



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 29 OF 2014**  
**(FORMERLY KISII HCCR CASE NO. 24 OF 2012)**

**BETWEEN**

**REPUBLIC ....., PROSECUTOR**

**AND**

**BEN MUCHERA MWEBI ..... ACCUSED**

**JUDGMENT**

1. On 14<sup>th</sup> February 2012 this court was informed that on 11<sup>th</sup> February 2012, **BEN MUCHERA MWEBI** (“the accused”) had murdered **MORRIS OMONDI OTIEGO** (“the deceased”) at Kenguka Village in Ngege Sub-location, Migori County contrary to **section 203** as read with **section 204 of Penal Code (Chapter 63 of the Laws of Kenya)**.
2. Philip Omondi Achieng (PW 1) was at home in Migori on 11<sup>th</sup> February 2012 when he was called by the deceased’s brother, Joseph Ndiege (PW 4) at about 11.00am. PW 4 informed him that the deceased had been abducted somewhere in Ogembo, Kisii. PW 4 requested him to contact the CID at Migori to report the incident. PW 1 knew the deceased as an accountant at Migori District Hospital and he had stayed with him for a while when he started working there. PW 1 proceeded to Migori Police Station at about 1.00pm. As he did not find anyone, he left and returned after a while. When he went back to the reporting desk he saw the accused ahead of him on the line giving a statement that bore a striking similarity to what he was about to report. The accused was stating that he met a person in his house with his wife and the neighbours wanted to beat the person. He went back to the CID office and informed the officer present that what he wanted to report was already being reported by someone at the report office.
3. PW 1 further testified that the Commanding Officer (“OCS”) and some officers immediately left with a vehicle while he remained at the Police Station. Before the OCS returned, a taxi came to the police station at about 3.00pm. The deceased was seated at the back left side. The other occupants were said to be neighbours of the accused. He could not recall the name of the occupants but he knew one of the ladies as she used to sell oranges next to Migori District Hospital where the deceased was working. He got into the vehicle and they proceeded to the hospital.
4. PW 1 further testified that the deceased was admitted to Migori District Hospital. Due to his deteriorating condition, a decision was made to transfer him to Aga Khan Hospital Kisumu for further treatment at about 10.00pm. PW 1 did not accompany the deceased to Kisumu. He was informed by PW 4 in the morning that the deceased had died. PW 1 recalled that he attended the

- post mortem. In cross-examination, PW 1 stated that before he could make a report, the man, whom he identified as the accused, reported that his house was located at Paris Centre and that there was a man who they had beaten after finding him in the house with his wife.
5. The deceased's sister in law, Ivonne Adhiambo Olendi (PW 2) testified that on 11<sup>th</sup> February 2012 she was at home in Macalder. At about 11.00am, her husband Paul Ochieng Otieno, came home and asked her whether she had spoken to the deceased. He informed her that the deceased had been involved in an accident and that she should try and call him on his mobile phone. She tried calling the deceased but only got through at 2.00pm. When the deceased picked the call, she asked him what was happening. There was silence but a male voice in the background told him to say that he wanted Kshs. 10,000/= to be taken to hospital. She told the deceased to stop joking as she did not understand what he was saying but he did not respond. She heard a lady speaking in Swahili in the background saying that they should not speak in *Dholuo* or "*Kijathe*." The line was cut off before she could respond. She tried to call once again without success. When her husband came home they agreed that he should report the matter to the police. He went to Macalder Police Station but was told to go to Migori. Her husband called her at about 5.00pm to inform her that the deceased had been taken to Hospital. She was later informed that the deceased had passed away.
  6. A cleaner at Migori Level 4 Hospital, Susan Aoko Ongei (PW 3), recalled that on 11<sup>th</sup> February 2012 at about 2.00pm she was walking to town. When she reached Paris Centre, she found about 7 to 9 people gathered surrounding a young man seated on the ground slumped at the gate of Paris Centre. She immediately recognised him as an accountant who was working at the hospital. When she lifted his head, he fell by the side. She immediately screamed causing more people to come. She tried to call the Hospital Administrator and the Nursing Officer for assistance but they were not available so she called the Nurse on duty to request for an ambulance. As the ambulance had not arrived by 4.00pm, she decided to hire a taxi. When the taxi arrived, she put the deceased into the taxi. Two ladies, who were present, also entered the taxi. They proceeded with the taxi to the Hospital but they first dropped the two ladies at Migori Police Station. PW 3 stayed at the hospital at about 7.00pm. When she returned the next morning she was informed that the person had died.
  7. The deceased's brother, Joseph Ndiege Otiego (PW 4), testified that on 11<sup>th</sup> February 2012 he was in Nyakach and at about 10.00am, he called the deceased but he was not picking the call. A few minutes later he was called by PW 2 who told him that she had been called by another number by someone who identified himself as a watchman at Ogembo Hospital. PW 2 gave him the number of the person who called her. His attempts to reach the number were unsuccessful. He therefore called PW 1 and asked him to contact the police to track the calls. PW 1 later called to inform him that the deceased had been taken to hospital. PW 4 arrived at Migori at about 7.00pm to prepare for the deceased to be transferred to Aga Khan Hospital in Kisumu. He found the deceased lying on his bed on a drip. He was bleeding from the nose and mouth and he had several injuries on the body including a wound on the leg. He accompanied the deceased and a doctor in the Ambulance but the deceased was pronounced dead upon arrival at Aga Khan Kisumu at about 1.00pm. They came back with the body to Migori.
  8. Moses Ayodo Otieno (PW 5) testified that he was a Primary School teacher but he was also running a video show business at Paris Centre. He recalled that on 11<sup>th</sup> February 2012 at about midday he left home to tend to his video show business. Since it was a very hot day he decided to sit outside. As he was seated, he saw some ladies, who were tenants, gathered at the entrance. He described Paris Centre as a building where the front is a bar and the back has residential rooms. He operated one of the rooms as a video show shop. Out of 8 rooms, one was rented by the accused. The ladies stated that they heard some noise at night from a room where the door was closed. He remained there for the two hours. While he was there he saw the accused coming out of his house with another person. He recalled that the accused went with the person to the front side at the road. He described the accused as looking serious and disturbed.
  9. PW 5 testified that he went to his room to sleep at about 2.00pm as he felt dizzy. When he woke up at about 4.00pm there was no one in the show room. He went outside and found a huge crowd

- of about 100 people. Some people had come to the corridor. He went through the corridor and found a man lying on the corridor with the accused's wife and another lady seated whom she did not know. The man was lying on his chest with his face facing to the right. The man looked unconscious while the accused's wife looked composed. The other woman looked relaxed. Before he could find out who the man was PW 3, who was his aunt, came and identified the man as her workmate. He stated that PW 3 called a taxi to take the man to hospital while he returned to his business.
10. PW 5 confirmed that he knew the accused as he had been a tenant at the premises for about 3 months. The accused had a wife and a child but he could not recall her name. He stated that she was also running a business there. He testified that the person lying outside was a stranger to him. In cross-examination, PW 5 recalled that in his statement he recorded that on 10<sup>th</sup> February at about 9.30pm, he had seen the stranger walking from the toilet while the accused was on night duty. They passed each other as he went to the latrine.
  11. Dr Peter Asava (PW 6) conducted the postmortem on the body of the deceased on 14<sup>th</sup> February 2012 at Migori District Hospital Mortuary. He noted that the deceased had several external injuries as follows; a posterior neck abrasion 3cm long at the cervical vertebra level 4 and 5; there was a mid-line back abrasion at the level of thoracic vertebra 2; left shoulder bruises which measured 4 x 2cm in size. The deceased also had a 4cm long scrotal cut wound which had been stitched with nylon and a 10cm cut wound 10cm right lower limb above the right ankle joint. On internal examination, PW 6 noted that the deceased had a fracture on the left 4<sup>th</sup> rib fracture, fluid in the chest cavity and bleeding into the stomach. There was a 4cm long right frontal hairline fracture and the brain was markedly swollen. Part of the brain matter was pushed into the spinal canal. There was a haematoma measuring 10 x 12 cm in the temporal area above the ear. PW 6 concluded that the cause of death was head and brain injury due to assault. In cross-examination, PW 6 stated that the injuries could have been occasioned by different weapons and that the cut wounds indicated that the injuries were from sharp objects and that the lacerations and bruises indicated blunt force trauma.
  12. According to the investigating officer, Inspector David Mutegi (PW 7), the accused brought a report to Migori Police Station that a person unknown to him was being subjected to mob justice on 11<sup>th</sup> February 2012 at about 3.30pm. The accused stated that the person subjected to mob justice was found with his wife in the house and the mob was beating him.
  13. Together with the Commanding Officer and other officers, PW 7 proceeded to the scene at Paris Centre. While they were about half a kilometer from the station, they met a taxi being driven at a very high speed going towards the Police Station. The taxi was being followed by motorbike riders who were signaling to them to suggest that the victim was being taken to hospital. They did not proceed to Paris Centre, but turned back to follow the taxi to the Hospital. The taxi dropped two women at the Police Station. They decided to get into the police station then go to the hospital. At the station, they discovered the women were evacuated by the woman who hired the taxi to take the victims to the hospital. The officers at the report office confirmed that the victim had been taken to Migori District Hospital. They proceeded to the hospital and confirmed that the victim had been admitted in a critical condition. They left him undergoing treatment.
  14. When PW 7 returned to the station, he found rowdy people at the station gate who wanted to assault the accused. Because of the security situation, they decided to keep the accused and his wife in the station. The other lady was the accused's sister in law. PW 7 commenced investigations. He released the accused's sister in law as she came to the scene later while the accused and his wife were at the scene throughout.
  15. PW 7 visited the scene after the post mortem to establish what happened. He testified that it was not possible for police to go to the scene on the material day as the crowd was very rowdy. He established the accused found the deceased with his wife at about 5.00am. The deceased was subjected to beating in the accused's house until 3.00pm. PW 7 further testified that there was

communication between the accused and other people but when he tried to follow up the numbers which he had collected, he found that they were inoperative and he could not trace the subscribers. PW 7 also prepared a sketch plan which showed the place the deceased was found.

16. When the accused was placed on his defence he elected to make an unsworn statement in which he denied committing the offence. He stated that he was a watchman in Migori Town. He was at work on 11<sup>th</sup> February 2012 and since he was not feeling well, he left work and reached home at about 7.50am. When his wife opened the door for him, she was dressed in a *leso* with nothing underneath although she normally wore a nightdress. He noticed that she was scared. He also noticed the curtain that separated their single room was moving. When he opened it and he found a naked man trying to put on his trousers. The man got a knife and threatened him with it when the accused questioned him. Since he had a whistle from work, he immediately raised alarm.
17. Four people responded to the alarm and came to his room. The four men asked the other man to explain what he was doing there. The man denied that he was a thief. He said he had come to the house at about 9.00pm. The accused testified that people kept coming in and out of the house. The four men took the man aside and after a while they told him to go and report to the police while they remained behind with the man. The accused then proceeded to make a report to the police station. He explained that a man had been found in his house and was being guarded and that the police should come and arrest him. As there was no vehicle available at the police station, he waited from 12.30pm until about 3.00pm when the Commanding Officer and two officers came. As they left to go to his home, a taxi which was coming towards them signaled to them to stop. The accused stated that they were informed that since the police took too long to come, people started beating the man he had left behind. The man was being taken to Hospital in the taxi. They turned around and followed the taxi to the hospital. The accused came back with the officers to the police station.
18. Counsel for the accused submitted that the prosecution had not proved that the accused murdered the deceased. He argued that the evidence particularly that of PW 7 pointed to the fact that the injuries inflicted by the accused were consistent with assault by a mob. He further submitted that the presence of a stranger was confirmed by PW 5 who stated that on the night of 10<sup>th</sup> February 2010 at about 9.30pm he saw a stranger in the accused room and that when the accused returned he was provoked to raise alarm. He also noted that he reported the incident to the police station as early as midday hence he was not at the scene when the deceased was removed.
19. The fact and cause of death of deceased is not in dispute. The deceased died as a result of multiple injuries inflicted on his body by sharp and blunt weapons as confirmed by the autopsy conducted by PW 6.
20. The key issue in this case is whether the accused killed the deceased or whether the deceased was attacked by a mob. The prosecution case on this issue was largely circumstantial. It has been held in several cases that in order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify an inference of guilt on such evidence the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts (***R v Kipkering Arap Koske* 16 EACA 135** and ***Kariuki Karanja v R* [1986] KLR 190**).
21. The emerging facts of the case are the accused found the deceased in his house after coming from work. PW 5 confirmed that he had seen the deceased at about 9.30pm as he was going to relieve himself. The accused admitted as much in his unsworn statement that he came home and found his wife and the deceased in a compromising position. The accused's report to the police is corroborated by PW 1 who heard him make the report thus placing the deceased in the accused's house. I therefore find and hold that the deceased was in the accused house from the night of 10<sup>th</sup> February 2012 from about 9.00 pm upto the next morning. In such circumstances, the accused is

called upon to provide a reasonable explanation as what could have occurred in his house.

22. The law is clear that the burden of proof always rests on the prosecution to prove the case against the accused beyond any reasonable doubt. The accused does not have a duty or burden to establish his own innocence but there are instances when the law places a duty on the accused to explain certain facts particularly those peculiarly within his own knowledge. **Section 111(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)** which casts an evidential burden on the accused provides as follows:-

***111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***

***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***

***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.***

23. Where the accused fails to offer any reasonable explanation as to how the deceased came to suffer multiple injuries in his room, the court is entitled to presume certain facts under **section 119** of the **Evidence Act** which provides:-

***The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.***

24. The prosecution case was that the accused assaulted the deceased and left to die at the entrance of Paris Centre. Whether the deceased was assaulted by the four unknown people who responded to the accused's alarm is discounted by several facts presented by the prosecution.

25. PW 3 found the deceased slumped at the entrance of Paris Centre at about 2.00pm. At that point there were less than 10 people who were just watching the deceased. The deceased was not being subjected to assault by those people and there was no indication that there had been a mob earlier that had assaulted him. PW 5 also testified that when he woke up at about 4.00pm, he found the deceased lying down surrounded by a group of about 100 people. He did not allude to the deceased being subjected to any form of assault by the people who had gathered there or by any mob. It is that point that PW 3 arrived by taxi to pick the deceased and the two women.

26. By the time the PW 3 had arrived at the entrance of Paris and PW 5 had woken up, the accused had already left for the police station to report that there was a man who had been found in his house and was being guarded by the four men who had come to his room earlier. The accused's statement was untrue in light of the testimony of PW 1, PW 3 and PW 5. PW 7 testified that the accused reported that the deceased was being assaulted by some people.

27. The time which the accused made the report is crucial as it establishes whether the deceased was beaten by a mob as posited by the accused. I find the time the accused suggested that he was at the police station is inconsistent with the evidence. First, PW 1 testified that he was at the police station at 1.00pm when he found the report office closed but when he returned later he found the accused reporting the same incident he was about to report. PW 5 stated that he saw the accused with the deceased going towards the road which must have been before he went to rest at 2.00pm.

PW 7 confirmed that the accused made his report at the police station at about 3.20pm. In addition, there is the testimony of PW 2 who received a call from the deceased at about 2.00pm which corroborates the fact that at the material time, the deceased could not have been outside the gate of Paris Centre as he was not in a position to speak let alone make a phone call. In light of the aforesaid evidence, I reject the contention by the accused that he was at the police station at about 12.30 pm and that he had left the deceased being beaten.

28. Although the time stated by the witnesses is not precise for the reason that none of them was keeping or recording the exact time, I find that the sequence of events put together is consistent. The evidence points to the fact that the accused found the deceased in a compromising position with his wife, assaulted continuously until the afternoon. In the course of the assault, the deceased called his relatives. The accused then carried him, in an already weakened state, to the entrance of the Paris Center and left him there. He was seen by PW 5 taking the deceased to the place where he was found by PW 3. In order to cover his tracks, he went to report to the police that the deceased was being subjected to being beaten when nothing of the sort happened. I therefore reject his statement that he raised alarm when he found the accused in his house and was threatened with a knife. Had the accused raised alarm as he stated, I have no doubt that given the nature of Paris Center, its residents, the fact that it was near the road and the time of the morning, more people would have responded.
29. Counsel for the accused pointed to the fact that two key witnesses were not called. The first witness is the accused's wife who is a competent witness but not compellable hence I would not draw any adverse inference from the lack of her testimony. The second witness was the accused's sister who, according to PW 7, came to the scene much later hence her testimony would neither add nor subtract from the totality of the evidence I have outlined.
30. It is also tempting to discredit the prosecution evidence because the phonecalls made by the deceased to his relatives particularly PW 2 were not called as witnesses or traced. PW 7 stated that he could not trace the subscribers. What is important though, is the fact that the calls by the deceased triggered some action by PW 2 and PW 4. Without such calls PW 2 would not have gone to report to the Police Station. The calls themselves point to the fact that the deceased was alive when he was still in the accused's room when he made the calls. I therefore find that the failure to call and locate the subscribers of those calls does not weaken the prosecution case. On the whole therefore, I find that it is the accused who severely assaulted the deceased and caused his death.
31. I accept that the accused could have been provoked to assault the deceased when he found him in his house in a state of undress. But in this case, the accused specifically denied that he assaulted the deceased. He only raised alarm. Even if he had assaulted the deceased, such an assault would not have satisfied the provisions of **section 208** of the *Penal Code* which provides that an unlawful killing which would otherwise constitute murder would be reduced to manslaughter if the act is done in the heat of the passion before time to cool caused by sudden provocation. This is because of the nature of multiple injuries inflicted on the deceased which were inflicted from early morning to at least mid-afternoon implies that the killing morphed from an act borne of provocation to an intentional act. Further the fact that the deceased did not report the incident immediately is inconsistent with innocence.
32. The injuries inflicted on the deceased were multiple, vicious and aimed at parts of the body where the intention was to cause grievous harm or kill the deceased. These are the kind of injuries inflicted with, "*[a]n 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*. I therefore find that the prosecution proved that the injury was inflicted with malice aforethought.
33. Having considered all the evidence, I find the accused **BEN MUCHERA MWEBI** guilty of the murder of **MORRIS OMONDI OTIEGO** and I convict him.

**DATED and DELIVERED at HOMA BAY this 16<sup>th</sup> day of November 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Mogire, Advocate instructed by the accused.

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