



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 22 OF 2014**  
**(FORMERLY KISII HCCR NO. 81 OF 2011)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**CAVIN OTIENO OWUOR ..... ACCUSED**

**JUDGMENT**

1. On the night of 26<sup>th</sup> July 2011, **RONALD OTIENO OILE** (“the deceased”) left Milimani Bar and proceeded to his residence which was situated in Nyasare Estate behind Heritage Hotel within Migori Town. As he was drunk, he mistook his gate and went to the gate where the accused **CAVIN OTIENO OWUOR** resided. The accused, who also coming home, met the deceased and raised alarm claiming that the deceased was a thief. The neighbours opened the gate and together with the accused beat the deceased and left him for dead. The deceased was found dead the next day. On 23<sup>rd</sup> August 2011 this court was informed on that the accused murdered the deceased contrary to **section 203** as read to **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. In order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;
  - a. Proof of the fact and the cause of death of the deceased.
  - b. That the cause of the deceased’s death was a result of the direct consequence of the accused’s unlawful act or omission.
  - c. Proof that the unlawful act or omission was committed with malice aforethought as defined in **section 206** of the *Penal Code*.
3. The fact and cause of death of the deceased is not in dispute. George Oile (PW 1) testified that on the morning of 27<sup>th</sup> July 2011, he was informed that his brother, the deceased, had been killed. After making inquiries he proceeded to a place called Nyasare within Migori town where he found the deceased’s body lying about 5 metres away from the river. The deceased was dressed in a black long trouser and a white shirt which was torn and tied across his waist. He observed that the deceased had several injuries which looked like they had been inflicted a sharp object on the eye, top of the head and left ear. The deceased also had several injuries on the abdomen and right leg which appeared to have been inflicted by a blunt object. After seeing the body, he proceeded to

Migori Police Station to report the matter. Thereafter, he went back to the scene with police officers who took photographs, interrogated members of the public and took the deceased's body to St Joseph Ombo Hospital Mortuary. On 30<sup>th</sup> July 2011, he attended the post-mortem on 30<sup>th</sup> July 2011 where he identified the deceased's body.

4. Dr Joseph Otieno (PW 3) performed the autopsy on the deceased's body. He noted several bruises on the limbs, chest, forehead and back. There was a sharp penetrating injury through the lower lip passing through to the tongue, a split left ear, a sharp penetrating injury on the right eye destroying the eye ball and a penetrating injury on the left leg penetrating the ankle. The deceased also had several fractured ribs which resulted in severe bleeding in chest cavity and collapse of the lungs. Although there was a severe blood clot in the head, there were no fractures. PW 3 concluded that the deceased died of internal bleeding secondary to blunt injury to the chest which was consistent with assault.
5. After establishing the cause of death of the deceased, the investigation turned to finding out who had inflicted the fatal injuries on the deceased. Japhet Imonje Inana (PW 2), a resident of Heritage, Nyasare in Migori Town recalled that he returned home on the night of 26<sup>th</sup> July 2011 at about 10.00pm. When he reached home he started to watch TV. After about an hour he heard noise from the outside. He switched on the lights, looked outside through the window and saw many people gathered with runguns and other weapons. He called a neighbour who informed him that there just drunkards outside. He decided to go outside the gate and found people beating someone. He tried asking why the person was being beaten but no one would tell him. However, one man dressed in black short trouser and jersey and whom he knew as Calvin responded to him and told him that the person was a thief and that when he came he found the person standing by the gate preventing him from coming in by telling him, "*leo utatoa yote*". PW 2 inquired whether he knew the person was a drunkard and whether the alleged assailant was serious with the remarks. PW 2 noted that the person being beaten was drunk and that Calvin was among those beating the deceased.
6. As PW 3 continued to make inquiries, he heard another person saying that there had been thefts in the neighbourhood and asking him whether he was working with the person being beaten. PW 3 responded that he knew the person being beaten as he was a caretaker in the previous home he was living and that he had recently moved to the neighbourhood. He tried to explain to the crowd that he knew the deceased but the crowd was hostile to him. Although he could not recall exactly where the deceased resided, he knew the deceased's neighbour, one Otulo (PW 4). He went with the crowd to Otulo's place in order to confirm that the deceased resided there. Otulo responded to the call and after PW 3 explained to him what was happening, Otulo showed them the deceased's house. Calvin was among the group that followed to Otulo's house. The group continued to beat the deceased thereafter. As they left Otulo's house, the deceased was still alive. He was left seated about 2 metres from the gate with his head bowed down with his face bleeding. He kept asking, "*Why are you beating me, I am drunk.*" PW 3 stated that people there had mobile phone torches on and there was a security light on at the gate.
7. As the group left Otulo's home, PW 3 went back home. On the next day at about 7.00am, he saw people were surrounding the deceased's body which was away from the gate. When he arrived at his workplace, he was informed that he was required at the police station. He went to the Police Station and recorded a statement. PW 3 confirmed that he knew the accused as Calvin who used to reside in the neighbourhood. PW 3 had known him over a period of 6 months as he used to greet him casually.
8. When cross-examined by counsel for the accused, PW 3 testified that when he went out of the house after hearing noise, he found a large crowd gathered outside the gate and when he asked what is happening, it is the accused who responded specifically and a conversation ensued between him and the accused while they proceeded to Otulo's house.
9. Samuel Oluoch Otulo (PW 4), a resident of Nyasare, recalled that he was at home on the night of 26<sup>th</sup> July 2011 and that he went to bed at about 10.00pm. At about midnight, he heard noise and

many people at his door. PW 3 was calling him and when he looked through the window, he saw many people with torches and rungs. PW 3 asked him to open the door and explained to him why they had come. Since he knew PW 3, he went out to see the person who was being beaten. The person was about 10 metres away near a gate lying down with blood on his clothes. He recognized the person who appeared drunk as Ronald whom he also knew as Baba Emmanuel. He stated that Ronald had lived in the neighbourhood for about two months and had a wife and two children. He told the group that Ronald was a neighbour and that he worked at a bar. The crowd retorted that he was defending him and asked why he was far away from the house. As the crowd was charged, he went back to his house as he feared for his life.

10. Another resident of Nyasare, Sabas Ekea (PW 5) testified that on the night of 26<sup>th</sup> July 2011, he was awoken by loud noise at about 11.00pm. He did not get out as he feared the insecurity but after about twenty minutes, he went outside the compound and found many people beating a person. He testified that though the place was dark, there was security light and from a distance he was able to see where he was going. He could not identify any of the people beating the person they alleged was a thief. He heard the person asking why he was being beaten yet he was not a thief. After a while he went back to his house. In the morning as he was going to work, he saw a crowd of people surrounding the deceased's body. The only person he recognized that night was his neighbour Atieno (PW 6).
11. Evelyn Atieno Odida (PW 6) recalled that she heard noise outside her house on the night of 26<sup>th</sup> July 2011 but since she feared for her life, she remained indoors. She could hear people saying that they got a thief. On the next morning she saw the body of a male person lying outside the gate as she was going to work. There were many people outside accusing the residents of the plot of being involved in his death. While she was at work she was informed that her house had been broken into. She later recorded her statement.
12. Corporal Josphat Ongoki (PW 7), a police officer working at the Migori Police Station, Crime Branch recalled that on 27<sup>th</sup> July 2011 at 9.25am he was requested to attend to a murder scene at Nyasare Estate within Migori Township. He proceeded there and found the body of a middle aged man, who had multiple injuries on his body and had been battered to death. He also found a crowd at the scene which he drew back. He observed drops leading from the body to the gate of the enclosed rental estate. When he entered the compound, he found bloodstains on the doors of some of the houses and blood stains on the wall. He interrogated some members of the public and gathered that the deceased had been battered by a mob in reaction to an alarm raised by an occupant of one of the 12 houses who said he was a thief the previous night. He was informed that the accused is the one who raised alarm.
13. The final prosecution witness was Superintendent Jafred Mateche (PW 8), the Migori Divisional Criminal Investigation Officer, was the investigating officer. On 27<sup>th</sup> July 2011, while on duty, he received a report of murder from Nyasare Estate. He proceeded to the scene with other officers at about 11.00am. He found the body of the deceased had been removed. In the area, he found 12 rental units within a housing estate had been broken into and looted by irate members of public on the allegation that the deceased had been murdered by tenants of the plot. He commenced investigation to establish the circumstances the deceased met his death. He obtained statements from PW 2 and PW4 who narrated how they had found the deceased struggling with a tenant of the plot whom they identified as Calvin Otieno, the accused in this case. They alleged that the accused alleged that the deceased had attempted to rob him and as a result he raised an alarm which attracted tenants of his plot and the neighbouring plots who attacked the deceased causing him to die. He prepared a sketch plan of the scene and also caused a postmortem to be done.
14. At the close of the prosecution case, the accused was called upon to make his defence. He elected to give sworn testimony and called two witnesses. The accused testified that he was a medical laboratory technologist and was working in Migori in 2011. At the material time he was residing behind Heritage Hotel, Nyasare Estate. He lived in a compound with other houses and his house was the last one in the compound surrounded by a perimeter wall. The accused recalled that on

- 26<sup>th</sup> July 2011 at about 10.00pm he returning home from town. It was dark and as he approached the gate, he heard someone say, “*Utatoa yote.*” The person grabbed him and because he was scared he immediately called for help. People from all directions responded to his alarm as he tried to free himself. Since it was dark and he could not identify those people. After a while, the person who was holding him left and started running away but he did not go far as he was caught by the people who responded to the alarm and started beating the person. He stated that he was frightened so he did not beat the assailant. He went into his house thereafter. On the next morning, while he was at work, PW 8 came and took him to the police station. He denied that he knew the deceased.
- 15.Noah Tuma (DW 2) was residing at Nyasare area at the time and on 26<sup>th</sup> July 2011 at about 10.00pm, he heard a loud noise. He went outside and followed the neighbours who had responded to the alarm. They were shouting “*mwizi*”. He found a crowd gathered and someone being beaten. He observed so many people but since it was dark, he could not estimate their number or identify anyone. He went back and on the next day he heard the person was dead.
- 16.Another resident of Nyasare Fredrick Omondi Okello (DW 3) recalled that he was at home on 26<sup>th</sup> July 2011 when he heard a person shouting outside seeking help. He went out and found a group of people near a gate beating a person. He heard people say that he had attacked a person living nearby. As it was dark could not tell the number of people nor identify any of them. He tried to find out what happened but he was almost being beaten so he decided to go back to his house. He stated that he did not see the accused that night.
- 17.At the close of the defence case, counsel for the accused submitted that the defence witnesses demonstrated that the accused raised a distress call and members of the public responded. He submitted that the accused had little to do with the death of the deceased other than raise a distress call. He contended that the accused reacted in the way any reasonable person would have reacted faced with similar circumstances and that he had no control over the mob that responded to his distress call. He maintained that none of the prosecution witnesses saw the accused beat or assault the deceased hence the accused should be acquitted.
- 18.The learned prosecutor submitted that the prosecution had proved its case in that the all the ingredients of murder were proved. The prosecution contended that the intention of the accused was to call neighbours to assist him deal with accused. Counsel maintained that the circumstances were favourable to positive identification and even if there was insecurity the circumstances of the incident did not permit murder.
- 19.I have found as a fact that the deceased died from multiple injuries inflicted on him. From the testimony of the prosecution witnesses it is clear that on the night of 26<sup>th</sup> July 2011 the deceased was beaten by unknown members of the public who responded when the accused raised alarm. The question then is whether the accused is the person who inflicted the injuries that led to the deceased’s death.
- 20.The accused, his sworn testimony, does not deny that he was at the scene of the incident on the material night when he was attacked by the deceased. His position is that he was acting in self defence and that after the mob that came had freed him, he retreated to his house and the mob continued to beat the deceased. PW 2 testified that the accused told him how the deceased accosted him at the gate. However, according to PW 2, the accused was still part of the group that was beating the deceased when PW 2 took the mob to PW 4’s house to confirm that the deceased resided in the neighbourhood.
- 21.While I accept that the accused was acting or acted in self defence to free himself from the clutches of the deceased, he only did so until the mob arrived and proceeded to beat him together with the mob. I have considered the conditions of identification and warned myself of the dangers of convicting a person on the evidence of one witness. This case though, is one of recognition. PW 2 knew the accused before the material day. PW 2 actually spoke to him and the accused told him that he had been accosted by the deceased. The version of events narrated by the

accused to PW 2 is confirmed by the accused's own testimony. PW 2 was clear that the accused was part of the group beating the deceased as he proceeded to PW 4's house. I therefore find and hold that the accused was at Nyasare Estate on that night and that he was part of the mob that was beating the deceased.

22. The prosecution did not prove that it is the accused who inflicted the fatal blow. In order to find the accused guilty of murder, the prosecution had to prove that the accused together with the mob of people shared a common intention to kill or to do grievous bodily harm (see generally *Augustino Orete & Others v Uganda* [1966]EA 430 and *Dracaki s/o Afia & Another v R* [1963]EA 363 and *Peter Gachoki Njuku & Another v R* NYR CA Crim. App. No. 115 of 2002 [2002]eKLR). **Section 21** of the *Penal Code* states as follows;

*When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

23. In *Wanjiri d/o Wamerio v R*, 22 EACA 521, the Court stated that;

*Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.*

24. In this case, although the accused was part of the gang that was beating the deceased, it is clear that the mob came in response to an alarm raised by the accused. Although he participated in beating the deceased, there is no evidence that he was part of a pre-meditated plan to cause grievous harm or kill the deceased. The prosecution did not show what length of time the accused remained with the mob or continued to beat the deceased. In the circumstances, I find that though the accused engaged in an unlawful act that led to the death of the deceased such death may not have been intended or anticipated by the accused.

25. I therefore find the accused **CAVIN OTIENO OWUOR** guilty of the offence of manslaughter contrary to **section 202** of the *Penal Code* and I convict him accordingly.

**DATED and DELIVERED at MIGORI this 22<sup>nd</sup> day of October 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Kisia, Advocate for the accused.

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