



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
HIGH COURT CRIMINAL CASE NO 7 OF 2014

REPUBLIC

VERSUS

MARK ONGORO OKONGO.....1ST ACCUSED

ALPHACSAR NGUKA OCHIENG.....2ND ACCUSED

JUDGMENT

1. **MARK ONGORO OKONGO** (1ST accused) and **ALPHACSAR NGUKA OCHIENG** (2nd accused) are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge state that on 13th January 2014 at **NYAMONYE** village, **KARADING** sub-location in **RIANA** division of **NDHIWA** district within **HOMA BAY** county they murdered **SWINNERTON OTIENO OYUGI**. The 1st accused was represented by **MR NYAUKE** while **MR OSORO** appeared for the 2nd accused-both denied the charge. **MISS ONGETI** appeared for the State. The matter was heard to completion by **MAJANJA J**, who was transferred to Kisumu before he could write the judgment and I only took over the matter for purposes of writing judgment.

2. Following an incident on the night of 12th January where three thatched houses belonging to **PETER ONGORO, JACKSON ODEDO AND** another were set on fire in **NYAMONYE** village, the area assistant chief scheduled a baraza for 13th January 2014 at 10.30 am under a tree behind **TERESA AJWANG OYUGI'S (PW1)** home. So at the appointed time villagers begun to gather to wait for the chief to convene the meeting. Among those present were **TERESA AJAWNG OYUGI, MAUREEN AKOTH ONYANGO and SWINNERTON OTIENO OYUGI** (the deceased herein).

3. However another group comprising young men from the area were also gathering across the road to hold a parallel meeting. It was PW1's evidence that his parallel group comprised **BERNARD OGOLA AGENDI, MARK ONGORO OKONGO**. By half past midday the assistant chief had not arrived and the parallel group led by **PHILLIP OCHIENG** advanced towards the official group which was waiting for the assistant chief.

4. Suddenly **PHILLIP** grabbed **SWINNERTON** by the collar and the latter stood up. **PHILLIP OCHIENG** asked **SWINNERTON** why he had burnt down his house. Before **SWINNERTON** could answer, **PHILLIP** hit him on the neck and head. **PHILLIP** then pushed him, causing him to fall onto the ground. **MARK ONGORO** held **SWINNERTON** and tied his hands and legs using a rope. **MARK ONGORO** and **BERNARD OGOLA** each picked a piece of wood which they used to hit **SWINNERTON** on the back and neck.

5. **PW1** shouted "Why are you killing my son like the door. What is it that he has done?" **MARK**

ONGORO responded “What is that woman saying bring her so that we can kill her”. It was then that **ALPHAXAD NGUKA** appeared from the back just behind PW1 saying “Where is she? PW1 decided to run away, and as she was fleeing the 2nd accused “Let me get her so I can have sexual intercourse with her”. The 1st accused said “Bring her so we can kill her or f*** her” By this time **SWINNERTON** was lying down and all the people who had gathered at the venue had fled. She outpaced the 2nd accused who was chasing her, got inside her house and locked the door.

6. PW1 could hear some noise outside, so after about 8 minutes, she decided to go back to the scene and see what had happened. She met **MAUREEN AKOTH** on the way as she approached the scene, at about 4 metres away, she saw the people who had attacked **SWINNERTON** covering his body using twigs then they all fled off. She found **PETER ONGORO** at the scene and noted that the piece of wood which had been used to assault her son had been left behind. The deceased’s head was swollen and was lying with the head facing down-he had vomited blood and badly beaten on the back. Police then arrived and collected the deceased’s body as well as the piece of wood which PW1 identified in court as the one used by **BERNARD OGOLA** to assault the deceased.

7. PW1 identified the two accused as being among the people who beat up the deceased to death, saying they were her fellow villagers and she had known them since their childhood. PW1 later identified the deceased’s body to the Dr for postmortem.

8. On cross examination, PW1 clarified that the three people she saw beating her son included the first accused BUT the second accused is the one who chased her after her from the scene.

9. PETER ONGORO OYUGI (PW2) is a brother to the deceased and he informed the court that on the night when his house was set on fire, the deceased was one of the people helping to put out the fire. He confirmed that the area chief had called for a meeting which was to start at 10.00am although he did not know the agenda. He confirmed that a separate group of villagers comprising **OYUGI MIREGE, TOM NDEDE, PHILLIP OCHIENG, ONGORO OKONGO**, were also having a meeting as he was sent away from the parallel meeting. PW2 did not attend the meetings but at about noon while at his home, he heard his mother’s voice shouting “A human being should not be killed like a dog as **OGOLA** and **OCHIENG** are killing him.

10. PW2 went to the scene and found the deceased lying down and there was a lot of blood on the ground. He also saw his mother, his sister **MAUREEN AKOTH, ONGORO, NGIKA, OGOLA** at the scene, but **OGOLA** left shortly. It was PW2’s testimony that the 2nd accused whom he named as **ALPHAXAD** was chasing his mother and asking why she was calling out **OGOLLA**’s name. He also noticed that the 1st accused was pulling his sister **MAUREEN** by the hair, so PW2 intervened and took his mother and sister away from the scene. PW2 further explained:

“Because Mark Ongoro and Nguka wanted to beat us, we left my brother where he was. We also left the two.”

11. PW2 saw two pieces of wood in court and he identified one which was in court. He however explained that he did not see any of the accused beating the deceased.

12. MAUREEN AKOTH OKONGO (PW4) a sister to the deceased was also present at the intended chief’s baraza and she confirmed seeing a group which had gathered separately approach the venue and get to where the deceased was. One **OCHIENG** asked the deceased why he had decided to set fire to his house- to which the deceased responded that he was imagining something he did not know. She saw **OCHIENG** hitting the deceased on the neck and once the deceased fell onto the ground the 1st accused joined in and held his hands then tied them using a rope. She identified the 1st accused saying she knew very well as a neighbor. She saw him beating the deceased on the chest using a stick. She also named **OGOLA** and the 2nd accused as one of the assailants.

13. PW4 confirmed that her mother who was nearby begun screaming asking why they were killing her

son. PW4 ran towards the deceased whom she noticed had blood coming out of his mouth and realized that he was already dead. PW4 and her mother were screaming and it was her testimony that the 2nd accused asked for her mother saying he wanted to rape her to her. On cross examination by MR OSORO she confirmed that she told police the 2nd accused had pulled her by the hair and threatened to kill her if she continued screaming so she and her mother left the scene for their home.

14. When PC PETER MBUGUA (PW3) visited the scene he was informed that the deceased was killed by members of public who suspected that he was among those responsible for burning of the three houses, and among the names of attackers mentioned were **OGOLA and PHILLIP OCHENG** (who remain at large) and the two accused. He was also shown a piece of wood said to have been part of the murder weapon and he presented it to court as exhibit.

15. **DR KEVIN OSURI (PW6)** who conducted a postmortem on the deceased and produced the postmortem report observed that he had multiple bruises with a deformed skull with multiple fractures and multiple long bone fractures where both femurs were fractured at the mid shaft, as well as the humerus. The nasal bridge was broken and the lungs had a massive collection of blood. The cause of death was head injury due to excessive haemothorax

16. In his unsworn defence the 1st accused stated that on the date in question he was at his place of work from 7.30 am until 11.00pm when he left for his rented residence at Riat. He did not get to hear about **SWINNERTON'S** murder on that day until 9th February when he met the deceased's mother who was looking for his brother named **OGOLA**. Later on police picked him on pretext that he was to help them finding **OGOLA**, instead they took him to the home of the deceased's mother from where he was bundled into a waiting motor vehicle and taken to the police station

17. The 2nd accused in his sworn defence maintained that there was no evidence from PW1 linking him to the fatal assault on the deceased and he did not know how the deceased met his death. He seems to suggest that there was confusion as to who was involved in the killing because his last name is **OCHIENG** and pointed out that the other who had been mentioned was **PHILLIP OCHIEN'G**. He told the court that to date he does not know what happened and was shocked at the charges which were preferred against him. He explained that his home was far from the deceased's and although they were not friends, he had not disagreed with him. He maintained that on 13th January, he was at Ombo with one Maina and went to his home about a week later after the incident. Although the accused informed the court that he would call one **ERIC OCHIEN'G** as his defence witness, this never happened.

18. The incident took place in broad daylight and all the prosecution witnesses who were at the gathering were consistent that it was at about half past midday. All were also categorical that the motive for the attack stemmed from the belief that the deceased had set ablaze houses belonging to some of their own- indeed some houses had been burnt down within Nyamonye village the previous night. There could have been no mistaking of the identities as the witnesses knew the people they saw approaching as their village mates- a fact not denied by the defence. There could even be no doubt as to who attacked the deceased because the two groups had been standing apart from each other and PW1, PW2 and PW4 had sufficient time from 10.00am-12.30pm to see and observe them where they stood and even as they advanced towards them. They described how the attackers first spoke to **SWINNERTON** asking him why he had decided to burn a house belonging to one of them

19. PW1 may not have witnessed the 2nd accused's participation because when he made threats to rape her, she fled from the scene. However PW4 stated that he also assaulted the deceased –I believe her because by his hostile conduct towards the members of the deceased's family, I have no doubt that he was acting in concert with the 1st accused and the other members of the group.

20. Although both accused raised an alibi defence, this was weak and easily demolished by the evidence of the PW1, PW2 and PW4 which convincingly placed them at the scene. The findings by the Dr regarding the injuries inflicted on the deceased were consistent with the kind of beatings the witnesses described.

21. I find that the evidence presented proves the case against the accused beyond reasonable doubt and I reject their defence as a sham. Consequently I make a finding guilty that **MARK ONGORO OKON'GO** and **ALPHACSAR NGUKA OCHIENG** are guilty of the murder of **SWINNERTON OTIENO OYUGI**

Delivered and dated this 6th day of February 2017 at Homa Bay.

H.A OMONDI

JUDGE