW9 when they carried the deceased from the Police Station to their Hospital. PW10 said that two police officers accompanied them from the Police Station, that the two carried some drugs in a polythene paper claiming belonged to the deceased, and that he advised them to show to the doctor at the hospital.
 29. PW 19 No. 218177 Paul Cheruiyot, Superintendent of Police currently attached to Nandi County but formerly Officer in- Charge Diani Police Station. He said that he was posted to Diani in 2011. He knew the appellants in this matter. They were his colleagues. They served in the same station but in different units. The 3rd appellant was under his command. The 1st and 2nd appellants were under Tourism Police. They were not reporting to him. He did not know the deceased. On May 18, 2012, he reported on duty at around 7.00 a.m., and worked till 6.00 p.m. He then proceeded to his house after checking out. Later he proceeded to another robbery scene.
 30. He said that at around 3.00 a.m. he returned to the station but did not go into the cells since he had a Duty Officer in- charge. However, he saw the deceased standing at the Report Office desk. He did not talk to him. He saw the 2nd appellant in his office with some other people. He passed through the corridor, left through the back door, and went to his house, without talking to the 2nd appellant. He reckoned that since it was a tourist's case, and the officer in charge of tourism was present and in charge, there was no need.
 31. He said that at 11.00 a.m. the next day a Police Constable Maina informed him that the deceased had fallen ill. He rushed to the front office and found the deceased being moved to a waiting ambulance. He appeared very sick and so PW19 did not talk to him. He said that he was overall in command of the police station and responsible for the welfare of prisoners. PW19 testified that when an inmate is taken into a cell, his movements out of the cell must be recorded in the Occurrence Book. In the instant case, the prisoner was booked at 2.30 a.m. and at 3.00 a.m. when he went to the station, he saw the deceased talking to the 1st appellant outside the cell. The Occurrence Book had no entries showing movement of the deceased from the cell. He said that the purpose of the entries is to establish any complaints that may arise in relation to the movement of the inmate. PW19 said that he learnt that some items that were taken from the deceased went missing.
 32. PW 21 No. 233936 Chief Inspector Raphael Mulwa was in-charge of Investigations at Diani Police Station. On the material night, he was the Duty Officer, and was patrolling around Diani area. He received a call from the 1st appellant who asked for reinforcement to escort a person he had arrested to police station. He went to him and found 1st appellant at Tanduri Bar Parking Yard with PW22, PC Serem. He found the 1st appellant standing by the driver's door while PW22 was by the passenger door. In the vehicle were two men. All was calm. The 1st appellant informed him that he had found the deceased smoking bang. PW21 was surprised because the place was calm. He asked why there was a need for reinforcement. The 1st appellant said the deceased had attempted to drive away hence the need for reinforcement.



33. PW21 said that he asked the deceased if he had smoked bhang and he said no. The 1st appellant showed PW21 the bhang that deceased was smoking. PW21 then informed the deceased and PW6 that they will be taken to the police station. They appeared quite relaxed. He said that on arrival at the station, they searched the vehicle belonging to the deceased, which they had driven to the station and found nothing. He said that the 1st appellant showed him an envelope with tablets which he said he got from the deceased.
34. PW21 said that when he returned to the station from a robbery scene visit, he found the 2nd appellant talking to the deceased at the report office outside the cell. The 2nd appellant was the officer in-charge of Tourism Unit at the Station. In the morning at about 6.00 a.m. he returned to the station but did not see the deceased that morning. There was no incident reported about the deceased. He said that the 3rd and 4th appellants were in charge of the cells and the report office on the material night.
35. PW 22, Police Constable William Serem was on mobile patrol duties with his Officer, the 1st appellant, on May 18, 2012. That evening they were on patrol within Diani beach. At around 1.30 a.m. they entered Tanduri Restaurant and parked at a dark place 15 meters from the entrance. A bouncer at the restaurant went where they were and called the 1st appellant. He informed them that there was somebody smoking bhang. A double cabin motor vehicle was reversing. They approached it. Two occupants came out of the rear cabin and one entered the driver's side and the other the passenger side. They went to them. PW22 saw the 1st appellant holding half smoked bhang. He asked the driver who was a white man whether he knew it was illegal to smoke bhang in Kenya. They ordered the deceased to switch off the engine and come out of the vehicle but he did not, and attempted to drive away.
36. When the 1st appellant called for reinforcement from Inspector Mulwa, he arrived shortly. The deceased voluntarily came out of the motor vehicle. PW22 saw a khaki paper between the gear lever of the motor vehicle, which he removed from the car and handed over to the 1st appellant. The deceased and PW6 were handcuffed together and driven to the police station.
- He said that the deceased was in good condition but he looked drunk. They were orderly. He booked them in. The deceased was standing at the front office when PW22 left.
37. PW28, Sergeant Gideon Kiprotich was in May 2012 based at Diani Tourist Police as Record Keeper. On May 19, 2012 at about 2 a.m. he drafted a signal pertaining to the arrest of a tourist on instructions from 2nd appellant. With the 2nd appellant was a white lady, who was asking that the deceased be released on bail, but 2nd appellant told her to come the following day. PW28 left 2nd appellant's office and went to the Records Office and found the deceased sitting and having a cordial conversation with Police Constable Baraka, the 3rd appellant. There was light laughter. The deceased sat on a stool. PW28 addressed him about his details, where he resided. He said he lived in a cottage. He appeared drunk but he was okay. He answered questions promptly and without any difficulty. PW28 then drafted the signal of arrest of a foreigner, then left. The following morning at 8.00 a.m., he returned to the office and was informed by P.C Maina that the deceased was unwell.
38. PW28 informed the 2nd appellant that the deceased was unwell. The 2nd appellant informed him that he was aware but that since the matter involved drugs he had handed over the matter to the CID and informed Inspector Issa. Later that morning the deceased was taken to hospital, and later he passed away.
39. On May 22, 2012, PW28 attended the postmortem at Pandya Hospital on instructions of the 2nd appellant. The body was still dressed in a short and T-shirt. PW28 testified that when a suspect is arrested he is searched and he does not go into cell with anything. However, at the mortuary some



things were removed from the deceased's pockets. This was not normal. PW28 testified that there was nothing out of the ordinary in the way the 2nd appellant handled the matter.

40. PW23, Police Constable Kennedy Mutai, was attached at Diani Police Station on general duties. He was on duty on May 19, 2012 from 8.00 am to 4.00 pm. The deceased was one of the persons in custody. The 3rd and 4th appellants handed over duties to him. However, they did not inform him that the deceased had issues. At 9.00 am, the deceased was still sleeping and breathing heavily. He said that Inspector Issa, PW24 and himself instructed the remands at the cells to take the deceased out for fresh air, which they did. The OCS, PW19 was informed about the case.
41. PW24, Inspector Issa, attached to CID Diani on May 19, 2012 received some drugs from PC Kemboi, who had received them from the 2nd appellant, who told him that the deceased had been arrested with them. PW24 found the deceased lying with his head near the door and breathing heavily. He was not talking. He accompanied the deceased to hospital, handcuffed one of his hands to the bed and waited outside, only to receive the news of the deceased demise.
42. PW 29 218172 Mwenda Ethaiba the DCIO Kwale. On the night of 18th and May 19, 2012 at about 2.30 a.m. he received a call from CIP Chege the 1st appellant who was attached to the Tourist Police Diani. He informed him that he had arrested the deceased while smoking bhang. He also recovered some drugs. PW29 was informed because matters of drugs were in his docket, and because the matter involved a foreigner. He told the 1st appellant that he would address the matter in the morning. At 7 a.m. PW24 Inspector Issa found the deceased unwell in his cell.
PW29 was among those who took the deceased to hospital.
43. PW 30 – No. 56261 Sergeant Stephen Nyamai, was attached to Scene of Crime's Office Mombasa County as a scene of crime officer. He took photographs during the postmortem of the deceased, which was performed at Pandya Hospital Mortuary on May 22, 2012. He took several photographs including:
 - a. the general view of drugs on table;
 - b. various full length views of the deceased;
 - c. close-up view showing the pathologist examining the arm;
 - d. close-up view showing a bruise on the left arm;
 - e. close-up view showing jump staining marks of art on the chest;
 - f. close-up view showing bruise on the testis;
 - g. close-up closer view of the back of the deceased;
 - h. closer view showing the liver, closer view showing the heart;
 - i. closer view showing a bruise on the left side of the head-interior;
 - j. close-up views of the brain, skull , and bruises to the head; and,
 - k. bruise on upper palm of the left arm.
44. PW30 took 26 photos in all.
45. PW32 Jeremiah Arodi worked with IPOA as the in-charge of investigations. IPOA is a Government Agency mandated, inter alia, to receive and investigate complaints made against police officers. He led a team of investigators into this matter in June 2013.



46. PW32 stated that the ODPP required the Chairperson of IPOA to conduct independent investigations into the circumstances that led to the death of the deceased at Palm Beach Hospital Diani. He prepared a report containing summary and recommendations of their investigations. He stated that they collected various documents and registers, original Inquest File, Cell Register, Occurrence Book of Diani Police Station, reports including Post Mortem Reports, Forensic Analysts Reports, and various exhibits all related to the case.
47. They then embarked on independent investigations, which included visiting the Palm Beach Hospital, and interviewing various players including the police officers on duty and those that were in-charge at the Diani Police at the time. PW32 testified that he also spoke to the pathologists who conducted the post mortem on the body of the deceased, and the doctors at Palm Beach Hospital where the deceased was admitted before he died.
48. The results of the investigations were that the appellants were negligent for failure to attend to the medical condition of the deceased. On May 18, 2012 the police was informed at 9.30 am of the illness of the deceased. The 2nd appellant was informed of the deceased illness, but there is no record of that in the Occurrence Book, which ought to have been recorded. Further, the deceased was seen with the 2nd appellant even after he had been booked in cell, but it was not recorded. PW32 ruled out the deceased being injured at the point of arrest, arguing that it would not have taken that long before the injury manifested itself.
49. PW32 investigated the possibility of drug overdose as being the cause of death but discounted that aspect.. The deceased went to Diani Police Station at 2.30 a.m. appearing normal. Witnesses saw him outside the cell after having been booked into the cell. At the time the deceased was held in cells, the 1st to 4th appellants were at some stages in the office and that the 3rd and 4th appellant had the duty of taking care of the deceased, and of recording any movement in and out of the cell. . PW32 testified that when a prisoner is taken out from the cell, there must be a record made in the Occurrence Book detailing the reasons for movement, times out and times back to the cell and who was moving them. The record must be in the cell Movement Register and Occurrence Book. The only recorded movement of the deceased is when he was taken to the hospital. The 2nd appellant was the senior most officer and OCS of Tourist Police Unit, to which the 1st appellant was attached. PW32 testified that the 2nd appellant was obligated to take care of the deceased. It is on record the 2nd appellant talked to the deceased on the morning of the relevant day. It was his duty to observe the deceased and assist him. That the 3rd and 4th appellant were required to take any action necessary regarding the condition of the deceased. The deceased did not make any complaints of his condition upon arrest. PW32 agreed with the expert witnesses who opined that the deceased must have been injured between 3.00 and 5.00 a.m. PW32 testified that excessive consumption of drug could not have been the cause of the blunt force injury the deceased had. That even the result of toxicology showed that the amount of drug in the blood was little and could not cause such injury.

The Defence

The 1st appellant's defence

50. DW1, 1st appellant Sergeant Naftali Chege gave sworn evidence. His testimony was that on May 19, 2012, he was working at Diani Tourism Police. He had served in that position for about 4 ½ years. But in total he had served the police since 1985 for about 27 years up to 2012. His in-charge Chief Inspector Munyiri, the 2nd appellant herein, gave them duties. On the night of May 18, 2021 the 1st appellant reported to work after 6.00 p.m. He was instructed to patrol along Diani Beach, together with PW22,



and PC driver Mohammed, using a Toyota Land Cruiser GK A670L. They patrolled along Beach road and surrounding hotels and estates along the beach. They came to Tandori Bar and Restaurant, along the road. The bar has both open and private section. From the open space one could see the road. They parked in a side road, about 75 metres from the bar. They came out of the vehicle and were just relaxing. Shortly thereafter, a bouncer whom they knew facially came out of the bar and informed them there was a white man smoking bhang in the hotel. The bouncer tried to remove the smoker but he resisted and the bouncer wanted their assistance.

51. He said that he led his team to the hotel at a well-lit place. He saw the deceased leave the bar to go into his car. The bouncer pointed him out. His car was Toyota Hilux. The 1st appellant was with PW22. PC Mohamed was still in their vehicle. That he approached the deceased on the driver's side. PW22 approached him from the passenger seat. As he approached the vehicle, he smelt bhang, and then he saw a bhang roll in the deceased's mouth. Both of them were in uniform. The deceased was about to reverse and the 1st appellant took that bhang from his lips, to use as exhibit. He explained that he was a tourist police officer and identified himself and told the deceased that they were arresting him. Then the deceased took out his phone to call somebody. The 1st appellant also took out his phone to call inspector Raphael Mulwa to come and arrest the suspect.
52. The 1st appellant said that he sensed that the deceased wanted to drive off and using their vehicle blocked his vehicle so that he could not drive away. He testified that the deceased had 3 passengers, all African. That the man who sat at a co-driver's seat was Bowy, PW6. That PW22 recovered an envelope from the dashboard of the deceased vehicle inside which were some drugs.

The couple who sat at the back seat came out and went into the bar. It was about 1.00 a.m. All this time the deceased was talking on phone, comfortably seated in his car.
53. He said that there was no confrontation. In less than ten minutes, Inspector Mulwa, PW21 arrived in his car. He went to where they were and enquired about the issue. He told him that the deceased was smoking bhang. Then PW21 talked with the deceased who came out of his car without resistance. PW21 had come with PC Chirchir, who handcuffed the deceased and PW6. They ordered the two to enter into the 1st appellant's vehicle. PC Chirchir drove the deceased's car to the police station. The 1st appellant testified that the deceased did not make any complaint at all the whole time. At the Diani Police Station, PW22 and he did further search on the deceased vehicle and found a packet of lizra rolling papers, used in rolling bhang. At Diani Police Station were two officers manning the station, the 3rd and 4th appellants respectively. PC Langat was the station guard.
54. The 1st appellant instructed PW22 to search the suspects again. Nothing was found. He then called the DCIO SP Mwenda, PW29, to inform him that he had arrested a person with narcotics so that the narcotic department could handle the suspect. Because SP Mwenda, did not respond, he called Inspector Munyiri, the 2nd appellant, his boss, who reported after about 20 minutes. By that time, the suspects had not been put in cell. The 2nd appellant greeted them and entered his office. He followed him into the office and briefed him about the case. He said that after that, he went out. The DCIO PW29 returned his cell and he informed him that the case was a narcotic issue, he instructed him to book the suspect, and that he would sort the issue the following day. He said that the 2nd appellant did not speak with the deceased at all.
55. He said he sought from the deceased his passports and other personal particulars. In the process, he took PW6's statement and released him after the deceased told him that he was the person suspected and that he was giving PW6 a lift in his car. He then booked the deceased as a suspect, at about 2.30 hours, and put him in cell. The suspect appeared normal to him, and did not complain of anything, neither did he say that he was suffering from any discomfort. He did not have any injuries at all. That



after PW22 arranged for a signal of arrest that the 2nd appellant signed, they left the station to resume their night patrol duties. They reported back to the station to sign off after 6.00 a.m. He did not see the deceased that morning, and did not have any news about the deceased.

56. At about 10.00 a.m. he left his house to go take tea at the police canteen. He saw the deceased lying down. He also saw some white people at the station. They had come to bail out the deceased, but they said the deceased was unwell so his health should be attended to before the issue of bail. The 1st appellant was present when the deceased was taken to hospital in a stretcher, but he did not go to the hospital. At about 5.30 p.m. he was informed that the deceased died at Palm Beach Hospital. He did not see his body. He did not know what caused his death. He did not know anything that might have taken place in the Tandori Bar before the bouncer called them that night.
57. The 1st appellant testified that he was not aware how the deceased phone got lost at the police station, but he heard that his phone actually got lost.

The 2nd appellant's defence

58. DW2 Charles Wangombe Munyiri, the 2nd appellant gave sworn evidence. He said that he was a retired police officer, Chief Inspector of Police No. 217842. He retired in December 2015. At the time of retirement, he was working at police headquarters in Nairobi. Before that in 2008 up to 2013, he was in Diani Police Station, as in-charge Diani Tourist Unit. He testified that on May 19, 2012 he was at Diani Police Station, when at around 2.30 a.m. he received a call from the 1st appellant who informed him that he had arrested a foreigner who was smoking cannabis sativa, and he had brought him to the police station. He woke up and proceeded to the police station. He entered through the front door at the reception. On entering, he found many police officers including the 1st, 3rd and 4th appellants and PW21.
59. He said that the 1st appellant showed him the suspect who was seated in a chair. PW21 was outside the reception desk while the others were inside the desk area. He enquired from the 1st appellant the passport of the deceased, to which the 1st appellant replied that he had no passport. The 2nd appellant approached the deceased, greeted him. He did not reply immediately but after hesitation, he said that he was fine. The suspect told him he had misplaced his passport. He then took the Occurrence Book and went through the entry made in connection of the deceased. He thought the deceased looked dull and somehow sleepy. This was about quarter to 3.00 a.m. After that, he went to the general office for Tourist Police where he found PW22, PW5 and PW6. PW6 was recording a statement. PW5 was the father of PW6. Then he walked into his office, which is next to the general office.
60. From his office, he summoned PC Rono, the Records Officer to draft a report for signal to be sent to headquarters and other relevant offices for the arrest of a foreigner. The report was titled "Arrest of a foreigner". The report was to inform the British High Commission that one of their subjects had been arrested. While still in his office, the sister to the deceased, who appeared drunk, entered. She was requesting if the deceased could be released, but he asked her to return the next day with the deceased's passport. She said she would return 9.00 a.m. but she did not show up as promised.
61. He said that he went back to his house to sleep, using the back door. This was about 3.00 a.m. He did not meet or see the deceased alive again. He stated that all departments of police use one cell and that the OCS is responsible for the welfare of suspects placed in the cells. He said that he went back to the office at around 9.00am, and PW22 handed over to him some envelope which contained some drugs and half smoked bhang. That he instructed PC Rono to hand over the item to PW24. Thereafter he left the station building to go to the beach to do supervision. He learnt of the deceased demise from PW29 at 5pm on 19th. He rushed to the hospital and found PW24 and another CID Officer. He confirmed that



indeed the suspect had passed away. He then arranged for the transfer of the body to Pandya Memorial Hospital. The DCIO instructed him to open an inquest file, which he did. However, the following day, he received instructions from Nairobi to hand over the file to the CID which he did. He said that he felt sad for the death of the deceased. He denied the charge.

62. He testified that the 1st appellant had arrested a suspect with half smoked bhang, and that at the time, the 1st appellant did not mention any other drugs found with the deceased. However, when he read the OB he found mention of other drugs. He was instructed to open an inquest file into the death of the deceased, and he did so, and barely 4 days after the death, recorded statements from witnesses. The investigations were later taken over by the CID. He said that he did not invent the story of the drugs at the police station but that the drugs were handed over to him at the station during the early hours of May 19, 2012. He was however surprised that some drugs were found on the body of the deceased at the mortuary. That night at report desk the 3rd appellant was in charge of the cell and monitored whoever entered the cell, while the 4th appellant was the Report officer who was responsible of making entries of the reports in the Occurrence Book. He referred to OB entry on May 19, 2012 at 00 hours and stated that it is not easy to tell who made that entry.

The 3rd appellant's defence

63. DW3, Police Constable Ishmael Baraka Bulima gave sworn evidence. He testified that he had served as police officer for 3 years by 2012, and Diani Police Station was his first posting. His boss was the OCS, who was not in at the station that night. Inspector Mulwa, PW21 was the Duty Officer and holding for OCS. He stated that on the night of 18th and May 19, 2012, at about midnight he reported on duty as Cell Sentry Officer while the 4th appellant, was the Record Office Personnel. While on duty both of them sat at the front office. When they reported on duty they took over from the previous officers the Cell Register, and confirmed that the register contained the names of all those who were in the cells. At about 2.00 a.m. the patrol teams returned to the station. Inspector Mulwa, led the first team comprising PC Chirchir and PC Mugambi. The second team was led by the 1st appellant and comprised PW22 and Police Driver Mohamed.
64. The latter team brought two prisoners, the deceased and PW6 handcuffed together. The 1st appellant reported to the 3rd appellant that the suspects were arrested smoking bhang at beach area and they showed what the 2nd appellant had recovered from the suspects. The 1st appellant un-cuffed them and told the deceased to enter the reception area. The 1st appellant took PW6 to the Tourist Police Office for about 30 minutes after which he was released.
65. PW22 returned to the reception and interrogated the deceased about the passport and his particulars. The 1st appellant booked the deceased in the Occurrence Book. At about 3.00 a.m. the 3rd appellant booked the deceased in the Cells Register and escorted him to the cells. He said that he did not notice anything abnormal about the deceased.
66. That after about 45 minutes two white people arrived at the station, a man and a woman. They talked with the deceased through the grill, since cell doors were normally not opened at night. The 3rd appellant referred the two to the 2nd appellant who was then in his office to discuss the possible release of the deceased. The two went and talked with the 2nd appellant and left after a few minutes. They passed by the cell and talked to the deceased and told him they would come back in the morning. He said that nothing happened after that until he handed over the Cell Register. He checked the prisoners and all was okay. Later he learnt of the death of the deceased. He said that the deceased had a phone and ATM card which he kept them safely in a metal box, whose key was held by the 4th appellant. He said he was aware the deceased property and the entire metal box disappeared.



67. He denied the allegation that he caused the death of the deceased. That until the time he left duty, his attention was not drawn to any uncomfortable condition or state of the deceased and that in the cells that night there was no commotion or quarrel, and that the remands very friendly.
68. He said that the 4th appellant was responsible for making entries in the Occurrence Book that night. He referred to an entry of 19th May 2012, OB No.3. whose maker was not disclosed, which he said was not unusual. He said that the entry were not correct. He said that the 2nd appellant was at the station that night, but denied that the deceased was assaulted at the Tourist Police Office. The 3rd appellant did not go into the cell at 6.00 a.m. to find out the state of cell mates as that was not necessary as there no need for that.

The 4th appellant's defence

69. DW4 No.56351 Police Constable John Pamba gave sworn evidence. He said that he was employed in 1988 as a police constable. He worked in various stations but from 2008 to the material time, he was stationed at Diani Police Station. On 19th May 2012 he reported to work at midnight as the front officer to receive reports and enquiries from visitors, and to assist those in cells. He worked with the 3rd appellant who was junior to him. At about 2.00 a.m., they received two suspects, PW6 and the deceased. They were brought by the 1st appellant and PW22, and were in handcuffs. At the station was PW21 the Duty Officer and PC Chirchir. He said that the 1st appellant went outside to one of the two vehicles they came in and returned with some drugs. The 1st appellant took PW6 to the Tourist Police Office, and were later joined by two men. Eventually, PW6 was released. All this time he was at the front office and the deceased was also standing at the reception area. He was fidgety. He said that the 1st appellant entered cell entry details for the deceased then left stating he had done his work. The deceased was in good condition. He recorded deceased's property, a phone and ATM card, and placed him in cell. Thereafter two relatives of the deceased arrived, a sister and a family friend. He directed the sister to the Tourist Office. After about five minutes, the sister returned saying she was told to come in the morning. The OCS and others had gone out to a robbery scene and they returned about 3.00 a.m.
70. He said that at about 5.00 a.m. he heard people in the cell shouting 'afande, afande.' The 4th appellant opened the cell door and found the deceased sleeping and snoring, He told the cell mates who had called him to call back should there be any issue.
71. He said that he handed over to PC John Maina and PC Kimutai and left at 7 a.m. That by the time he left, the deceased was in good shape. Further, that the deceased was not tortured at the Police Station or in the Tourist Police Office.
72. In the evening at about 5.00 p.m., he got information that the deceased died at the hospital. He was shocked because he was with him the whole night that he was well when he arrived at station. He was standing and walking on his own. He denied knowledge of a 'blue code of silence' in the police force. He testified that on the second night he saw the 1st appellant at the police station at about 3.00 a.m. yet he was not supposed to be there. That was the night also that they lost the suspect's property box. The 4th appellant remained with the key while the box was stolen. The 4th appellant testified that the OCS is required to visit cells every morning. On that night, the OCS was in a robbery scene, but he did not return to the police station.

Issues for determination

73. The issues before the trial Court, as canvassed by counsel were threefold. The first was regarding circumstantial evidence whether the prosecution adduced evidence to unerringly establish that the



appellants caused the injuries that led to the death of the deceased or were responsible for them. Related to that is whether it was material for the prosecution to prove the age of the injury that caused the deceased, and to establish the reason the deceased was in comatose on the morning of the 19th May 2012. Second was whether forensic evidence has weight in determining who caused death, or whether it did not just confirm the cause of death. Third was which police officer had command responsibility at the Diani Police Station on the material night. Fourth, whether the defence of the appellants was believable and credible. Related to that is whether the appellants discharged their statutory responsibility of handling the deceased as a suspect.

74. The learned trial Judge identified four issues for determination after considering the entire evidence and submissions by counsel on both sides. These were
- i. At what point was the deceased injured.
 - ii. Whether there was death of the deceased and cause of death.
 - iii. Whether the accused persons committed the unlawful act that caused the death.
 - iv. Whether the accused persons committed the unlawful act with malice aforethought.
75. In a judgment dated November 15, 2021, the learned trial judge found that the prosecution had proved that the deceased died out of culpable negligence of the 1st, 2nd, 3rd and 4th appellants who failed to provide medical care for the deceased, leading to his death from the injuries he sustained at the Diani Police Station. The trial court convicted the 1st, 2nd, 3rd and 4th accused persons of the lesser charge of manslaughter under section 202 of the *Penal Code*.
76. The learned Judge sentenced the appellants on the November 15, 2021 as follows:
- i. The 1st appellant was sentenced to imprisonment for a period of 15 years, five of which are suspended.
 - ii. The 2nd appellant was sentenced to serve 12 years imprisonment, six of which are suspended.
 - iii. The 3rd appellant shall serve 9 years in prison, 5 of which are suspended.
 - iv. The 4th appellant shall serve 12 years in prison, 6 of which are suspended. However due to his invalid condition he shall continue to seek treatment outside prison, and shall only move into jail on November 15, 2022 regardless of whether or not he shall have healed.

The grounds of appeal

77. The appellants being dissatisfied with the judgment and sentence of the trial court preferred this appeal. We have considered the grounds of appeal filed by each of the appellants. Each contend that the learned trial Judge erred in law and fact in convicting them and in the sentences meted out to them. The grounds revolve around similar issues and can be summarized as follows:
- i. For finding that the circumstantial evidence adduced by the prosecution established the charge against the appellants for which they were convicted.
 - ii. For failing to find that there were other co-existing circumstances that presented other possible explanations of how the deceased sustained the fatal injuries.
 - iii. For finding that the appellants removed the deceased from the cells and inflicted fatal injuries without any iota of evidence.



- iv. For finding that the prosecution proved that the appellants owed the deceased a duty of care, that they knew the deceased was injured, that they declined to take him to hospital and therefore failed in that duty.
- v. For relying on a theory which had not been canvassed at the trial by any party, to convict the appellants.
- vi. For rejecting the appellants defence.
- vii. For meting out unreasonably heavy sentences to the appellants without due regard to the circumstances of the whole case.

Notice of Intention to Enhance Sentence

78. The ODPP filed a Notice of Intention to have enhancement of sentence to life imprisonment against the appellants, to make it commensurate with the sentence provided under section 202 as read with section 205 of the *Penal Code*. The Notice is brought pursuant to Article 159 of *the Constitution* as read together with section 3(A), 3(B) of the *Appellate Jurisdiction Act*, and rule 4 and 12 of the *Court of Appeal Rules*, 2010.
79. The appeal was heard on the virtual platform on the July 28, 2022. Present at the hearing were the 1st, 2nd and 3rd appellants. The 4th appellant was absent on account of illness. Learned counsel Mr. Otieno was present for learned counsel Mr. Aminga for the 1st appellant; learned counsel Mr. Kimathi for the 2nd appellant; learned counsel Mr. Magolo for the 3rd appellant; learned counsel Mr. Wangalwa for the 4th appellant; and, learned Prosecution Counsel Mr. Mulamula for learned Prosecution Counsel Mr. Kabaga for the State.
80. Mr. Otieno urged that Mr. Aminga was relying on his filed written submissions dated July 4, 2022. Mr. Kimathi relied on his written submissions dated July 5, 2022. Mr. Magolo relied on his written submissions dated July 20, 2022. Mr. Wangalwa relied on his submissions filed on July 28, 2022. Mr. Mulamula for the State said that the State was relying on the submissions filed before the High Court, urging that they apply to this appeal. On the sentence, he urged that they relied on the Notice of Enhancement of Sentence
81. Mr. Otieno in his oral submissions summarized the grounds of appeal raised by his client into three, and submitted that circumstantial evidence was not established as no evidence was adduced that unerringly pointed to the 1st appellant's guilt; he urged that the prosecution did not adduce evidence to establish that the appellant owed any duty of care to the deceased for reason the 1st appellant was attached to Tourism Unit, and the deceased was arrested for drugs which fell under the OCS, PW19 and PW21. He urged that no evidence was adduced to prove that the 1st appellant knew or had reason to believe that the deceased was injured, and that for that reason, the duty of care had not crystalized.
82. Mr. Kimathi for the 2nd appellant urged that the only time the 2nd appellant saw the deceased was when the deceased was at the police station reception desk and he looked drunk and sleepy. Counsel urged that at the time there was nothing warranting the 2nd appellant to suspect that the deceased was injured. Counsel relied on the case of *Musili Tulo v Republic*, Cr App No. 30 of 2013 and *Mwangi & Another v Republic* [2004] 2 KLR 32 which expounds the principles that apply in determining whether circumstantial evidence adduced by the prosecution was sufficient to sustain a conviction. It was his submission that the evidence did not point to the 3rd appellant, that the evidence was not cogently and firmly established, neither did it form a chain so complete that there was no escape from the conclusion that within all human probability the crime was committed by the appellant. Counsel urged that there



- was no evidence adduced to show that the 2nd appellant handled the deceased at any given point. That there was no material evidence to link the 2nd appellant with the injuries sustained by the deceased since the trial court was not in a position to determine whether the injuries suffered were inflicted on the deceased before or after he was booked in the police station.
83. Further, that the persons who visited the police station confirmed that they saw the deceased at the reception or in the cell. He urged that it was the OCS, PW19 and PW21 who were responsible for the welfare of the deceased and if anything, it is them who should have been charged for negligence and not the 2nd appellant. Counsel faulted the learned trial Judge of making findings that contravened the principles under section 107 of the *Evidence Act*, on he who alleges must prove. Also faulted was failure by the prosecution to avail all the important independent witnesses in the case, including the bouncer who called the police to the scene, the doctor who diagnosed and treated the deceased for overdose and the DCI police officers who exonerated the 2nd appellant from blame. In concluding, the 2nd appellant submitted that the limb on actus reus required in determining the charge against him was never established.
84. Mr. Magolo for the 3rd appellant cited paragraph 168 of the trial Court's judgment and submitted, that even though the fatal injuries suffered by the deceased were not contested, the court's findings were erroneous. Counsel urged that there was no evidence to show who or what caused the injuries; where the injuries were inflicted and whether the injuries were capable of causing death. Mr. Magolo submitted that there was no evidence that the 3rd appellant had a conversation with the deceased as to become aware or to have reasons to believe that the deceased had any injuries. He urged that the trial court's rationale was not supported by evidence presented before the Court. Counsel urged that the possibility that the deceased may have suffered the injuries before being handed over to the police could not be ruled out.
85. Mr. Wangalwa for the 4th appellant urged that there were inconsistencies in the testimonies of PW13, PW16, PW12, PW17, PW19, PW20 and PW23, and that this evidence could not have led to the conclusions reached by the trial court. In reference to paragraphs 141 and 142 of the judgment, counsel urged that the trial Court's holding, that the deceased was brutally tortured by unknown people within the inner compound of the Diani Police Station between 3.00 hours and 5.00 hours, on the morning of May 19, 2012, was erroneous. He urged that the finding was not based on evidence as there was no evidence adduced to establish the time and place where the injuries on the deceased were inflicted.
86. The 4th appellant further contended that the trial judge having determined that the prosecution had not proved the charge of murder, proceeded to make a finding that the prosecution proved that the deceased died out of culpable negligence of the appellants. He urged that there was no evidence before the court to demonstrate that the 4th appellant knew that the deceased had suffered injuries, a fact that was not obvious to the six cell mates and evaded the doctors who attended to the deceased at Palm Beach Hospital. Mr. Wangalwa submitted that the deceased himself did not complain or raise an alarm to either the cellmates or his relatives who visited him at Diani Police Station at about 30 a.m. on the material night.
87. We have already captured herein above the submission by the State. Mr. Mulamula submitted that they were depending on the submissions they made before the High Court, without availing them or explaining in what way they can apply to the appeal. Likewise, Mr. Mulamula relied on the Notice of Enhancement of Sentence, without substantiation.
88. Having heard submissions of counsel to this appeal, and having considered the evidence adduced before the trial Court, we find that what is for our determination is:



- i. Whether the learned trial Judge relied on contradictory evidence to convict the appellants.
 - ii. Whether there was any evidence to establish that the death of the deceased was caused by an unlawful act or omission attributable to the appellants.
 - iii. Whether there was any basis for finding the appellants guilty of the offence of manslaughter on account of palpable negligence.
89. We shall deal with the issues together as they are related. There are facts that are not disputed. It is not in dispute that the deceased and his friend, PW6 were arrested by the 1st appellant, PW21 and PW22, outside Tanduri Bar and Restaurant, Beach area, Diani. It was about 12.30 a.m., on the night of 18th and May 19, 2012. It is not in dispute that the deceased and PW6 were driven to Diani Police Station, and that after half an hour, PW6 was bailed out by his father PW5. There is no dispute that attempts by his sister and his friends to have the deceased granted bail and released from cells that evening were not successful.
90. There is no dispute that the deceased was placed in cells between 3.00 and 3.30 a.m. looking healthy and relaxed, and that he fell asleep in the cell, snoring loudly. It is not disputed that he did not wake up at 6.00 a.m. for tea despite efforts made by cellmates and the tea man. There is no dispute that the deceased was taken to Palm Beach Hospital in serious condition between 00 and 11.00 a.m. on the morning of 19th May, and that at around 4.30 p.m., he lost his life.
91. The prosecution case hinged on circumstantial evidence. We note that the learned trial Judge quoted extensively several authorities that set out the principles the court should apply when considering a case that is based on circumstantial evidence, whether wholly or in part. Among those, the Judge quoted the locus classicus *Abanga alias Onyango v Republic* C. A. No. 32 of 1990. Also quoted was *Mishi Tulo v Republic* C. A. No. 30 of 2013 and *Sawe v Republic* [2003] eKLR 364. The case of *Abanga* (supra) sets out the tests that should be applied to circumstantial evidence in order to determine whether it can found a conviction. It was held:
- “...such evidence must satisfy three tests:
- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (
 - ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (
 - iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”
92. In *Sawe vs Republic* [supra], this court set further tests that the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This case also provided that the burden of proving facts that justify the drawing of the guilty inference lies with the prosecution. Furthermore, the court should satisfy itself that there are no co-existing circumstances weakening the chain of circumstances relied upon.



93. The learned trial Judge embarked on determining the time and the circumstances under which the injuries on the deceased was caused and found as follows:

“ 140. At what point was the deceased injured, It is not easy to answer this question. What is in evidence is that the deceased arrived at the Diani police station at about 30 hours in good health. Between 2.30 hours and 3.00 hours the deceased talked to several people, including friends, relatives, and the police. He was in perfect health and had absolutely no complaints. Evidence shows that at about 3.00 hours the deceased talked with the 2nd accused. The 2nd accused has denied this fact, stating that apart from greeting the deceased he never had any discussion with the deceased. However, when PW5 and PW6 left after PW6 was bailed, the deceased had not been booked in the cell. But when PW2, PW3 and PW7 went to see the deceased at the police station, they were able to talk to him and he was in good health although inside the cell. The injury which the deceased suffered were not the kind of injuries which he received while inside the cell. Otherwise the cell mates would have noticed this.” (Emphasis added)

94. We see here that the learned trial Judge made an assumption regarding the causation of the injuries the deceased suffered, and a conclusion that the injuries were not inflicted while the deceased was in the cells. He continued to find:

“ 141. The only rational explanation is that at one point between 3.00 hours and 5.00 hours the deceased was removed from his cell by the police officers who were taking care of him. The deceased was removed from the cell for interrogation on the issue of bail and other issues, and there was a disagreement which led to the brutal torture of the deceased. This torture took place outside the cell and the deceased tried to defend himself and that explains the bruises he suffered on his left arm.

141. The deceased was further tortured in his private parts hence the bruise in his scrotum. These are not the kind of injuries which could have taken place at Tanduri Restaurant because they could have drawn attention of the other people. Again these injuries could not have been incurred inside the cell because the other cell mates could have known. The circumstantial evidence shows that the deceased was tortured outside the cell, inside the enclosure of the police station, and his torturers were people unknown to this court, but well known to all the accused persons because they had the legal custody of the deceased.”(emphasis added)

95. The appellants have contested the learned trial Judge’s finding based on the evidence before the court, and maintain that there was no evidence to support it. Was there any evidence to show who or what inflicted the injuries the deceased suffered, and which led to his death? We have analyzed, examined and evaluated afresh the entire evidence that was adduced before the trial court.

96. The movements of the deceased on the evening of May 18, 2012 are easily traceable through the evidence of his friend, PW6 who spent the evening with him from 5.00 p.m. to 12.30 a.m. that night. According to PW6, the deceased spent almost all his time talking on the phone, showing signs of unease. To PW6, he was a disturbed man but he did not get to know why. He is clear the deceased took no alcohol neither did he smoke anything that night. When one Kamau, PW11 and his girlfriend joined



- them they had dinner. According to PW11, he offered the deceased a beer and he took WhiteCap then went to his car. That is where PW6 found him on phone. PW11 joined later. Soon thereafter, the 1st appellant and PW22 confronted them, arrested them after calling for re-enforcement from the Duty Officer PW21.
97. The deceased was driven to the Police Station and seen by the 2nd appellant, PW5, PW21 and PW22 outside the report office where the 3rd and 4th appellants worked as Cells Sentry and Report Office Personnel. All reported that he was well, chatty, lucid able to walk and sit on his own. PW6, who knew him well, said he looked fatigued. PW7 who saw him at the cell grill where he peeped through to talk to him said he looked fine and that he also confirmed that to him.
98. When the deceased was placed in cells at 3.00 or 3.30 a.m. that night, he met PW12, PW15, PW17 and PW18, his cellmates. They were all positive in their evidence that the deceased did not leave the cell from the time he entered until the next day when PW12 and others assisted PW23 and PW24 to carry him outside.
99. Given that evidence, it is clear to us that the learned Judge's findings that the deceased was removed from the cells after 3.00 a.m. had no evidential basis whatsoever. The learned Judge stated that it was the only rational conclusion he could arrive at, given the evidence before him. This Court had an occasion to deal with the issue of conclusions based on 'rational', in *PON v Republic* [2019] eKLR, Ouko, P, Gatembu & Murgor, JJA, where the Court observed:
- “To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be a rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the Court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are *Rex v Kipkerring Arap Koske & 2 others* [1949] EACA 135 and *Simoni Musoke v R* [1958] EA 71.”
100. The issue is whether in this case the only rational inference that could be drawn from the circumstances was the one the learned Judge drew. It cannot be the only rational conclusion to be drawn because there was no iota of evidence to suggest that the deceased ever left the cells after being placed there. As the Judge observed, there were in-mates of the deceased as we have listed above. They discounted such a theory in their evidence. Secondly, the same group discounted any commotion, struggle, fight or confrontation of any kind between the cellmates including the deceased, and between the deceased and police officers. The inference drawn by the learned Judge had no evidential support. It was, with respect, an inference based on conjecture.
101. The appellants decried the failure by the prosecution to call crucial witnesses. The first one is the Bouncer who drew the attention of the 1st appellant to the fact that the deceased was smoking cannabis sativa (bhang) in the Tanduri facility and that he was resisting to leave. The Bouncer was an important person as he was an independent witness. Having told the 1st appellant and PW22 that the deceased had resisted attempts to have him leave their facility, it was important for this witness to be called to explain the nature of resistance the deceased mounted and whether any force was used to eject the deceased from the premises. His evidence was crucial as there could have been a possibility the deceased and the Bouncer may have had a confrontation that could have led to the injuries the deceased suffered on the night in question. Without the evidence of this person, the prosecution cannot be said to have established that the injuries the deceased suffered were exclusively caused in the hands of the appellants.



102. Before we conclude on the issue of the Bouncer, let us examine one other issue that is quite glaring. The learned Judge’s reasoning was that the head injury with brain hematoma could not have been missed by witnesses who came into contact with the deceased, thus his argument the injury could only have occurred after 2.30. a.m. and before 5.00 a.m. Regarding the injury, there is evidence that the doctor who treated the deceased when he was taken to Palm Beach Hospital informed PW4, uncle to the deceased, and PW7, a friend of the deceased that he was treating the deceased for drug overdose. Then there was the evidence of the pathologists, PW13 and PW20, who were the first to detect the severe head injury, and both of them were in agreement, that it was possible to miss the injury on a physical examination, unless one parted the thick hair the deceased had.
103. The doctor was the other critical witness who should have been called as a witness to comment on the injuries the deceased had, and answer the allegation he was treating him for the wrong problem. The point is that if the doctor, who was trained specifically for the purpose of detecting illnesses and treating them missed the injury, how can the appellants be blamed for not noticing or realizing that the deceased had a severe injury.
104. As to where the prognosis that the deceased was injured after 3.00 a.m. and before 6.00 a.m. came from, that was the evidence of Mr. Payne, PW25 who opined, after reviewing statements of witnesses, the various reports, including post mortem and forensic analysts, that the head injury must have been inflicted on the deceased after 2.30 a.m., the hour he was placed in cells, and 6.00 a.m. when he was found in comatose. We accept that PW25 was an expert in his field. However, it is trite law that an expert’s opinion must be tested against all other evidence, and the court may accept or reject it if there is cogent reason to do so. A case in point is *Dhalay v Republic* [1997] KLR 514 the Court of Appeal held: -
- “It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”
105. There was no basis for accepting the suggestion by PW25 that the only time the injury could have been inflicted was after 3.00 a.m. as there was no evidence that the deceased left the police cell after he was placed there at 2.30 a.m, That means the prosecution was unable to adduce evidence to show the time and place the head injury was caused, and to establish who did it. There was therefore a possibility that the deceased already had the injury before he was handed over to the 3rd and 4th appellants at the Diani Police Station.
106. There is no evidence to suggest that it was the 1st appellant and PW22 who did it. There is only strong suspicion, given the exaggeration the 1st appellant mounted that the deceased was dangerous or violent to justify calling PW21 for re-enforcement. Or, his attempt to plant drugs on the person of the deceased, even after his admission in hospital. As much as the motive for doing so is unknown that cannot be a basis for finding that he inflicted the injury on the deceased. It was the prosecution’s duty to bring cogent evidence to prove their case.
107. In conclusion, there are many issues which are not clear in this case, and many un-answered questions. All these are grey areas which justify the application of the case of *PON v Republic* [2019] eKLR, that the guilt of the suspect should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances; and that If there is any reasonable possibility consistent with innocence, it is the duty of the Court to find the suspect not guilty.



108. The appellants were convicted of manslaughter contrary to Section 202 of the *Penal Code*. The learned Judge had the following to say as to the reason of coming to a finding of guilt:

“The deceased was under the custody of the 1st, 2nd, 3rd and 4th Accused persons from the time of his arrest until he fell ill. It was their duty to ensure he received medical attention but they failed to take any immediate action. This led to a deterioration in the deceased’s condition and the untimely death.

149. Despite arrest of the deceased for an offence, he had a right to life. This is provided for under article 26(1) of *the Constitution* which states that:

“Every person has the right to life. It is also stated in subsection (3) that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law.”

150. The National Police Service aims at giving effect to Article 238 of *the Constitution* and Article 244 among others which set out the National Police Service objects and functions as well as demand for police compliance with constitutional standards of human rights and fundamental freedoms.

150. To this end, the fifth schedule to the *National Police Service Act* on ‘Arrest and Detention Rules’ states as follows: -

A detained person shall have the right to access to doctors and general medical assistance when required.”

99 The Trial Court’s conclusion on whether the appellants committed the unlawful act with malice aforethought was:

149. After weighing the evidence of the prosecution witnesses, I am satisfied that death of the deceased was caused through an unlawful act and or omission on the part of the accused persons who failed to provide immediate medical attention to the deceased under their custody leading to his death. In *Republic v Ismail Hussein Ibrahim* [2018] eKLR, malice aforethought as follows: -

“... the mens rea or the mental element required for a conviction for the offence of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If malice aforethought is lacking the unlawful homicide will not be murder but manslaughter.”

168. It came out clearly during the cross-examination of all accused persons by learned State Counsel, Mr. Muteti, that the accused persons were all professionally trained, and have been in service for periods ranging from 3 to 37 years. They had adequate knowledge and experience on how to treat suspects. They were trained in the rules regarding human rights and dignity; they were all aware of *the constitution* of Kenya and statutory regulations concerning the rights of arrested persons. They knew the rules and regulations under IPOA; they were schooled and trained in international, regional and local safety legal instruments, for



treatment of offenders. All of them testified to these training. However, they chose to do their work with the usual casualness, without any regard to their profession and the duty to protect life. To them these legal instruments were mere rules with no consequences whatsoever.”

109. Under English law, where a person causes death through extreme carelessness or incompetence, gross negligence is required. In *R. vs. Bateman* 19 Cr. App. R. 8 the Court of Criminal Appeal held that gross negligence manslaughter involved the following elements:
- i. The defendant owed a duty to the deceased to take care;
 - ii. The defendant breached this duty;
 - iii. The breach caused the death of the deceased; and
 - iv. The defendant's negligence was gross, that is, it showed such a disregard for the life and safety of others as to amount to a crime and deserve punishment.”
110. While there is no doubt that, the appellants owed a duty of care to persons under their care, that duty could not have been general or at large. The learned trial Judge found that the duty owed was to provide immediate medical care to the deceased, but that they failed to take any immediate action, and that this led to a deterioration in the deceased's condition and the untimely death. The deceased was under the immediate custody of the 3rd and 4th appellant. The 1st and 2nd appellants were charged for being the senior officers in the Tourists Unit, which arrested the deceased. That connection to the offence is rather remote, especially where they were not informed of the need for medical care, and where they were in no position to come into that knowledge on their own. The prosecution needed to prove that the actions of neglect was willful, and in disregard to human life. It could only be willful if it was proved that they were aware that the appellant needed the medical attention. That evidence is lacking.
111. We have come to the conclusion that the learned trial Judge overlooked the applicable principles to cases of this nature. We also find that there were too many unresolved issues in this case, and that in the circumstances they ought to be resolved in favour of the appellants. We find that the convictions entered against each of the appellants was unsafe and ought not to stand. That being the case we see no need to comment on the sentences meted out against the appellants.
112. In the result, the appellants' appeals are allowed. The convictions be and are hereby quashed and the sentences set aside. The appellants shall be set at liberty forthwith unless otherwise lawfully held in custody.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....



JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

