



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Criminal Case 19 of 2004**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**1. SHEM OMONDI OWUOR**

**2. JOSHUA OCHIENG**

**3. PETER OGWENO AWOUR**

**4. EDWARD ONYANGO AWOUR..... ACCUSED**

**JUDGMENT**

The accused were jointly charged with murder contrary to **section 203** as read with **204** of the **Penal Code**. The particulars of the offence were that on the 23<sup>rd</sup> day of January 2004 at Rongo sub-location, Wang' Chieng Location Rachuonyo district, the accused jointly with others not before court they murdered **Tom Owuor Muga**, hereinafter referred to as "**the deceased**". In the course of the trial all the accused except Joshua Ochieng Awour (3<sup>rd</sup> Accused) died in prison custody due to various illnesses. The prosecution case was fully heard by the late Hon. Justice Kaburu Bauni. The defence counsel, Mr. Omwega as well as Mr. Kemo, Principal State Counsel, agreed by consent that pursuant to the provisions of **section 200(3)** as read with **section 201(2)** of the **Criminal Procedure Code** that I proceed to hear the defence case and deliver the judgment. The prosecution called eight witnesses. The prosecution case can be summarized as hereunder:

Margaret Auma Owuor, PW1, was the widow of the deceased. She testified that on 23<sup>rd</sup> January 2004 she was informed by a boy known as Morris Okoth Muga that the deceased was being stoned by some people. She ran towards the scene but could not get there because the accused were throwing stones towards her direction. The witness went and reported to a nearby police station. When she went to the scene with police officers her husband was already dead. PW1 saw the first and the second accused seated next to the deceased and members of the public were standing afar. The first and the second accused were armed with pangas and rungs and the police proceeded to arrest them.

Risper Adera, PW4, testified that on the material day at about 6.30 a.m. she was in her house when she heard screams from a nearby road. She went out to check what was happening. She saw a group of people beating someone who was lying down. The people were about twenty footsteps from her house. She identified them as the accused herein. She asked them whom they were beating but there was no response. Later on the third accused told PW4 that they had killed the person. The third accused

proceeded to blow a whistle to attract people to the scene. When people started gathering the attackers began to throw stones at them and the onlookers also threw stones at the four accused in return. When the police went to the scene at about 9.00 a.m. PW4 identified the victim as the deceased herein. PW4 saw blood oozing out of the mouth of the deceased and the eyes. The head was also bleeding.

**Nelson Otieno Muga, PW5**, was also notified by a young girl known as **Florence Akinyi** that someone was being beaten in the neighbourhood. When he moved towards the scene where the person was being beaten he saw and recognized the accused persons who were his neighbours. The accused started running towards him. They were armed with runigus and pangas. They were also throwing stones at anyone who was approaching the scene. PW5 decided to rush to Othoro police station to make a report. He met there with other people who had also gone to report the same incident. The evidence of PW4 and 5 was corroborated by that of **Yoweri Odhiambo Owuor, PW6**, and **Jim Owuor, PW7**, sons of the deceased. PW6 did not see the accused assaulting the deceased but when he attempted to go to the scene where his father was lying the accused pelted him with stones.

**Inspector Henry Nyakeri, PW2**, was one of the police officers who went to the scene of crime on the material day. He found the deceased lying dead and the four accused had been arrested by administration police officers. The administration police officers had recovered three pangas and runigus from the accused.

**Dr. Peter Ogola, PW8**, performed a postmortem on the body of the deceased in the presence of police constable **Michael Ochola, PW3**. The body was identified to him by **Nelson Otieno Muga (PW5)** and **Joseph Owuor Bolo**.

The doctor found a deep cut above the right eye of the deceased and the bridge of the nose was depressed. There was blood around the nose and the mouth. The back of the head was deformed. There were two cuts on the upper part of the head. Internally there was blood in the left chest cavity and a depressed fracture at the back of the head. There was also blood in the skull. The doctor formed an opinion that the deceased died as a result of cardiopulmonary arrest secondary to multiple injuries.

The third accused gave a sworn statement of defence. He stated that on the material day at about 9.30 a.m he was riding his bicycle from Sondu market towards his home. Just before he arrived he met some police officers who had arrested his co-accused. He was also arrested and taken to Othoro police patrol Base. After about one hour they were escorted to Oyugis police station where they were held for about three months before they were taken to court and charged with murder. The accused denied having murdered the deceased and said that he was in good terms with the deceased.

Mr. Omwega for the accused submitted that the prosecution did not prove to the required standard the charge against the accused. He pointed out that the postmortem report that was produced in court was in respect of Tom Benard Owuor and not Tom Owuor Muga, the deceased in this case. Consequently, it had not been proved that Tom Owuor Muga died.

Counsel further submitted that the accused were arrested on 23<sup>rd</sup> January 2004 and kept in police custody up to 26<sup>th</sup> May 2004. No explanation was given by the prosecution for the delay in arraigning the accused in court. The third accused's constitutional right as guaranteed by **section 72(3) (b)** of the **Constitution** was breached, Mr. Omwega submitted.

The defence counsel further submitted that the investigating officer conducted very shoddy investigations in that he neither drew a sketch of the scene nor took photographs thereat. Evidence of crucial witnesses like the administration police officers who arrested the accused was also not recorded. He urged the court to acquit the third accused of the charge of murder.

**Mr Kemo, Principal State Counsel**, submitted that the prosecution had proved its case beyond reasonable doubt. With regard to the Postmortem report, Mr. Kemo submitted that PW3 testified that he was present when the postmortem was conducted and that the body had been identified as that of Tom Owuor Muga by relatives of the deceased. In his view, it was possible that the deceased had a second

baptismal name, Benard. There was no dispute that the postmortem was conducted on the body of the deceased herein, he stated.

Mr. Kemo added that the two administration police officers recorded their statements but it was not deemed necessary to call them since the evidence of PW2 was sufficient. Failure to produce the pangas and the rungus that were said to have been used by the accused in killing the deceased was not fatal to the prosecution case as several witnesses had testified that the accused were properly seen armed with the said weapons, Mr. Kemo contended. He urged the court to convict the third accused accordingly.

From the evidence on record, it is not in dispute that the accused were seen by several witnesses carrying rungus and pangas at the scene of the crime. The accused were stoning someone who was later identified as the deceased. PW4 was told by the accused that they had killed the deceased. PW4 was just about twenty metres away from the accused and she clearly saw and recognized them as they were her neighbours. It is the third accused who talked to PW4 and said that they had killed the deceased. The accused were hostile to members of the public who wanted to go to the scene.

Several people rushed to the nearby police post and administration police camp and reported the incident. The accused were arrested almost immediately after the death of the deceased. There was sufficient direct and circumstantial evidence which pointed to the accused as the only people who could have caused the death of the deceased.

Regarding the post mortem report, it is not in dispute that the same was in the name of Tom Benard Awuor and not Tom Awuor Muga. However, I believe that this was a simple issue of mix up of names. The deceased's body was clearly identified by his family members before PW8 conducted the post mortem. Apart from that, there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries and this is one them, see **NDUNGU V REPUBLIC** [1985] KLR 487.

All in all, I am satisfied that there is sufficient evidence to warrant the third accused's conviction. However, the prosecution did not explain why it breached the accused's constitutional right by holding him in unlawful custody for nearly four months. **Section 72(3) (b)** of the **Constitution** requires that a person who is charged with an offence punishable by death be held for a maximum of fourteen days before he is arraigned in court. Where that is not done, the burden of proving that the accused was taken to court as soon as was reasonably practicable lies with whoever alleges that the provision of the subsection were complied with.

In **ALBANUS MWASIA MUTUA V REPUBLIC**, Criminal Appeal No.120 of 2004, the appellant had been convicted on a charge of robbery with violence and sentenced to death.

During the hearing of his appeal it was established that the prosecution had not complied with the aforesaid provisions of the Constitution. In acquitting him, the Court of Appeal held that:

***“The jurisprudence which emerges from the cases we have cited in the judgment appears to be that***

***an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the Constitution also amounted to a violation of his rights under section 77(1) of the Constitution which guarantees to him a fair hearing within a reasonable time.”***

Likewise, I find that the accused's constitutional rights were deliberately violated. Consequently, I acquit the third accused of the charge of murder.

He is ordered set at liberty unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at KISII this 31<sup>st</sup> day of October, 2008.**

**D. MUSINGA**

JUDGE

Delivered in the open court in the presence of:

1. Third accused
2. Mr. Sagwe HB for Mr. Omwega for the third accused.
3. Mr. Kemo, Principal State Counsel for the Republic

**D. MUSINGA**

JUDGE