



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & MURGOR, JJA)

CRIMINAL APPEAL NO. 55 OF 2019

BETWEEN

NAHASHON MUTUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment and sentence of the High Court of Kenya at Nairobi (S.N. Mutuku, J.) dated 14th February 2019*

*in*

*H.C.C.R.C. No. 84 of 2015)*

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**JUDGMENT OF THE COURT**

[1] **Martin Koome Manyara (Martin)** who appeared to be drunk was arrested from his house by officers from Ruaraka Police Station. Martin who had no injuries was locked up at the police station. The next morning, Martin was found with serious injuries and had to be rushed to Kenyatta National Hospital, where he succumbed to his injuries. A suspect who was in the cells with Martin was accused of causing the injuries to Martin. He was charged with the offence of murder.

[2] Arising from complaints made to Independent Policing Oversight Authority (IPOA), investigations were carried out and the charge against the suspect was withdrawn, and **Chief Inspector Nahashon Mutua (Mutua)**, who was at the material time the Officer Commanding Station (OCS) at Ruaraka Police Station, was arraigned before the High Court charged with the murder of Martin. The proverbial table had been turned, the hunter had become the hunted. The trial resulted in Mutua being convicted and sentenced to death. Mutua is now the appellant before us.

[3] The events leading to the trial in the High Court, commenced on 19th December 2013, when **Martin** who is now deceased, arrived at his house at around 9.30 p.m. His wife **Peninah Nkuene Kariambuthi (Peninah)** was in the house watching TV together with two small children under five years old. She had a six-week old baby who was asleep. Peninah was alarmed when Martin took the baby and refused to hand her over to Peninah, telling her that she was seeing the baby for the last time. Peninah requested a neighbor one Baba Johnnie to intervene, but the neighbor was not successful in getting Martin to release the child. As the gate was closed, and the house was on the first floor, Martin threatened to jump over the balcony to the house. Baba Johnnie sought help from other neighbours, and because they feared that Martin would harm the child, they decided to seek help from Ruaraka Police station which was just some metres away from Martin's house.

[4] Three police officers from the police station including **Cpl. Geoffrey Mukaria (Cpl. Mukaria)** went to Martin's house. They asked Martin, who was still refusing to let go of the child, to accompany them to the police station. As they walked out, the policemen managed to take away the baby from Martin and handed over the baby to Peninah, who accompanied the police as they escorted Martin to the police station. At the police station, Peninah remained at the report office as Martin was being interrogated by **Mutua**. After a while, Cpl. Mukaria who had booked Peninah's report in the OB, told Peninah to go home and come back the next morning. Shortly thereafter, one Collins Omondi Otieno (Collins) was brought to the station by members of the public for allegedly failing to pay a bill after drinking. Collins was also locked in the cells.

[5] At around 11.00 p.m., a protected witness (who testified as prosecution witness number 4), whom we shall call Ali (not his name), was in the cells having been arrested the previous day as a robbery suspect. He heard a man screaming from outside asking to be left alone. The

door of Ali's cell was opened and the man was pushed in. The man was wearing a white vest which had blood stains. This man was **Victor Kioko Nzuki (Victor)**. Shortly thereafter, Ali heard another person screaming outside the cell. Another protected witness (who testified as prosecution witness number 5), whom we shall refer to as Rama (not his name), and who was also in the cell with Ali, also heard the commotion and a voice saying in Kiswahili '*si uniletee ile chuma yangu*'. Rama identified the voice as that of Mutua whom he knew and had talked to before.

[6] Ali became curious and climbed the cell door and peeped through the wire mesh to see what was happening. He saw a man being beaten by Mutua. Ali recognized Mutua as he had seen him during the day and he knew him as the OCS of the station. Ali was able to see Mutua with the help of light from an electric bulb which was outside. Mutua was beating Martin with a metal pipe. Ali informed Rama and his cell mates what he had seen.

[7] Another protected witness (who testified as prosecution witness number 7) whom we refer to as **Tom**, (not his name) was also in the cell on that fateful night. Tom climbed on top of a jerry can that was inside the cell, and looking through the door vent was able to see Mutua holding a metal rod beating Martin while telling him to get into the drum full of water. He was able to see what was happening with the aid of light from an electric bulb.

[8] **Victor** had been arrested on the fateful night on allegations of drinking at a local bar and failing to pay the bill. As he entered the report office at the police station, he saw someone beating another with a metal bar. He recognized the man beating the other as Mutua whom he knew before. Victor called Mutua by name thinking he would help him, but Mutua was very harsh and hit him on the mouth, causing him to lose one lower tooth. Mutua picked a metal bar and hit Victor on the right arm and on his back. Victor suffered a broken hand and lost consciousness. He was then thrown into the cells where he found other cell mates. Victor was the first victim that Ali, Rama and Tom referred to as having been thrown in the cells. The second victim whom the witnesses identified as Martin was brought to the cell where Victor and the other suspects were. Martin was bleeding from the ears and nose, and his head was swollen. The next morning Victor and Martin, both of whom were in bad shape and groaning in pain, were taken to Neema Uhai Hospital. Victor was left there being attended to, but Martin was referred to Kenyatta National Hospital. Victor was subsequently treated and both his arms put on a sling.

[9] Ali, Tom, Rama and their cellmates were shocked when Mutua went to the cell and demanded to know who had beaten Martin. Mutua intimated that Martin had been beaten by Kevin who was one of the suspects in the cells. Mutua beat Kevin with a whip. By this time Martin had been removed from the cells and taken to hospital. Mutua then called Ali, Tom, and other suspects who were in the cells and instructed them that they would testify that Martin had been beaten in the cell by Kevin. Ali and Tom who both claim to be illiterate, were forced to sign written statements after which they were released from the cells to go home.

[10] Meanwhile, on the night that he was arrested, Rama had contacted Atieno (full name withheld), his mother who went to the police station the next morning and talked to him. She returned again to the police station but on the third day found that Rama had been beaten and could not walk unassisted. Rama stated that he was assaulted by Mutua. Rama was later taken to Makadara law courts, then brought to Milimani Law Courts where he was charged with the murder of Martin. His case was later withdrawn and he was taken from Industrial Area police station into protective custody.

[11] According to **Inspector Evans Chea (IP Chea)** the Deputy OCS at Ruaraka Police Station, he reported on duty at 7.00 a.m. on 20th December, 2013. He learnt that there were two suspects in the cells who were injured. He went to the cells and found about 11 to 12 suspects. He called the suspects to come out, but two of the suspects did not come out. One, whom he identified as Martin had a swollen head and mouth, and could neither speak nor stand. He also had a cut on the lips and saliva and blood were oozing out. His clothing was all wet. The second suspect who could talk but could not stand was Victor. His hand was swollen and he had a cut on the lips. IP Chea consulted Mutua who directed him to have the two men taken to hospital. Victor was taken to Neema Uhai Hospital while Martin was taken to Kenyatta National Hospital.

[12] The same afternoon, Peninah and **Ann Karimi Manyara (Karimi)**, a sister to Martin went to the police station intending to see him. They were informed that Martin was injured and had been taken to Kenyatta National Hospital. They went to Kenyatta National Hospital casualty where they found Martin. He was bleeding, and his whole face and head were swollen. Martin who had not been attended to was groaning in pain. They contacted Harriet Kariuki, an in-law to Martin who works at Kenyatta National Hospital as a nurse. Harriet went to the hospital, but upon arrival at the hospital found Martin already dead.

[13] In the meantime, IP Chea, Mutua and **Jackson Mutivo (Jackson)**, a brother to Victor, went to the Neema Uhai hospital and found Victor having been treated, both his arms were in plaster. They all went back to the police station where they collected Victor's shoes and then dropped Victor at his home. According to IP Chea, when they went to the police station, Victor informed them that a fight broke out in the cells, when one Kevin Odhiambo, who is a bouncer and boxer started ransacking other suspects, and that Kevin punched and hit Martin pushing him on the wall. Victor's shoes were retrieved from the cells and IP Chea recorded Victor's report in the OB. On the same night, IP Chea learnt from Peninah that Martin had died. He recorded statements from suspects who were in the cells, but some suspects were not willing to record statements. Charges were later preferred against Kevin Odhiambo.

[14] Jackson had a different version of the events. He recalled receiving a call on 20th December, 2013 from Ruaraka Police Station informing him that his brother had been assaulted. Later he received another call informing him that his brother was at Neema Uhai Hospital. He went to the hospital at 2.30 p.m. and found Victor, who informed him that he had been assaulted by Mutua. Jackson later went to Ruaraka Police Station where he met Mutua together with IP Chea. Mutua who was very remorseful for having assaulted Victor, explained that he thought Victor was one of the relatives of a man who was accused of trying to murder a child. Mutua accompanied Jackson to Neema Uhai Hospital where they found that Victor had been discharged. Mutua gave Victor Ksh. 6,000 part of which was for the hospital bill. Later, Mutua asked Jackson to persuade Victor not to pursue the matter as Victor had reported the assault at Pangani Police Station. Mutua offered Victor Ksh. 1 million and Victor said he would think about it.

[15] On 23rd December 2013, **Dr. Bernard Owino Mundia (Dr. Bernard)**, a pathologist, examined the body of Martin and noted that he had several recent external and internal injuries, leading to extensive bleeding and intracranial hemorrhage. He concluded that the cause of

death was multiple injuries on the head, neck and chest, due to blunt force trauma.

[16] Several months later, the police went to the house where Tom was staying with his grandmother **Sarah Alosa Osuka (Sarah)**. The police who included Mutua, were in the company of a suspect and were looking for one James. The police asked Tom if he knew the suspect. It was someone whom Tom had seen before, although he did not know him. When Tom informed the officers that he did not know the suspect, Mutua beat him using a water pipe forcing him to admit that he knew where James was. He was then taken to Ruaraka police station where he stayed for three days, after which he was charged at Makadara Law Courts for being in possession of bhang, three pangas and a scissor.

[17] Both Ali and Tom swore that Mutua is the one who assaulted Martin and forced him into the water drum which was almost full, and that he was beating Martin whenever he tried to raise his head up. They denied that there was any fight in the cells, and stated that by the time Martin was brought to the cells, he was already injured and could not walk.

[18] Following complaints made by Victor and Karimi to the Independent Policing Oversight Authority (IPOA), **Evans Okeyo (Okeyo)**, a principal investigator with IPOA, was assigned to investigate and determine the circumstances under which Martin died. Okeyo visited Ruaraka Police station and interviewed several witnesses including the officers who were on duty on that night. He also interviewed some of the suspects who were in the cells. The suspects implicated Mutua as the person who assaulted Martin and Victor. IPOA wrote to DPP asking him to halt the criminal prosecution that had already been initiated against Kevin for the murder of Martin, and the DPP entered a *nolle prosequi* in the criminal case. As a result of his investigations, Okeyo concluded that Martin was assaulted and seriously injured by Mutua, and that in an attempt to cover up, a robbery suspect who was in the cells with Martin was blamed. He also visited Kenya National Hospital and found that Martin was left at the hospital without any security even though he was under police custody at the time he was taken to hospital. IPOA submitted their investigation report to the DPP who agreed with their recommendation that Mutua should be charged with the murder of Martin.

[19] Upon being put on his defence, the appellant gave sworn evidence and called nine witnesses. He explained that on the material night he was at the canteen for about an hour when at around 11.30 p.m. he was called to the report office in regard to a case where his officers needed advice on which charges to prefer. The case involved a man and his wife. It was alleged that the man who was drunk, had threatened to kill his child. After interviewing the two, Mutua directed that the man be charged with attempting to kill the child and subjecting the child to torture, and that he be placed in the cells. The man was Martin. Mutua denied beating Martin but maintained that he put in the cells at 11.50 hours, and that he did not have any injuries.

[20] Mutua explained that on the same night, Victor was also brought to the station by employees of Lex bar and restaurant. He denied that Victor found him beating Martin. He explained that Victor had visible injuries when he was brought to the station. He instructed that Victor be placed in the cells because he was noisy and drunk. Mutua left the police station at 3.30 a.m. He later received information from IP Chea that there were two seriously injured suspects in the cells and he advised him to take them to hospital.

[21] Mutua testified that when he went back to the police station, Jackson went to see him and asked him for money to pay the hospital bill for Victor. He gave Jackson the money and went with Jackson to see Victor at the hospital. The bill was paid and Mutua used his vehicle to take Victor home. While in the vehicle, Victor informed Mutua, in the presence of IP Chea and others who were in the vehicle that he had been attacked in the cells by a person whom he described as a boxer, heavily built, with a scar, and who had white sport shoes. Victor informed them that the man had hit Martin against the wall.

[22] Later Mutua went to the cells and demanded to know who the boxer was and discovered that it was Kelvin Odhiambo. He instructed IP Chea to record statements of all the suspects. Later, he learnt that Martin had died and Kevin was subsequently charged with murder. Victor was asked to record a statement but he did not come to the station. On 24th December 2013, Victor recorded a complaint that Mutua had assaulted him. Sometime in January 2014, at the request of Victor, they met and had lunch. Victor requested for KShs. 150,000 for him to record a statement which was not in favour of Martin. He learned that a complaint had been made to IPOA. He denied having hit the deceased with a metal pipe or having immersed him in a drum full of water. He denied having compelled any suspect to sign a statement. In total, he denied causing the death of Martin.

[23] The defendants' witnesses included **Gilbert Kapule (Kapule)** who testified that while in remand at Industrial Area prison he shared a cell with one Kevin Odhiambo a.k.a Nyundo and that Kevin had informed him that he had beaten a suspect at Ruaraka Police Station because the suspect was an informer. Kevin who was charged with the murder of the suspect explained to them that he was trying to implicate another person for the murder.

[24] **Doreen Kairuthi** and **Emmanuel Shikuku Suba** also testified as defence witnesses. They explained how Victor was arrested at Lex restaurant where they both work, after he had ordered drinks for himself and friends, and became unruly when asked to pay and that Victor was roughed up and beaten by their customers resulting in his artificial tooth falling off. Victor was therefore taken to Ruaraka Police Station where he was locked in. Both denied witnessing Mutua beating Victor.

[25] **PC Kennedy Kasavuli Sirunya (PC Kennedy)** a police officer attached to Ruaraka Police Station also testified and explained how one Kevin Odhiambo was brought to the police station in a matatu minibus. A passenger complained that Kevin had robbed him of KShs. 1,000 while armed with a knife. Kevin, whom the passengers referred to as 'boxer' was booked in for robbery with violence. On the same night at about 10.00 p.m., Martin was brought in by three officers and members of the public. Mutua was called and he instructed that Martin be booked with child torture; that despite resisting, Martin was searched and placed in the cells. He was in good health and did not have any injuries. PC Kennedy swore that Mutua did not assault Martin. Shortly thereafter, Victor was also brought to the station, his mouth was bleeding and his clothes bloodstained. Victor called Mutua, but he ignored him. During the night there was noise in the cells because Victor and Martin were drunk. At about 4.00 a.m. the commotion became too much, so PC Kennedy and other officers decided to open the cells. They found Victor lying on the floor, and Martin leaning on the wall holding his head and his stomach. The matter was reported to the duty officer. At 6.00 a.m. the cell was opened. All inmates came out except Martin who appeared to be sleeping. One of the suspects, Wanjala Waswa who was in the cells claimed that Martin had been beaten by the boxer.

[26] **Cpl. Boniface Otieno Odhiambo (Cpl. Odhiambo)** who was the duty officer on the material night also testified for the defence. He stated that he was one of the three officers who went to Martin's house, where they found Martin holding the baby tightly to his chest. They pleaded with him to hand over the baby but he refused. They forcefully took the baby and handed it to the mother. They then escorted Martin who was drunk and violent to the police station. He denied witnessing Mutua beating Martin. He was informed that there was a fight in the cell and when they went to the cells with other police officers, they found the deceased lying on the floor with his face swollen.

[27] Joseph Kamau Njihia (Njihia), was a key witness for the defence. He explained that he was arrested on 19th December, 2013 and taken to Ruaraka Police Station where Mutua was OCS. He recalled that Kevin Odhiambo, Victor and Martin were also brought to the cell where he was. He explained that Kevin was searching other inmates. Martin refused to be searched and a fight ensued and Kevin beat up Martin, and severally hit his head against the wall. In the morning Martin was not able to stand as he was unconscious. Njihia was released to go home. He identified a statement dated 4th December 2013 as his own.

[28] PC Nguru Muthiani (PC Nguru), who was working in crime office at Ruaraka Police station testified that together with IP Chea, they investigated and compiled the file in which Kevin was charged with the murder of Martin. The postmortem revealed that Martin had multiple injuries and broken ribs. Their investigations revealed that Kevin Odhiambo had killed Martin and he was therefore charged with murder. In January 2014, he met with Jackson together with PC Nyaga and Victor at Choma Zone Thika Road. PC Nguru arranged for a meeting between them and Mutua. During the meeting Victor demanded Kshs. 150,000 to convince witnesses to record statements in favour of Mutua. These were witnesses who had recanted statements that they had made earlier in Kevin's case. Victor informed them that he would persuade the witnesses to change their statements.

[29] Chief Inspector James Koech (CI Koech), Deputy DCIO Starehe Division was also a defence witness. He produced the police file in which investigations were carried out and Kevin charged. He conceded that the case against Kevin was later withdrawn and Mutua charged with the murder of Martin. He maintained that the DPP had given instructions to have Kevin charged with murder, and that Kevin was the right person to be charged.

[30] Stella Kanyiri, a Deputy Registrar attached to Milimani Criminal Division produced criminal case file No. 1 of 2014 in evidence at the request of the defence. According to the file, Kevin Odhiambo Lalji was charged with murder, the particulars being that he murdered Martin Koome Manyara. He took his plea on 9th January 2014 but a *nolle prosequi* was entered on 3rd November, 2014, when prosecution counsel, a Mr. Konga informed the court that the DPP had reviewed the file and seen the need for further investigations.

[31] After full trial and following submissions made by the prosecution and counsel for the defence, the trial court delivered a judgment in which it found that Martin died as a result of injuries sustained from an assault that he suffered while at Ruaraka Police Station. Upon reviewing the evidence adduced by the prosecution and the defence, the trial Judge found that Martin was taken to the police station before Victor, but Victor was placed in the cells before Martin; that there were inconsistencies and contradictions in the OB entries; that there was a drum of water near the door of the cells as testified to by the prosecution witnesses; that the evidence of Ali, Rama and Tom was credible and cogent and the few contradictions were minor and did not go to the central issue of who assaulted Martin; that the evidence of the three prosecution witnesses was also consistent with that of Njihia, a defence witness; that their evidence was also consistent with that of Victor who stated that Mutua assaulted Martin; that it was also consistent with the evidence of Peninah who testified that she heard her husband being whipped; and that during the *locus in quo* session, it was demonstrated that it was possible for someone inside the cell to see what was happening outside.

[32] The trial Judge also found that Mutua and the officers under his command flouted police procedures. The officers did not keep a tight check on suspects, some of whom were said to be drunk and disorderly. That although it was said that prisoners fought in the cells, there was no officer to testify regarding the commotion, nor was there any record in the OB of any such fight or commotion. In addition, there was no explanation as to why Victor and Martin who were said to be injured, were not taken immediately to a medical facility or why Victor was taken to a private hospital and left there without any police officer guarding him, and Martin abandoned at Kenyatta National Hospital without any officer guarding or ensuring that he was treated. [33] In addition, the trial Judge found Mutua's conduct telling. He went to the private hospital where Victor was admitted and paid his hospital bill. He drove Victor home after he was discharged from hospital. He visited the cells after the assault seeking to know who had assaulted Martin, and he instructed that some suspects, some of whom were suspected to have committed serious offences be released from custody. The trial Judge therefore rejected the defence evidence that Martin was assaulted by a fellow suspect in the cells, and accepted the prosecution evidence that Mutua is the one who assaulted Martin and caused him the fatal injuries leading to his death.

[34] In regard to malice aforethought, the trial Judge relying on **Bonaya Ipu vs Republic [2016] eKLR** and **Chesakit v Uganda Cr. Appeal No. 95 of 2004**, found that the injuries suffered by Martin which included severe injuries to the head, neck, face, 8 broken ribs on the right side, five broken ribs on the left side, and bleeding on the brain, were a clear indication that Mutua struck Martin several times forcefully and that Mutua being a senior police officer, knew or ought to have known that such repeated assault of Martin by a metal bar on sensitive areas would cause death or grievous harm. After concluding that malice aforethought in terms of section 206 of the Penal Code was established, the trial judge convicted Mutua of the offence of murder and sentenced him to death.

[35] Mutua who is dissatisfied with the judgment of the High Court has raised 22 grounds of appeal. In written submissions prepared by his advocate, Mutua summarized his grounds as: standard of proof and contradictory evidence; testimony of the three star witnesses; motive; investigations by IPOA; failure to call independent witnesses; the murder weapon; conflicting attire allegedly worn by Mutua; and evidence tendered by the defence. The advocate faulted the charge against Mutua pointing out that although the charge stated that he murdered Martin on the night of 19th December 2013, Martin was actually still alive on 20th December, 2013 when his wife visited him at Kenyatta National hospital.

[36] Mutua's advocate urged that the prosecution case was not proved to the required standard as there was contradiction between the prosecution witnesses' evidence, in that despite Peninah having said that she heard Martin being beaten with a pipe, and Cpl. Mukaria having denied seeing Mutua assaulting Martin, reliance was placed on the evidence of Ali, Rama and Tom, all of whom were criminal suspects who had been arrested for different offences; that the witnesses were allowed to hide under the cloak of protected witnesses which denied the

court the chance to assess their demeanor; and the defence an opportunity to properly challenge their testimony; thereby denying Mutua a fair trial, as without seeing the demeanor of the witnesses, the court could not assess the truthfulness of their evidence. **Johannes Amadi v Republic [2018] eKLR** was cited.

[37] The defence advocate contended that motive was an important aspect that must be ascertained from the circumstances in order to determine pertinent issues; that the three star witnesses, each had their own version of how many suspects were in the cells, and this contradiction vitiated their evidence; that the three witnesses were all in custody courtesy of Mutua as OCS, and this was reason for a vendetta and a motive for the witnesses to lie against Mutua (**Dishon Litakwa Limbalula v Republic [2013] eKLR** cited); that the evidence of the 3 star witnesses was not believable as they gave different versions of the events in their statements in Kevin Odhiambo's case, and in Mutua's case.

[38] The advocate posited that there was interference in the case against Mutua, as the witnesses who had given their statements were allowed to alter them and make fresh statements in order to incriminate Mutua; that under Article 157 of the Constitution, the office of the DPP is a constitutional office which is independent and does not require the consent of any person or authority; and that the fact that IPOA was able to direct and dictate to the office of the DPP who to charge, was clear evidence of interference. In addition, the Court was informed that some material witnesses who included the neighbours of Martin were not called to testify, and an adverse inference should be drawn from this failure.

[39] An issue was also raised regarding the contradictions and inconsistencies in the evidence relating to the murder weapon. Some witnesses referred to the weapon as a metal rod, others a whip, and yet others a pipe. The defence lamented that the trial Judge failed to realize that the *rungu* that Mutua was said to have was a swagger cane that each and every officer of the rank of inspector and above, is entitled to carry as a symbol of authority. Moreover, no attempt was made to produce the metal pipe nor the swagger cane.

[40] In addition, although the court placed great reliance on the evidence of Ali as the person who saw Mutua commit the offence, his evidence regarding the attire allegedly worn by Mutua was not believable, as at one stage he said that Mutua was wearing his uniform, a khaki shirt and brown khaki trouser, while at another stage, he said Mutua was wearing a brown heavy civilian jacket. Finally, the advocate for the appellant submitted that the trial Judge improperly rejected the defence evidence without any proper reason, and failed to take into account that the defence evidence included evidence of police officers who were on duty on the material night, and evidence of a suspect who was in the cells together with the prosecution's main witnesses. He urged that in light of the flaws in the investigations, the trial and eventual conviction of Mutua, did not meet the threshold of a fair trial and the Court should therefore quash Mutua's conviction and set aside the sentence.

[41] During the hearing of the appeal Mutua was represented by Dr. J. Khaminwa, Mr. Gachie Mwanza and Ms. Brenda Wekesa, while the respondent was represented by Mr. Gitonga Muriuki. In highlighting the written submissions, Dr. Khaminwa pointed out that there was violation of Mutua's constitutional and human rights as there were no effective criminal investigations carried out before Mutua was brought to court. Dr. Khaminwa argued that a decision having been made to prosecute Kevin Odhiambo with the murder of Martin, under Section 26 of the Independent Policing Oversight Authority Act (IPOA Act), IPOA had no jurisdiction to investigate the matter; that IPOA exercised authority without the sanction of the DPP; and that the prosecution of Mutua on the statements taken by IPOA rendered his trial irregular. Dr. Khaminwa also submitted that it was wrong for the learned Judge to visit the scene of crime and turn the court into a witness institution.

[42] Learned Counsel Mr. Gachie added that the charge sheet against Mutua was fatally defective; that Harriet and Rama who were sworn as Muslims were actually Christians and their evidence was therefore irregular; and that the pathologist's description of the injuries on the body of the deceased as being consistent with mob justice was not taken into account.

[43] Mr. Gitonga Muriuki from the office of the DPP opposed the appeal and fully supported Mutua's conviction and sentence. He submitted that IPOA is a statutory body with a clear mandate; that it was within that mandate to receive complaints from members of the public, touching on the conduct of police officers; and that by the time IPOA investigated the case and forwarded a recommendation to the DPP, the criminal case against Odhiambo had already been terminated. As regards the visit of the court to the scene, Mr. Muriuki pointed out that this was at the request of the defence and they cannot therefore turn round and criticize the court. On the alleged defect on the charge sheet, he argued that the injuries were inflicted on Martin on 19th December, 2013 and although Martin died on 20th December, 2013, the murder was committed on the day the injuries were inflicted. He pointed out that under cross-examination, the pathologist had conceded that the injuries inflicted on Martin could have been inflicted by one person if the victim was subdued. Regarding alleged contradictions, Mr. Muriuki argued that the same were not material, nor did they prejudice Mutua as they related to minor issues.

[44] Mr. Muriuki pointed out that the offence was committed by Mutua at the police station at night, and the only persons who witnessed Mutua's actions were the suspects who were in the cells at the police station for various reasons; that notwithstanding the character of these suspects, their credibility was not impeached at all during the trial despite the rigorous cross-examination to which they were subjected; and that the suspects had no reason to harbor a grudge against Mutua as he was not ordinarily the arresting officer. As regards the protected witnesses, Mr. Muriuki pointed out that this was provided for under the Witness Protection Act; that although several police officers stationed at Ruaraka Police station testified for the prosecution and the defence, none of them saw the injuries being inflicted on Martin, and therefore their evidence was hearsay. Counsel urged the Court to consider the evidence of Peninah, Ali, Rama, Tom and Victor, who gave direct eye witness accounts; and that Ali, Rama and Tom who had changed their statements explained satisfactorily to the court why they had to do so. The Court was urged to consider the circumstances of the case and dismiss the appeal in its entirety.

[45] This being a first appeal, the Court's duty is as restated by this Court in **Mark Oiruri Mose vs Republic [2013] eKLR**;

***“...the first appellate Court has the duty to revisit the evidence tendered before the trial Court, afresh analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that. The well-known case of Okeno vs Republic (1972) EA 32 which sets out that principle has been referred to in several decisions of this Court and of the***

### ***High Court.”***

[46] Mutua having been charged with the offence of murder, under section 203 of the Penal Code, the elements of the offence of murder that required proof were: that the deceased person died; that his cause of death was a result of an unlawful act or omission on the part of Mutua; and that in committing the act or omission, Mutua had malice aforethought. In this case, it is not disputed that Martin died. The evidence of Peninah, Karimi, Harriet and Dr. Bernard in this regard was not controverted. The pertinent question that we must address is whether the prosecution proved that Martin's death was caused by an unlawful act or omission on the part of Mutua, and if so, whether Mutua in committing the act or omission, had malice aforethought.

[47] The chain of events leading to the arrest of Martin until his arrival at the police station have already been alluded to. They are largely not in dispute. Both the prosecution and the defence admitted that Martin was arrested from his house because it was feared that he would inflict harm on his infant child. It was not disputed that Martin was drunk when he was arrested; that on arrival at the police station, he was resisting being locked up in the cells; that up to the time Martin arrived at the police station, he did not have any injuries; that Martin was found in the cells the next morning with serious injuries; and that he succumbed to the injuries the same day.

[48] What is in dispute is where and how Martin sustained the fatal injuries that led to his death. Some prosecution witnesses have claimed that before Martin was put in the cells, Mutua assaulted him for thirty minutes, using a metal rod which he used to beat him on the face and head, while forcing him to immerse himself into a drum full of water, and that thereafter Mutua placed Martin in the cells, by which time Martin had serious injuries and could hardly talk. Mutua on the other hand denies assaulting Martin and claims that Martin was placed in the cells immediately after being brought to the police station, and that it was in the cells where he was attacked by one of the inmates. There are therefore two different versions regarding how Martin may have sustained his injuries.

[49] It is clear that the incident occurred at the police station at night. The only persons who were at the station at that time were the suspects who were in the cells, and the police officers who were on duty. Three of the suspects Ali, Rama and Tom who testified for the prosecution, each swore that they saw Mutua assaulting Martin. Another suspect was Njihia who testified as a defence witness. He swore that Martin sustained his injuries in the cells when a fight broke out after he resisted his pockets being ransacked by Kevin, one of the suspects in the cells. Njihia explained that Kevin beat up Martin, hitting his head against the wall, and by morning Martin was unconscious and unable to stand.

[50] The police officers who were on duty that night included two prosecution witnesses, Cpl. Mukaria and IP Chea, and three defence witnesses, PC Kennedy, Cpl. Odhiambo and PC Muthiani. Only PC Kennedy was present at the time and he testified that Mutua did not assault Martin. Cpl. Mukaria and IP Chea both testified that they were not present at the material time, and only came back the next morning to find Martin and Victor seriously injured. Cpl. Odhiambo and PC Muthiani were also not present when Martin was placed in the cells, and only learnt of the injuries the next day. PC Kennedy is the only police officer who maintained that Mutua did not beat Martin. He implied that there was commotion in the cells, and that when they later opened the cells, they found Victor lying on the floor, and Martin leaning against the wall holding his head and his stomach.

[51] Of interest is IP Chea's evidence that Victor informed him in the presence of Mutua, Jackson and others that Martin was beaten up in the cells by another cellmate Kevin, and that he caused Kevin to be charged with the murder of Martin. Both Victor and Jackson have denied this allegation. The trial Judge who visited the *locus in quo* noted the proximity of the cells to the report office. The visit to the locus in quo was requested for by the defence, and the trial Judge was entitled to take into account her observations.

[52] It is inconceivable that two suspects could have sustained such serious injuries in the cells just next to the report office without the police officers who were charged with the responsibility of taking care of the prisoners, intervening and getting to the bottom of the matter. We do not find the evidence of PC Kennedy to be of much help in this regard. No such report was filed or found in the OB by the duty officers, nor did the OB have any record of any fight or commotion. According to PC Kennedy, Martin was carried into the cells by five officers. Mutua stated that he was taken into the cells by three officers. Whether it was five or three officers, it confirms the narrative that Martin was not able to go into the cells by himself. One also wonders why apart from PC Kennedy, no other officer testified to carrying Martin into the cells.

[53] It is not surprising that the evidence of the police officers was not of much help. IPOA had come in to investigate the circumstances of Martin's death with a view to establishing whether there were any disciplinary or criminal offences committed by any of the police officers. This put the conduct of all the officers who were on duty that night under the spotlight, and naturally made them apprehensive and defensive. Secondly, the officers who were on duty were all junior to Mutua and may not have wanted to incriminate him. As this Court noted in **Titus Ngamau Musila Katitu vs Republic [2020] eKLR**, it is not unusual for police officers to cover up for each other:

***“The “blue code of silence” is a common phenomenon, spanning across different countries and police cultures in America, Europe, Asia and even Africa. It is the unwritten rule according to which police officers never provide incriminating information about their colleagues; to close ranks in silence and to cover up knowledge of a fellow officer's wrongdoing with a collective blanket of self-preservation, a feeling of esprit de corps among officers who by and large depend on each other for their very risky lives as they confront the violent and hostile world of policing and crime.”***

[54] The contradictory and evasive nature of the evidence of the police officers who were on duty on the material night was self-serving, and intended to cloud the evidence of other witnesses, to cover up any complicity on their part. It is for this reason that we turn to the evidence of the suspects who were in the cells in order to determine the credible version between the evidence of Ali, Rama and Tom supporting the version that Mutua assaulted Martin, and the evidence of Njihia supporting the version that Martin was assaulted by a fellow inmate in the cells. The evidence of Ali, Rama and Tom is consistent with the evidence of Victor who testified that he found Mutua beating up Martin. We are cognizant of the fact that these witnesses were all suspects who were in the police station on allegations of having committed various offences. That notwithstanding, the suspects remained innocent until proved otherwise. Their character could not be questioned merely by their having been in the cells as suspects. There is no evidence to show that they were hell bent to incriminate Mutua. The witnesses explained how Mutua literally tortured Martin by beating him up while at the same time forcing him into a drum full of water. The witnesses

were subjected to rigorous cross-examination, but remained consistent in their evidence.

[55] As regards the earlier statements made by Ali and Tom implicating Kevin as the culprit who caused Martin's injuries, the witnesses explained how they were forced by Mutua to sign the statements. Both Mutua and IP Chea stated that the suspects had initially kept silent when asked who beat up Martin. It is apparent that the statements were signed under threats and intimidation. We find that Rama who testified that he was charged with the murder of Martin, turns out to be the same person as Kevin. Rama denied having assaulted Martin and explained how the charge of murder was planted upon him, but was later withdrawn.

[56] The evidence of Njihia is rather doubtful. It is common knowledge that all suspects are normally searched before being placed in the cells and any valuables recorded and kept away. Why would Kevin be searching other suspects? It is not surprising that under cross examination, Njihia contradicted himself by giving a different reason for the suspect beating Martin. Njihia in fact admitted that Mutua released him to go home after he signed the statement implicating Kevin, and that the complaint that had landed him at the police station was not pursued. The trial Judge who saw Njihia testify was not impressed by the witness, and described him as "either lying or was trying to shield the truth from coming out." Likewise, we dismiss the evidence of this witness as unreliable and untrustworthy.

[57] Even more puzzling was the evidence of Kapule, who was a remandee in Industrial Area remand prison, who claimed to have shared a cell with Kevin, and learnt from Kevin who was facing a murder charge, that he had beaten someone in the police cells, and that the person had died from the injuries, and he was trying to maneuver to escape the murder charge. Again the reason for the alleged beating is totally different from what Njihia stated, nor is the name of the alleged victim identified. Kapule admits that he did not tell anyone in authority about the alleged information. The credibility of this witness is certainly also in doubt. His evidence appears to have been tailor made to support the defence.

[58] Okeyo, the IPOA investigator who investigated the murder of Martin, testified that the alleged fight in the cells was not recorded in the OB, and that Mutua released some suspects without any explanation. This casts aspersions on the credibility of Mutua's evidence and provides some corroboration to the evidence of Ali, Rama and Tom that suspects were released after signing the statement implicating Kevin in the commission of the offence.

[59] Further, we agree with the trial Judge that the conduct of Mutua in regard to Victor raised a red flag. Why would such a senior officer go out of his way to visit a suspect in a hospital, pay his medical bill and drive him to his house? The explanation can only be as testified to by Victor, that Mutua was the one who had inflicted the injuries upon him, and the evidence of Jackson that Mutua was trying to prevail upon Victor not to pursue the matter. Victor explained the frustrations that he went through in his effort to secure justice for Mutua's malfeasance. There is no reason why Victor would have relentlessly pursued the allegations against Mutua, if they were untrue, particularly after Mutua had gone out of his way to assist him pay the hospital bills. The allegation that Victor was trying to extort money from Mutua as inducement to drop his complaint cannot be true. The investigations by IPOA mainly concerned the death of Martin, and once initiated the matter was no longer in Victor's hands as he was not in a position to influence the statements of other witnesses. In our view the conduct of Mutua lends credibility to the evidence of Ali, Rama and Tom, that Mutua was the one who assaulted Victor and Martin on the material night. It also negates the evidence of Mutua that Victor had informed him that it was the bouncer identified as Kevin who had beaten and injured Martin and Victor.

[60] We are aware that there were contradictions and inconsistencies in the evidence of the prosecution witnesses. As already noted, some were self-serving. In our view, the contradictions did not affect the credibility of the main witnesses. For instance, the weapon that Mutua was alleged to have used was described differently by various witnesses. Ali and Tom described the weapon that Mutua used to assault Martin as a metal water pipe. Victor described the weapon as a metal bar. While it is clear that the weapon was metal, the description by Ali and Tom that it was a metal water pipe is the correct description. Victor appears to have been drunk when he was taken to the station and therefore his impression of what the weapon was may not have been accurate. There was mention of a rungu, but this was different from the metal pipe that IP Mutua had used to beat the deceased. The rungu is apparently what he used the second day when he was threatening the suspects to reveal who had beaten Martin. It was submitted by the defence that the Rungu was a swagger cane. However, the description that Ali and Tom gave clearly shows that it was not the swagger cane that officers carry as a symbol of authority, but a cane which had been modified to inflict pain because of the rough ball that was on one end.

[61] Another subject of contradiction was the description of the clothing that Mutua was wearing on the material night. While Ali and Tom maintained that Mutua was wearing his official Khaki uniform with the official beret, Victor testified that Mutua was wearing a brown heavy leather civilian jacket. As we have already stated, the evidence of Victor regarding the events of that night, appears to have been clouded by the fact that he was drunk. Be that as it may, Mutua was known to Victor and he did identify him by recognition. Rama also testified that he was able to recognize Mutua's voice, while both Ali and Tom saw and identified Mutua. Therefore, the inconsistency regarding Mutua's attire was inconsequential.

[62] As regards the submission that the pathologist testified that from the injuries, Martin could have been subjected to mob justice, this is not born out by the evidence on the record. To the contrary, the pathologist was categorical in his evidence that the injuries sustained by Martin were quite severe and "**would require mob justice or significant amount of force**". The pathologist also added:

***"I cannot comment on whether more than one person assault (sic) him. If it was one person he was more muscular or strong. It is possible for one person to cause such severe injuries.....All injuries were caused by blunt trauma."***

Under cross-examination the pathologist stated:

***"If the victim was subdued, one person could cause such injuries."***

[63] Given the circumstances in which Mutua was alleged to have assaulted Martin, the evidence of the pathologist is neither contradictory, nor does it rule out the injuries having been inflicted by one person. Having considered and analysed the evidence as a whole, we come to the

conclusion that there was sufficient evidence before the trial court upon which a conclusion could be drawn that Mutua was the person who inflicted the fatal injuries on Martin. His action was, no doubt unlawful. His defence was therefore properly rejected.

[64] On the issue concerning the propriety of the charge against Mutua, it is the act or omission that constitutes the offence. It is clear that Martin suffered the fatal injuries on the 19th December 2013. That was the date when the unlawful act that culminated in Martin's death was committed. Therefore, the offence was committed on 19th December 2013 when the unlawful act was committed and not 20th December 2013 when Martin died. The contention that the charge sheet was irregular or defective has no substance.

[65] As regards Mutua's contention, that his right to fair trial was violated because the court was not able to assess the demeanor of Ali, Rama and Tom, the record shows that these were protected witnesses.

Protection of witnesses is provided for under the Witness Protection Act, Chapter 79 Laws of Kenya. Section 3 of that Act provides that:

**“A witness is a person who needs protection from a threat or risk which exists on account of his being a crucial witness, who –**

**(a) Has given or agreed to give evidence on behalf of the State in –**

**(i) Proceedings for an offence.”**

[66] Section 4(3) of the Witness Protection Act, provides that the witness protection agency:

**“may request the court in support of the program to implement protection measures during court proceedings, which measures may include, but not be limited to-**

**(a) holding in camera or closed sessions;**

**(b) the use of pseudonyms;**

**(c) the reduction of identifying information;**

**(d) the use of video link;**

**(e) employing measures to obscure or distort the identity of the witness.”**

[67] Other than the fact that Ali, Rama and Tom were protected witnesses, the record does not reveal much about this aspect. However, in accordance with the Witness Protection Act, the trial court was required to protect the identity of the witnesses, and we believe this is what the trial court did by having the identity, including faces of the witnesses concealed. It is clear that Mutua was a senior police officer who was being tried for a very serious crime which if established had grave consequences. Ali, Rama and Tom who were the crucial eye witnesses alleged that Mutua had framed Kevin with the offence, and forced them to sign statements to this effect, when they had actually seen Mutua assault Martin. Ali testified that his twin brother was shot dead by police officers. The witnesses were definitely in fear of their lives and needed protection in order for them to be able to testify freely.

[68] The trial court had to achieve the delicate balance of ensuring Mutua a fair trial, while at the same time ensuring protection of the witnesses. Mutua's right was not in any way compromised as his counsel was able to test the credibility and veracity of the witnesses by cross-examining them at length. This is apparent from the following extract of the judgment in which the learned Judge described the trial as follows:

***“It was as strongly prosecuted as it was spiritedly and intensely defended. The demeanor of the accused person generally and how he carried himself specifically throughout this trial was a spectacle to behold. He was alert to every word uttered by witnesses. Nothing escaped his keen attention. He kept his lawyers on their toes. I do not think anyone would have envied Mr Mwangi and Ms Celine Odembo. They had to remain attentive to ensure that nothing escaped their attention as well. They had no other choice. Their client, Nahashon Mutua pen and paper in hand, was busy noting down everything he considered relevant and of interest to his case and ensuring that his lawyers picked on the issues he was raising as he noted down points in the dock and addressing them. Where his lawyers failed to catch his attention perhaps because they were busy noting down evidence on their notes (sic) pads, the accused ensured he caught the eye of the judge and communicated his concerns! We went through this trial painstakingly and laboriously in order to ensure that all the issues raised by the parties were addressed. The prosecution was not spared either. They, too, were kept on their toes in case they missed out on some important issue raised by the defence that might have compromised their side of the case. In my view both the prosecution counsel and the defence team diligently served their respective clients well and I take this opportunity to commend them for the manner in which they ably represented their instructing client and ensured that all the issues raised in this case were fully addressed while remaining faithful to the law and procedure.”***

[69] The defence team did not raise any complaints during the trial concerning the violation of Mutua's right to a fair trial, nor have they challenged the above quoted extract of the judgment. The allegations that the appellant's right to a fair trial was violated is obviously an afterthought. The trial Judge did consider the demeanor of the crucial witnesses and made the following finding in the judgment, which we have no reason to depart from:

*“I have stated above that PW4, PW5, and PW7, the three prosecution witnesses who can be termed the star witnesses remained firm and focused in their evidence. They were not shaken by the intense cross examination visited on them. I find their evidence cogent and credible.”*

[70] Under section 6(a) of the IPOA Act, which is Act No. 35 of 2011, IPOA has several functions including:

**“6(a) investigate any complaints related to disciplinary or criminal offences committed by any member of the service whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief and shall make public the response received to these recommendations.”**

[71] Under Section 7 of the IPOA Act, IPOA has powers necessary for the execution of its functions, which includes:

**“(1) The Authority shall have all the powers necessary for the execution of its functions under this Act, and without prejudice to the generality of the foregoing, the Authority shall have the power—**

**(a) to investigate the Service on its own motion or on receipt of complaints from members of the public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate, including by—**

**(i) requisition of reports, records, documents or any information from any source, including from the Police, irrespective of whether that source is located within or outside Kenya and irrespective of whether any other person or body, other than a court of law, has already instituted or completed a similar investigation or similar proceedings;**

**(ii) entering upon any establishment or premises, including Police premises, on the strength of a warrant, and subject to any relevant law, where the premises are a private home or dwelling;**

**(iii) seizing and removing any object or thing from any premises, including Police premises, which may be related to the matter under investigation, and in respect of which a receipt shall be given to the owner or person apparently in control of the object or thing;**

**(iv) interviewing and taking statements under oath or affirmation from any person, group or members of organizations or institutions and, at its discretion, to conduct such interviews in private;**

**(v) summoning any person to meet with its staff, or to attend any of its sessions or hearings, and to compel the attendance of any person who fails to respond to its summons;**

**(vi) administering oaths or affirmations before taking evidence or statements where necessary;**

**(vii) summoning any serving or retired Police officer to appear before it and to produce any document, thing or information that may be considered relevant to the function of the Authority;**

**(viii) ensuring that where necessary, the identities of complainants or witnesses are not disclosed to their detriment;**

**(ix) recommending to the Director of Public Prosecutions the prosecution of any person for any offence;**

**(x) investigating any death or serious injury occurring or suspected of having occurred as a result of police action.**

**(b) to take over on-going internal investigations into misconduct or failure to comply with any law if such investigations are inordinately delayed or manifestly unreasonable;**

**(c) where appropriate, to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil proceedings for compensation in respect of injuries, damages and loss of income;**

**(d) require the Director of Public Prosecutions to provide it with his response to any recommendation made by the Authority to prosecute any person or body.”**

[72] Okeyo testified that IPOA received two complaints against Mutua which prompted IPOA to commence preliminary investigations that revealed that the death of Martin may have been the result of an unlawful act on the part of an officer or officers at Ruaraka police station. Consequently, IPOA consulted the DPP and the charge against Kevin was withdrawn to facilitate further investigations. The investigations which included taking statements from suspects and police officers who were at the police station at the material time, examining the cells and OB records, and visiting Kenyatta National Hospital, resulted in Mutua being charged with the offence. In our view IPOA did no more than it was mandated to do under the IPOA Act. Although criminal proceedings had been initiated against Kevin, the proceedings were withdrawn, and therefore the investigations that were conducted by IPOA did not contravene section 26 of the IPOA Act that prevents the authority from investigating any matter which is a subject of proceedings before a court of law.

[73] The pathologist testified that Martin sustained serious injuries which caused his death. The injuries were life threatening and it is evident that in inflicting the injuries, Mutua knew or ought to have known that the injuries would cause grievous harm or death. Malice aforethought

was therefore properly inferred under section 206 (b) of the Penal Code and the element of *mens rea* established. The upshot of the above is that the charge against Mutua was proved beyond reasonable doubt, and he was properly convicted of the offence of murder. His appeal against conviction has no merit.

[74] As regards the appeal against sentence, the trial Judge gave a considered ruling taking into account Mutua's mitigation and gave reasons why she considered the sentence of death appropriate. The sentence imposed by the trial Judge is a legal sentence and cannot be said to be excessive, taking into account the circumstances and impunity in which the offence was committed. We find no reason to interfere with the discretion of the trial Judge. The appeal is therefore dismissed in its entirety.

**Dated and Delivered at Nairobi this 18th day of December, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**