



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

**Criminal Case 32 of 2004**

**REPUBLIC..... APPLICANT**

**VERSUS**

**PETER ARINGO OMONDI..... ACCUSED**

**JUDGMENT**

The Accused Peter Aringo Omondi faces charge of offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, in that it is alleged that on 14th December, 2003 at Kasabuni Estate within Nairobi area jointly with others not before the court he murdered Daniel Okoth Musemba (referred to as ‘the deceased’ in this judgment)

It is placed on record by Prosecution witness that the deceased, with Joseph Otieno Maguda (PW.1) Odhiambo Stephen Owino (PW.2), Geoffrey Onyango (PW.4) and others, was having a party at the house of Odhiambo (PW.2) at Karia Dudu. They had soda and safari cane whisky Mari cane (local brew) up to evening and then on their way out also entered a bar called Rex Inn. According to PW.1, they were at PW.2’s house up to 6.30 p.m., but PW.1 puts it around 3.00 p.m., while PW.4 mentions at around 4.00 p.m.

I shall put in detail their respective evidence after they left the house of PW.2 as it is most relevant to this case.

PW.1 stated that they entered the said Bar around 6.30 p.m. and as there arose a disagreement between Odero (one of the friends with them) and another identified as Vincent they all left the Bar around 6.45 p.m. That means they did not stay long in the Bar. When he was outside, the Accused held his hand and a fight ensued between them. The Accused however, ran away when he saw his other friends coming behind him. After 10 minutes the Accused resurfaced again with a panga but was overpowered by them. They continued walking back home to Ngomongo. After walking a short distance a crowd of about 20 people led by the Accused emerged running after them shouting ‘thieves, thieves!’ Accused had a panga and others had rungas and pangas. On seeing the crowd they all disbursed in different directions, but he saw the deceased entering a church along the way to Glue cola. Afterwards he was informed that one of them had been killed. He went to the scene at about 7.10 p.m. He described injuries on the deceased viz;

**“He was stabbed by a knife on the side of the neck.**

**He had an injury on his head. I saw blood around.”**

He confirmed that weapon was not found on the scene.

I may pause here and state that although he had stated that he did not know the Accused and saw him for the first time when he held his hand around 6.45 p.m., he was not called to attend on Identification parade but identified the Accused from the dock. He did not testify also that he informed the police either at the scene or when recording his statement that he was able to identify the Accused. It is on record that he had also been drinking since 10.00 a.m.

I can also place here that Dr. Wasike (PW.3) a Pathologist who performed autopsy on the deceased did not mention any stab wound around the neck of the deceased. What she had observed were bruises on the scalp. According to her opinion, cause of death was head injury following blunt trauma which she confirmed could result due to a fall. Sgt. John Kamau (PW.6) told that the deceased has serious injuries behind his ears. Thus the descriptions from witnesses vary.

This witness did not testify that when he saw the deceased going towards the church he also saw the Accused either himself or with others following him. In any event the Accused is said to have been wielding a panga and the cause of death does not mention any sharp object. Moreover, I do not have any evidence of any involvement of the Accused with the deceased before and during the chase from the crowd by this witness or by any other witnesses.

PW.2 who was the host of the party testified that he escorted his friends out of his house at around 3.00 p.m. when they became noisy. They then entered the Bar and stayed there till about 5.30 p.m. In the bar Odera and Vincent had a fight. After the same was settled they decided to go home. They had hardly walked for about 10 meters, and were told that one of them was being beaten. On looking behind he saw Mai (not identified) and other person were about to fight, but seeing them the other person ran away. On the way he stopped to talk to a friend and after a while he heard his friends shout '**he has come back with a panga**'. He saw three persons with pangas and decided to walk the opposite direction and reached his home.

After thirty minutes he decided to walk back to the estate of his friends and learnt that the deceased had died. That was about 7.00 to 7.30 p.m.

This witness has specifically stated, and I quote:

***"I did not see the Accused at Rex Inn or anywhere that day."***

This would seal the fate of the Prosecution but I shall deal with the evidence in whole.

PW.4 stated that they (including the deceased) went to the house of PW.2 in the morning of the material day 'to make merry!' He stated that they left this house at about 4.00 p.m. and entered another Bar. The deceased had too much to drink but he stayed and danced at the Bar. Then they left the bar at about 6.30 p.m. and after walking a short distance of about 30 feet, he heard that someone from them was being beaten. It was PW.1. He also knew the Accused as Aringo. They separated them. This witness did not state that the Accused ran away on seeing them. He went on his way thereafter but after some time he saw about five people coming with pangas and PW.1 told them that 'everyone is now on his own'. He went to the River side and was not followed.

He placed the Accused amongst group of five persons. PW.5 George Odhiambo a brother to the deceased received information on 16th December 2004 that the killer of his brother was traveling from a country bus to escape. He went there and not finding the Accused, boarded Dolphin Bus to go home. While in the Bus he was told by its conductor that one Oliech (I do not know who he was) had informed him 'that the killer of the deceased was in the same bus. The Bus was taken to Kabete Police Station and the Accused was arrested. His evidence in addition to being haphazard did not add any value. PW.6 Sgt. Kamau also testified that he had received a report that someone was mobbed by members of public. It is clear from the above evidence, apart from being contradictory in material aspect that the prosecution case rests on circumstantial evidence. The Accused against this evidence stated in his sworn testimony that he worked as a conductor on Route 25 on the material day at about 8.00 p.m. While he was at his home in Kasabuni he heard commotion and people saying '**Aringo has killed a person.**'

When he came out people saw him and started beating him. He was treated at a clinic and on 15th December 2003 was sent home, for some errands. At 8.30 p.m. while the vehicle was nearing Kabete Police Station the conductor asked the driver to take the vehicle to the Police Station and there he was arrested. He insisted in cross-examination that he was arrested on 15th December, 2003 and not on 16th December, 2003 as PW.5 had testified. No other evidence is before me to clarify this discrepancy.

Without reiterating what I have observed hereinbefore, I find that the Prosecution case has left many yawning gaps which are far from having been filled. To say the least the Accused has neither been identified properly nor has he been placed at the scene. The injuries found on the body of the deceased are inconsistent with the weapon the Accused was claimed to have been last seen with.

In the premises, I find that the Prosecution has failed to prove its case beyond reasonable doubt. I enter finding of not guilty in his favour and acquit him of the charge of murder as leveled against him.

The Assessors were of the similar opinion.

He be released forthwith unless held otherwise as per law.

Dated and signed at Nairobi this 20th day of December, 2005.

**K.H. RAWAL**

**JUDGE**

**20.12.05**