



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL CASE NO. 51 OF 2012**

**BETWEEN**

**REPUBLIC..... PROSECUTOR**

**AND**

**SAMUEL OMONDI GOMBE *ALIAS* AGOK ..... 1ST ACCUSED**  
**VITALIS OBOLA OKENDO *ALIAS* DAKTARI ..... 2ND ACCUSED**  
**HEZRON OTIENO OKENDO *ALIAS* OTIS ..... 3RD ACCUSED**  
**CHARLES OTIENO OMOLO ..... 4TH ACCUSED**

**JUDGMENT**

1. On 20<sup>th</sup> July 2012, this Court was informed that **SAMUEL OMONDI GOMBE *alias* AGOK, VITALIS OBOLA OKENDO *alias* DAKTARI, HEZRON OTIENO OKENDO *alias* OTIS** and **CHARLES OTIENO OMULO** had murdered **MESHACK OWINO MUHOR** (the deceased) on 19<sup>th</sup> July 2012 at Karapul Village, Siaya Township, Siaya District jointly with others not before the Court. I completed the trial after Chemitei J., had taken part of the evidence. At the close of the prosecution case, I discharged the 4<sup>th</sup> accused. The prosecution marshalled 4 witnesses while the accused gave sworn testimony.

2. The key witness of the events of the night of 18<sup>th</sup> -19<sup>th</sup> July 2012 was the deceased's wife, Christine Akinyi Owino (PW1). She recalled that the deceased, who used to bake bricks, arrived home that evening at 7.00pm. While they were asleep, she heard some people demanding that they open the door. The assailants forced themselves into the house and demanded to see the deceased. He was awoken and dragged out of the house while being beaten. As they were beating him, others were searching his house. She remained in the house and could hear the deceased screaming outside. They assailants left with the deceased as she remained in the house until daybreak. She recalled that she could identify the three accused whom she knew from the village. PW 1 further testified the court that at daybreak she went to her mother-in-law's home where two ladies came and informed them that the deceased's body was found lying along the road. She went to the scene with the deceased's brother, Joseph Ouma Muhor (PW2) and the deceased's mother, Catherine Adhiambo Muhor (PW3).

3. The three went to the scene and found the deceased in an unconscious state. PW 2 went back home, got a wheelbarrow and took him back home. He died shortly thereafter. PW 2 informed the Assistant Chief who arrived and they left together for the police station. The police arrived later and took the deceased's body to the police station.

4. The investigating officer, Corporal Patrick Malumasa (PW 5) recalled he was instructed by his superiors to investigate the case. He proceeded to record statements for the various witnesses. In particular, PW 1 told him that she had recognised the 3 accused as the people who came into their house that night. By the time he was taking her statement the accused together with other suspects had already been arrested.

5. The accused elected to give sworn testimony. They denied that they killed the deceased and stated that he was killed by a mob. They told that court that on the morning of 17<sup>th</sup> July 2012 at about 3.00am, there was a lot of commotion in the village. They were all woken up by the alarm raised by the villagers and it was apparent that the villagers were chasing a thief. The thief was seen entering a house and the group tried to flush him out. The mob woke up the suspect's father who was forced that to order the suspect open the door. The suspect opened the door and when the group went into the house, they recovered some personal items belonging to a local teacher. The suspect named Owino Nyaboro, the deceased, as his accomplice. The mob left him alone. All the accused testified that on the night of 18<sup>th</sup> July 2012, they were all asleep in their respective homes when the deceased was attacked by a mob. They were arrested on 19<sup>th</sup> July 2012 after being called by the Chief.

6. At the close of the defence case, counsel for the accused, Mr Adiso, pointed out that the incident that took place on the material night a mob attack after alarm was raised by the members of the public. The thrust of his submission was that the circumstances were not conducive for positive identification of the accused as the incident took place at night and that the assailant were part of a mob. He contended that the prosecution case was undermined by the fact that all the evidence implicating the accused was from the deceased's family members and that there was no other corroborating or independent evidence to implicate the accused.

7. The prosecution case was the accused went invaded the deceased's home at night on suspicion that he had stolen some goods. They assaulted him and he died thereafter. Dr Macrine Adhiambo (PW 4) produced the post-mortem form on behalf of Dr Rapenda under the **section 77 of the Evidence Act (Chapter 80 of the Laws of Kenya)**. She testified that she had worked under him for 2 years and was familiar with his handwriting. The key observation by Dr Rapenda in the post mortem report prepared on 26<sup>th</sup> July 2012, was that the deceased had an occipital bruise on the scalp. Internal examination of the head did not disclose any fracture except subdural haematoma. He therefore concluded that the deceased died from a severe head injury caused by a caused by a subdural haematoma due to a fall on a hard surface or blow from a blunt object.

8. The prosecution case is based on the identification of the accused by one witness in difficult circumstances. It has been said time and again that the court ought to warn itself of the danger of relying on the evidence of such a witness and should scrutinize the evidence carefully before proceeding to convict the accused. This principle has been reiterated by the Court of Appeal in several cases following the Court of Appeal for Eastern Africa decision in **Abdalla Bin Wendo & Another v Republic [1953] 20 EACA 166**, where the Court stated as follows:

*Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions following a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.*

9. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See **R v Turnbull [1967] 3 ALL ER 549**). This requirement is, however, relaxed when dealing with the case of recognition because, "recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other." (see

**Anjononi & Others v Republic [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

10. In this case PW 1 testified that she knew the three accused well as they lived in the same village and they were all relatives of the deceased. On the material night, she was able to recognise them as they had flash lights which they shone all over their small one roomed house. The accused persons also took time to search the house and that gave PW 1 ample time to observe them and given that she knew them from before, it was easy to recognise them in the confines of that room. It is therefore clear that the accused were positively identified by PW 1 as the people who came to remove her husband from the house and then assault him. Nothing was suggested to PW 1 in cross-examination that she was untruthful or that she had a grudge against the accused. PW 5 confirmed that PW 1 named the accused in her statement to him.

11. As the accused dragged the deceased from his house and went away with him, they had a duty to explain what happened to him since he was found dead (**Mkendeshwa v Republic [2002] 1 KLR 461**) on the very next morning. They raised an alibi defence which must be considered alongside the testimony of PW 1 and since I have found her testimony was truthful and believable, I reject the alibi. My view of their defence is further buttressed by the fact that there is evidence that an incident took place at the village few nights before in which the deceased was named as a suspect. Given the magnitude of the incidence, the involvement of village and the fact that the deceased was identified as a suspect, is a matter which the deceased father, PW 2 and the other witnesses from the village would have known about. The matter was not suggested or put to the witnesses in cross-examination hence I am of the firm view that their defence is an afterthought.

12. Although the prosecution did not prove which of the accused struck the fatal blow, in law, this is not necessary as the Court of Appeal observed in **Njoroge v Republic [1983] KLR 197**:

*If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavour to effect the common object of the assembly.*

The accused all went to the deceased house, dragged him out and assaulted him. If they participated the unlawful activity they are considered to have shared a common intention to kill the deceased and they are all guilty notwithstanding that the prosecution failed to prove who struck the fatal blow.

13. I now turn to the issue of malice aforethought. The deceased could only have died as the result of an act by the accused. It is clear from the evidence that the accused and others forced their way into the deceased's house and dragged him outside. PW 1 could hear him screaming and it was obvious that he was being assaulted. The mob left with him only for him to be discovered the following morning with a head injury. The nature of the injury, being vicious and targeted on the head, is consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **section 206(a)** of the **Penal Code**.

14. Having considered all the evidence, I am satisfied that the prosecution has proved its case beyond reasonable doubt. I therefore convict **SAMUEL OMONDI GOMBE alias AGOK, VITALIS OBOLA OKENDO alias DAKTARI, HEZRON OTIENO OKENDO alias OTIS and CHARLES OTIENO OMULO** for the murder of **MESHACK OWINO MUHOR**

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of March 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Adiso instructed by Adiso and Company Advocates for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.