



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 50 OF 2014
(FORMERLY KISII HCCR NO. 2 OF 2014)

BETWEEN

REPUBLIC PROSECUTOR

AND

MARTIN OUMA OKOTH 1ST ACCUSED

JOSEPH NYARIARO OTIENO ALIAS ABON 2ND ACCUSED

LENCER ANYANGO OKUMBO 3RD ACCUSED

JUDGMENT

1. The three accused, **MARTIN OUMA OKOTH** (“Okoth”), **JOSEPH NYARIARO OTIENO** (“Abon”) and **LENCER ANYANGO OKUMBO** (“Lencer”) are facing a charge of murder contrary to **section 202** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They are alleged to have murdered Kevin Omondi Abich (“the deceased”) on 27th November 2013 at Nyoniang’ Village, Komenya Sub-location, North Kanyamkago Location of Migori County. The prosecution marshalled 6 witnesses while the accused elected to make unsworn statements.
2. Geoffrey Onyango Otieno (PW 2) testified that the deceased, also known as Ajeyi, was his cousin with whom he was residing at Komenya Village. He recalled that on the night of 27th December 2013, the deceased received a phone call just as they were about to sleep. The deceased told him that Lencer called him. He knew Lencer as the deceased’s girlfriend. Although he did not tell him the content or reason for the call, the deceased requested to be escorted to see Lencer at Nyoniang’ village. They reached Lencer’s place at about 10.00pm and found her waiting for them near Abon’s house. They followed Lencer and entered Abon’s house.
3. When PW 2 entered the house, it was dark and immediately the door behind them was locked. He could not tell who locked the door. Lencer lit a paraffin lamp. He found Alec and Odira on the right side of the door and Okoth on the left side of the door. Okoth was carrying a panga while Odira and Alec were carrying rungun. Abon was standing near a table while Lencer was also standing in the house. Abon asked them what they had come to do in his house. Before they could respond, Abon started beating them, and the other joined in the beating. PW 2 recalled that although he was beaten on the back, he did not see who was beating him. As he was being beaten, he kicked the door and ran out into the shamba which was next to the house. He was being

followed but was not caught. He could not see what was happening behind him and did not know what was happening to the deceased. He ran until he reached his home at about 11.00 pm. He immediately told his father, Daniel Otieno, what had happened.

4. PW 2 went back to Abon's house with his father and two of his brothers, Okoth and Otieno. When they reached there were many people with torches. They went to the shamba where they found the deceased lying on the ground with his left hand cut. They called Joseph Leo Oyugi (PW 5), the deceased's uncle and informed him what had happened.
5. Charles Ogendo Julu (PW 4) lived about 100m away from Abon. He recalled that on 27th December 2013, he went to see his sister in law, one Pamela Owino, was supposed to be taken to a function in Kwabwai by Abon very early the next morning. She also told him that she would tell Abon to take her very early. He would also pick up her son Kevin Ochieng Owino alias Alec. Abon passed by Pamela's house at about 10.00pm to make arrangements for the safari next morning. PW 4 further testified that Abon did not come as expected on the next morning. On the same night he heard some noise. When he went out, he met Abon leaving his shamba. He heard Abon say that what was happening was a shame. When he asked what was happening, Abon told him that the deceased was there and he should go and see what was happening. Apart from Abon, he found Lencer and her mother, Odira and Alec. Lencer and her mother were tying the deceased's hand, which was bleeding, while the deceased was lying down. PW 4 then left to seek help but when he returned at about 11.00pm, he found the deceased dead.
6. PW 5 recalled that that on 20th December 2013 at about 2.00am, he received a call from him his cousin, Okumbo Okang'a, that the deceased, who was his nephew had been killed at Nyoniang' Village. He informed Okumbo to preserve the scene as he was rushing to Migori Police Station. He went to Migori Police Station on the same morning and left for the scene with 3 Officers. On the way he called the Assistant Chief, Amos Asingo Keya (PW 3) and informed him that they were coming. PW 3 informed them that he had already received one the suspects who had come to report to him. They arrived at the scene at about 11.00 am and found Abon under arrest at the Chief's office. At the scene, they found the deceased's body in the tobacco plantation next to Abon's house. PW 3 came to the scene after they had arrived. The police took the body to Rapcom Mortuary where the postmortem was done by Dr Jared Ndege (PW 1) after he identified the body.
7. The Assistant Chief of Komenya Sub-Location in North Kanyamkago, Uriri Sub-County, Amos Asingo Keya (PW 3), recalled that on 28th December 2013 he was at home when Abon called at about 7.00 am. He came to his home and told him that on 27th December 2013 at about 9.00p.m., he heard that the deceased, who had befriended his sister Lencer, had come upon receiving a call from Lencer. He informed then that he wanted to resolve the issue of the relationship between Lencer and the deceased. Others in the cottage with him were Odira Anyanga and Alex. He stated the he only wanted to warn the deceased over the relationship with his sister and that his friends were there to help. He said that there was a disagreement and a commotion and as he was trying to stop the chaos in the dark, the people ran out, he chased them but was overpowered by the rest of the boys as he tried to stop them. He found out that Kevin had been cut and was bleeding. He tried to seek help but when he returned Kevin was dead. He then decided to call the chief with the information. After the discussion, PW 3 told him to calm down. Abon further told him that he had left a crowd at his home and that is why he came to see him.
8. PW 3 proceeded to Abon's homestead and found that the house had been burnt down. He also found an angry crowd of about 20 angry people carrying spears whom he tried to calm down. He proceeded where the deceased's body was in the shamba. He observed the deceased was lying on his back and his left hand tied with a shirt. He observed blood on the tobacco leaves where the body was. After a while police officers, who had been called by PW 5, arrived from Migori Police Station. He directed the police to where the deceased body was. The police officers took photographs of the body and removed the body from the scene.
9. PW 3 testified that he had left Abon behind and he asked the police to pick him up. Abon was re-

arrested and taken into custody. Between 28th and 30th December 2013, he started looking for Lencer in conjunction with his counterpart of South Kabura Sub-Location where he had received information she was. On 30th December 2013, he met with the Assistant Chief of South Kobura who handed over Lencer at Mirogi Center whereupon he took her to Migori Police Station. He further testified that Okoth was taken to Anjago Police Post by his father, Okoth Nyariaro, who called him and told him to take Okoth there as he did not want anything to happen.

10. Chief Inspector David Kemboi (PW 6) was at the material time based at Migori Police Station and the Investigating Officer. On 28th December 2013 at about 9.00a.m., he received a report of murder made by PW 3 to the effect that Abon had reported to him in the morning that the deceased person had been killed the previous night at about 11.00pm following a scuffle over Lencer. He proceeded to the scene with other officers. They found Abon at the Chief's Office at Komenya and re-arrested him. PW 3 directed them to a maize plantation, a distance from a homestead where they found the deceased's body. They were informed the quarrel took place at the homestead. They found a trail of blood to the scene and the deceased lying dead with a cut wound on the left elbow. They took photographs at the scene. Some houses had been burnt at the homestead. They removed the deceased's body and took it to Rapcom Hospital Mortuary.

11. Dr Jared Okoth Ndege (PW 1) conducted the post mortem on the deceased's body on 31st December 2013 after the body was identified by PW 5 and Okumbo Okanga. The significant findings were that the deceased had bruises on the left lower limb and a deep cut wound on the left arm on the cubital fossa, the elbow, with blood clots around the region. He certified that the cause of death was severe hemorrhage secondary to the deep cut on the left cubital fossa which severed the blood vessels on the arm. He opined that that injury was caused by a sharp object. The blood vessel on the arm was severed. PW 1 also examined the three accused to examine their mental status for purposes of the trial. He examined each of them and concluded that they were all fit to stand trial.

12. When the accused were put on their defence, they elected to make unsworn statements. The first accused, Okoth, stated that he was arrested by police officers who came to his home on 28th December 2013, arrested him and brought him to Migori where after he was charged with the offence of murder. He denied that he knew anything about the death of the deceased. Abon, the second accused, testified that on 28th December 2013, he had come from Muhuru when, upon reaching home, he saw smoke coming from this homestead and many people whom he did not know. He feared going home and decided to go and report to the chief who lived nearby that there was a fire at his home. The chief left him and proceeded to his homestead. He later came back in the company of policemen who took him to Migori Police Station whereafter he was charged with murder. He denied that he knew anything about the charges facing him. The third accused, Lencer, recalled that on 30th December 2013, she was at home in Gwasssi when some vigilantes she did not know came to her home and asked her to go with them to an unknown place. After they left, they met the chief who took her to Migori Police Station whereafter she was charged with murder. She denied knowledge of the charges facing her.

13. There are three ingredients of the offence of murder which the prosecution must establish in order to secure a conviction;

- a. Proof of the fact and the cause of death of the deceased.
- b. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the "actus reus" of the offence and
- c. Proof that the said unlawful act or omission was committed with malice aforethought- which constitutes the "mens rea" of the offence.

14. There is no dispute regarding the fact and cause of death. All the prosecution witnesses, PW 2, PW 3, PW 4, PW 5 and PW 6, who went to the scene of the incident and found the deceased's body in the nearby shamba confirmed that they saw the deceased had a cut wound injury on his

left arm. PW 5 identified the deceased's body before the autopsy was conducted by PW 1. The injury observed by the witnesses was consistent with the findings of PW 1. I therefore agree with the findings of PW 1 and I hold that the deceased died and that he died as a result of severe bleeding caused by a deep cut on the left elbow joint which severed the blood vessels.

15. The next issue is whether it is the deceased who cause the death of the deceased by an unlawful act or omission. The principal witness PW 2 narrated how Lencer, the deceased's girlfriend, lured him and the deceased to Abon's house where they were attacked on the night of 27th December 2014. Counsel for the accused attacked the testimony of PW 2 as lacking credibility and was without corroboration.

16. Admittedly, the circumstances surrounding the incident call for close scrutiny of the evidence to remove any possibility or error cause by identification in difficult circumstances. In this respect, I am alive to the directions by the Court of Appeal clearly stated in several cases such as **Wamunga v Republic [1989] KLR 424 at 426** where it stated:

[I]t is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

17. This case though was not one of identification of strangers but rather one of recognition of people well known to PW 2. The accused knew Lencer as the girlfriend of the deceased and Okoth and Abon as people who lived in the same village. At any rate, it was not the first time he was seeing them. I also find that the conditions existing in the Abon's house were favourable to positive identification. PW 2 stated how he entered the house and Lencer lit a paraffin tin lamp. He testified that the house was about 4 metres in diameter which means that the distance between him and all the assailants was close and the length of time they were together in that small room before the attack diminished the opportunity for mistaken identity.

18. Although there is no requirement that the credible testimony of PW 2 be corroborated, there is sufficient evidence to show that the three accused were in Abon's house on the material night. Abon reported to PW 3 that the deceased and PW 2 had come to his house after being called by Lencer. Further, PW 2 reported to PW 5 that the three accused were present when they were attacked. Besides, there was no evidence of a grudge or ill will by PW 2 against any of the accused. I therefore find and hold that the three accused were present in Abon's house when PW 2 and the deceased were attacked on the night of 27th December 2014.

19. The deceased died as a result of cut inflicted on him while he was being subjected to violence by the people who were in Abon's house. It is not clear who inflicted the blow and in order to find the accused guilty of murder, the prosecution has to prove that the accused and the others in the house 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.

20. In **Wanjiro 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.

21. Did the prosecution establish a common intention to kill or cause grievous harm to the deceased? The testimony of PW 2 points to a pre-meditated plan. Lencer called the deceased at 10.00pm to come to Abon's house. When PW 2 and the deceased entered the house it was dark. When they entered the door behind them was locked and when Lencer lit the paraffin lamp, Okoth, Abon and other assailants were waiting with weapons with which they used to beat PW 2 and the deceased who were defenceless. Why lock the door if the meeting was intended to be peaceful? This clearly points to a pre-meditated plan to lure the deceased to Abon's house and harm him.

22. In considering whether there was a common intention, I must also decide whether any of the accused dissociated or withdrew from the common enterprise. The Court of Appeal for East Africa dealt with the issue of dissociation or withdrawal from a common enterprise in **Michael Mukundi & Another v R NRB Crim. App. No. 529 & 721 of 1976 [1977]eKLR** where it quoted with approval the judgment of Sloan JA of the Court of Appeal of British Columbia in **R v Whitehouse (alias Savage) [1941] 1 WWR 112, 115** as follows;

After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it, What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

23. It is a question of fact whether a party has dissociated or withdrawn from the common enterprise. The court must examine all the evidence and determine whether the accused has divorced himself from the common enterprise. As regards Lencer, I find that she is the one who lured the deceased to the place where he was assaulted. There is no evidence that at time of the attack took place she did anything to withdraw herself from the attack. She obviously knew that there were armed men in a dark house waiting for her and the deceased. The fact that she was later seen by PW 4 nursing the deceased after the felonious act had been completed does not remove her from the common enterprise. Okoth was present in Abon's house and according to PW 2 and he was seen carrying a panga. He also did not dissociate himself from the attack.

24. The attack took place in Abon's house and according to PW 2, he is the one who started beating PW 2 and the accused. Although, he reported the matter to PW 3 the next morning and that he mentioned to PW 4 that what was happening in his house was a shame, I find that this is insufficient evidence of dissociation as he was present when the attack began in his house. If he only wanted a discussion with the deceased over his relationship with the Lencer, why would he permit the meeting to take place in his house in the middle of the night with his armed friends. His subsequent actions betrayed his guilt and remorse but did not amount to dissociation.

25. I therefore find and hold that the three accused acted in concert in causing the deceased to be lured to Abon's house, where they attacked him. The accused, in their defence said nothing of the events of that fateful night. They acted jointly to commit an unlawful act and it did not matter that it was not clear who inflicted the fatal blow on the deceased's left arm that led to his death.

26. Finally, I find that the prosecution proved malice aforethought. It is clear from the evidence outlined that the injury on the deceased was inflicted with such viciousness as to sever blood vessels leading to death. It is the kind of blow that was inflicted with, “*An intention to cause the death of or to do grievous harm to any person, whether the person is actually killed or not*” within the meaning of **section 206(a)** of the *Penal Code*.

27. Although the accused denied knowledge of the charges facing them, I find that the prosecution proved the case beyond reasonable doubt. I find **MARTIN OUMA OKOTH, JOSEPH NYARIARO OTIENO alias ABON and LENCER ANYANGO OKUMBO** guilty of murder contrary to **section 203** of the *Penal Code* and I convict each of them accordingly.

DATED and DELIVERED at MIGORI this 22nd day of October 2015

D.S. MAJANJA

JUDGE

Mr Odero instructed by Agure Odero and Company Advocates for the accused.

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