



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL MURDER CASE NO.42 OF 2014**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**KENNEDY OMONDI KUNGU ..... 1<sup>ST</sup> ACCUSED**

**MICHEAL JUMA KUNGU ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**1. KENNEDY OMONDI KUNGU (1<sup>st</sup> accused) and MICHEAL JUMA KUNGU (2<sup>nd</sup> accused) are jointly charged with murder contrary to Section 203 as read with 2014 Penal Code.**

The particulars are that on 3<sup>rd</sup> October 2014 at **KAWAGONE** Nyongo sub location in Rachuonyo North, within **HOMA BAY** County, they jointly with others not before court murdered **JOSEPH OMOLLO OPAPA**. Both accused denied the charge.

2. They were represented by **MR. OSORO** while **MISS ONGETI** appeared for the State who summarised the prosecution that on 3<sup>rd</sup> October 2014 at about 7.30 p.m., the deceased was travelling from **KAWADHGONE** trading centre accompanied by his two wives. When they got near the centre, they met two persons, one was armed.

There had been a grudge between the deceased and the two men's family. The two attacked the deceased and left him for the dead.

**3. GORRETTI AUMA OMOLLO (PW1)** is the deceased's first wife, and it was her evidence that on 03/10/2014, she was accompanied by her co-wife **MARY GORRETTI**, her daughter in-law **MARY AKOTH** and her husband (the deceased). They were walking from **KANDIEGE** heading for their home. Although night had fallen, there was a bright moon shining.

The foursome walked in a column, with **MARY GORRETTI** leading the way, followed by the deceased, PW1, and her daughter in-law brought up the rear.

4. When they got near the posho mill owned by **MILDRED SURE**, they met **MAURICE OCHIENG KUNGU** alias **NGUT** and **MICHEAL JUMA KUNGU** alias **TOTI** whom she knew very well. **MAURICE** had a panga but **MICHEAL** was not armed. She stated:-

**“I knew them before as we come from the same clan. They were approaching i.e. going towards where we had come from.”**

5. They passed each other – no one spoke to the other, and after moving for about 8 metres from each other, PW1 noticed that the two men were running having turned back towards them and PW1 told her husband:-

**“Joseph Ngut is killing you” but the deceased said he would not kill him.**

6. PW1 explained that the reason why she made that statement was due to the fact that earlier in the day the accused's elder brother **KENNEDY OMONDI** had earlier reported to the chief saying:-

**“Today we must kill Omollo.”**

7. The chief had relayed this message to the deceased and given him a letter to take to the police. On 3<sup>rd</sup> October the police and the chief summoned **KENNEDY OMONDI**, the deceased and PW1, to the chief's office. **KENNEDY (A1)** who had been accompanied by his brother A2 was thereafter arrested and taken to **KENDU BAY** police station. The arrest was made at 11.00 a.m., and everyone else dispersed. According to PW1:-

**“We thought we’d now be at peace and that is when we returned to the centre, and on our way home we met MICHEAL and MAURICE.”**

8. It was her evidence that during the attack on the fateful night, **MAURICE** struck the deceased on the side of the head using a panga, and then cut him twice. The deceased fell and **MICHEAL** (A2) picked a huge building stone measuring 6x9 and smashed the deceased’s head with it; as he lay on the ground.

PW1 and her co-wife were screaming and this attracted many people who came to the scene, but by then, the deceased was no more.

Police were called but by the time they arrived at the scene, the **KUNGU** brothers had fled.

9. PW1 explained that the problem between the deceased and the accused’s family begun when **KENNEDY** (1<sup>st</sup> accused) reported to chief **ERNEST ATARO** that he would kill the deceased on the very day and later in the evening his brothers attacked and killed the deceased.

10. On cross examination PW1 stated that there was a bright moon which enabled her to see and identify the late **KUNGU**’s brothers (who were her village mates) at a distance of about 8 metres away as they approached them.

She also confirmed that the 1<sup>st</sup> accused was not at the scene during the attack as he had earlier on been arrested and was at the police station.

PW1 denied suggestions by the defence counsel that she had framed up the accused. It was also her evidence that the attack lasted about 4 minutes which enabled her see and recognise the attackers.

11. Actually the deep seated difference between the two groups seems to have begun when the window to the deceased’s house was broken and someone outside said it was **KENNEDY** (1<sup>st</sup> accused) who had broken it. When the 1<sup>st</sup> accused learnt about such claims, he got really upset and this is what led him to go and inform the chief of his intention to kill deceased.

12. Apart from that there had been an earlier incident when goats belonging to the deceased destroyed sweet potatoes field belonging to **MAURICE**. **MAURICE** was angry and began throwing stones at the deceased’s home. The deceased reported the matter and **MAURICE** was arrested – however he later escaped.

13. **MARY GORRETTI OMOLLO** (PW3) a co-wife to PW1 confirmed that they were walking home together with PW1, their daughter in-law and the deceased when they met **MICHEAL JUMA KUNGU** and **MAURICE OCHIENG KUNGU**. She was able to see them with the aid of moonlight as they passed each other. She knew them and confirmed her co-wife warning their husband that he’d be killed. She also confirmed that after the pair had turned, the Omollo family stopped and turned upon prompting by the deceased, and when they turned to look behind, she noticed that the two men had also stopped and begun advancing towards them.

14. It was her evidence that the pair attacked the deceased using pangas and she explained:-

**“Maurice had a panga, Micheal did not have anything. Maurice cut Joseph with a panga at the back of the head twice.... Micheal picked a stone and hit Joseph as he lay on his stomach .... they carried away the weapon they had.”**

She too confirmed that the relationship between the deceased and 1<sup>st</sup> accused was frosty because the deceased had engineered the 1<sup>st</sup> accused’s arrest.

15. On cross examination she stated that she’d heard one of the accused had reported to the chief that he would kill the deceased. The deceased followed up on the threat resulting in the arrest of 1<sup>st</sup> accused. She however stated that 1<sup>st</sup> accused was not at the murder scene. She however identified the 2<sup>nd</sup> accused as the one who picked a building stone and smashed the deceased’s head. She described the scene as a village path which runs between homesteads.

16. **MARY AKOTH OMOLLO** (PW4) gave a version of events similar to what PW1 and PW3 narrated. The deceased was her father in-law. It was her evidence that the 2<sup>nd</sup> accused had an arrow, while **MAURICE** (who fled) had a panga. She knew them by the pet names **NGUT** and **TOTI** (A2).

17. On cross examination PW4 stated that the 2<sup>nd</sup> accused is the one who picked a huge stone and crushed the deceased’s head. She also confirmed that the relationship between her family and the accused was hostile.

18. The area assistant chief **ERNEST OPAR ATARO** (PW2) confirmed that the accused are biological brothers and that on 24<sup>th</sup> September 2014, at about 9.00 a.m. the 1<sup>st</sup> accused approached him at his home, and informed him that he would kill the deceased as they had been having some conflict and he felt that the deceased was always searching for him using police from Homa Bay. It was his evidence that the 1<sup>st</sup> accused stated as follows:-

**“... so I will kill him, then I will surrender to police in Homa Bay.”**

19. PW2 advised the 1<sup>st</sup> accused to make a similar report to police but the accused declined and went to **NYANGWESO** centre. That same day at about 4.00 p.m., PW2 got information from **JOSEPH OMOLLO** that the 1<sup>st</sup> accused was searching for the deceased while armed

with a panga. PW2 then informed the deceased about the utterances 1<sup>st</sup> accused had made. When the deceased asked why such a threat to his life would be made, PW2 told him to consider it as a joke.

20. On 25<sup>th</sup> September, the deceased obtained a letter from PW2 to take to Kendu Bay police so as to facilitate the 1<sup>st</sup> accused's arrest. Some time thereafter the 1<sup>st</sup> accused again approached PW2 and requested him to call the deceased so that they could talk. Indeed PW2 called a meeting whose objective was for the parties to live together in peace – both accused, deceased and their respective family members attended.

21. PW2 explained that the sour relations arose from an incident where the deceased's wife alleged that the 1<sup>st</sup> accused had thrown a stone at their window intending to harm her. The 1<sup>st</sup> accused denied the claims and said it was intended to provoke him. After the meeting the 1<sup>st</sup> accused sought forgiveness and even knelt down before the deceased, but the later rejected his gesture. PW2 urged him –

**“The boy has even knelt down, forgive him.”**

However the deceased was adamant that he would not forgive – so the matter went to Kendu Bay police station.

22. On 3<sup>rd</sup> September 2014, PW2 received a call from **MILDRED SURE** (another wife of the deceased) who informed him that **JOSEPH OMOLLO** had been killed by some people. He also received a call from PW1 who mentioned **MICHEAL JUMA** and another brother as the culprits. He proceeded to the scene and found a crowd milling around the body of the deceased which lay on the ground. He stated that there was moonlight and he also used his torch to beam the deceased's face and noticed a deep cut on the back of the neck. He clarified that the deceased was killed on a different day from the day 1<sup>st</sup> accused reported his rather disturbing threats to him.

23. The deceased's son **COLLINS ODUOR OMOLO** (PW5) also told this court that on 24/09/2014 his father informed him that the threats stated had issued through their assistant chief. He identified his father's body to police for post mortem.

24. **DR. ANDREW KIPYEGON CHERUIYOT** (PW7) conducted a post mortem on the deceased and noted that he had multiple cuts on the head with deformed skull with a fracture. Further the face, hands and ears had blood stains.

He formed the opinion that the cause of death was haemorrhagic shock due to severe head injury. His findings are contained in the post mortem report produced as **Exhibit 4**.

25. **PW6 PC RICHARD CHEMJOR** who conducted investigations confirmed that the deceased's two wives and daughter in-law named two Kungu brothers as the attackers being 2<sup>nd</sup> and **MAURICE** (who is still at large). He established that the assault was carried out as revenge due to the arrest of their brother earlier in the day. He confirmed that a report had been made to Kendu Bay police station vide **OB NO.9/19/9/14** by the deceased's wife (**GORRETI AUMA**) against the 1<sup>st</sup> accused for offence of malicious damage.

26. Another report had been made by the deceased at the same police station vide **OB NO.9/24/9/14** about a threat made by the 1<sup>st</sup> accused to kill him, and the deceased had recorded a statement (produced as Exhibit 1).

27. After investigations and with the assistance of the **DCIO (CIP JUSTINA MUTIA)** it was decided that the 1<sup>st</sup> accused be charged with murder because they had a common knowledge of killing the deceased.

Apparently after the incident the 2<sup>nd</sup> accused disappeared and was only traced on the year 2015.

As for **MAURICE** when police arrested him, the 1<sup>st</sup> and 2<sup>nd</sup> accused raised an alarm and threw stones at police and he was able to escape with handcuffs – he remains at large to date.

28. On cross examination PW6 stated that he did not recover the murder weapon. He confirmed that all the eye witnesses informed him that the 2<sup>nd</sup> accused was the one who crushed the deceased's head using a huge stone. He visited the scene and confirmed it was strewn with lots of stones so he could not pick out which one was used to assault the deceased. He explained his inability to get scenes of crime personnel to take photographs of the scene because –

a. It was at night; and

b. There were so many people at the scene.

29. Both accused gave sworn testimony. **KENNEDY OMONDI KUNGU** (1<sup>st</sup> accused) explained that on the date of the incident, he was arrested at 10.00 a.m. so that by 7.30 p.m. he was in the police cells at Kendu bay police station. He was categorical that he did not see the deceased on 3<sup>rd</sup> October 2014, but is aware the deceased is the one who had reported him to police thus leading to his arrest. He stated:-

**“I am not aware of the events surrounding his death because on that date at 7.00 p.m., I was under arrest at Kendu Bay police station.”**

He denied ever having disagreed with the deceased or his wives, saying he would like to know why he was arrested.

30. He however did not have any records to prove that he was held at the police station. He confirmed being summoned by the assistant

chief on 3/10/2014 but says all that happened is that upon getting to the chief's office, he was handcuffed and told he'd know the reason for his arrest at the police station.

31. The 2<sup>nd</sup> accused **MICHEAL JUMA KUNGU** explained that on 3/10/2014 he was excavating stones at a quarry within **KAWADHGONE** in the company of **ZABLON AMOLO** and has no idea why he was arrested. He stated that he had never disagreed with the deceased or his wives and was just arrested as he was escorting his wife to hospital.

32. On cross examination he confirmed that the area described as the scene of murder has huge stones but he had nothing to do with the deceased's death. He explained that although the deceased was his relative, he did not attend his burial as he was away in Kisumu taking care of his sick wife.

33. There is no dispute that **JOSEPH OMOLO OPAPA** met his violent death on 3<sup>rd</sup> October 2014 along a footpath as he was walking home in the company of some of his female family members. Although the accused deny having any dispute with the deceased, it is common ground that the deceased had lodged complaints against 1<sup>st</sup> accused to the police at Kendu Bay police station as confirmed by the copies of Occurrence Books (OB) produced in court. The issue for determination are:-

a. Who killed the deceased?

b. What was the motive for the killing?

**34. Section 203 Penal Code** provides that – **“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

**Section 206** defines malice aforethought to include *inter alia*:-

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

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

35. The incident happened at night and all prosecution witnesses confirmed that darkness had already enveloped the area. All the eyewitnesses were however categorical that they were able to see and identify the attackers with the aid of moonlight. This evidence of the source of light was independently confirmed by the assistant chief who said there was moonlight. This was not just a passing swift glance – the Omollo family members were walking in a single file and stepped aside to allow the other two men to pass – and each individual whom they passed saw and recognised them – they were not strangers to each other – infact the chief confirmed they were related by clan and were not only from the same village, but lived within the same neighbourhood.

36. It was not a swift hit and run, the two men stopped, turned back then advanced at the Omollos, struck deceased several times before inflicting a final crushing blow with a stone. They then fled and were missing from the area until 2015 when the 2<sup>nd</sup> accused was arrested. His brother with whom they committed the offence remains at large to date. The disappearing act by the two (albeit A2 later being traced) is totally inconsistent with the acts of innocence. I am persuaded that A2 and his missing brother Maurice were positively identified by recognition at the scene.

37. It is also abundantly clear that the 1<sup>st</sup> accused was not one of those who attacked the deceased and was not seen at the scene. All prosecution witnesses were consistent in the role the 2<sup>nd</sup> accused played.

38. What could have been the motive for the attack? It is no secret that the two families had an acrimonies relationship and the Omollos had on more than one occasion involved police in arresting the 1<sup>st</sup> accused. The area assistant chief confirmed as much and indeed even an attempt to call a truce between them was rejected by the deceased.

39. So bad were things that the 1<sup>st</sup> accused feeling perpetually harassed by the deceased invoking police action at every whim, reported to the chief he'd had enough and would kill the deceased. Did this threat crystallize into what happened on the night in question? Was the 1<sup>st</sup> accused the hand behind the action by his two brothers – or were his words a mere threat which by some ill twist fate coincided with the murder?

40. Apart from his utterances, there is no other evidence showing that the 1<sup>st</sup> accused colluded or conspired with his brothers to kill the deceased. It may well have been that his brothers felt the same way that he did – harassed and fed up with the deceased's use of police and rejection at attempts to reconcile. I am persuaded that the 1<sup>st</sup> accused's brothers decided to carry out the revenge for their brother's sufferings – that is what provided the motive.

41. Consequently, I hold and find that the evidence tendered proves the charge of murder against the 2<sup>nd</sup> accused. As for the 1<sup>st</sup> accused there is strong suspicion that he may have executed his threat through his brothers – but suspicion no makes how strong cannot be a basis of a conviction and I find the evidence prescribed insufficient to sustain the charge against him. The upshot is that I return a finding of **NOT GUILTY** against the 1<sup>st</sup> accused and a finding of **GUILTY** against the 2<sup>nd</sup> accused.

**Delivered and dated this 16<sup>th</sup> day of October, 2017 at Homa Bay**

**H.A. OMONDI**

**JUDGE**