



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 47 OF 2013

BETWEEN

REPUBLIC PROSECUTOR

AND

ERIC OPIYO AGUNDA 1ST ACCUSED

FREDRICK OTIENO OUMA 2ND ACCUSED

TIMOTHY OGUTU KIAGE 3RD ACCUSED

JOHN ODHIAMBO OPIYO 4TH ACCUSED

WILLIAM ODIENGE OTETE 5TH ACCUSED

ANDREW ODHIAMBO MILAR 6TH ACCUSED

JUDGMENT

1. The accused persons, **ERICK OPIYO AGUNDA (A1), FREDRICK OTIENO AUMA (A2), TIMOTHY OGUTU KIAGE (A3), JOHN ODHIAMBO OPIYO (A4), WILLIAM ODIENGE OTETE (A5)** and **ANDREW ODHIAMBO MILAR (A6)** were charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on 4th June, 2013 at Mirogi Trading Centre, Ndhiwa District within Homa Bay County they jointly, with others not before the court, murdered **MICHAEL ODHIAMBO AKUKU alias APESA** (“the deceased”). The prosecution’s case was that the deceased was beaten and set on fire by a mob which included the accused persons, on suspicion that he had stolen some items including a motor cycle.

2. At the conclusion of the prosecution case, the court found that the prosecution had made out a prima facie case against **ERICK OPIYO AGUNDA (A1), JOHN ODHIAMBO OPIYO (A4), WILLIAM ODIENGE OTETE (A5)** and **ANDREW ODHIAMBO MILAR (A6)** and entered a verdict of not guilty against **FREDRICK OTIENO OUMA (A2)** and **TIMOTHY OGUTU KIAGE (A3)**.

3. The cause of death was established by Dr Nicodemus Odundo (PW 7) who produced the post mortem report prepared by Dr Ayoma Ojwang’ who had passed away before the trial commenced. Dr Ojwang’ performed the post-mortem on 6th June 2013 at the Homa Bay District Hospital Mortuary after the body

was identified by Joseph Matunga Akuku (PW 1). He noted that the deceased's lower limbs were burnt and flesh eaten by animals. There was a massive haematoma on the left front side of the chest and scalp haemorrhage on the right region. The base of the skull had a fracture and as result, he certified that the cause of death was a head injury. PW 7 opined that the injuries could have been caused by blunt objects and the limbs and deceased's clothes burnt by fire.

4. The events of 4th June 2013 were narrated by various witnesses. On that day, Joseph Matunga Akuku (PW 1) recalled that he was at Kisii when he received a call from his brother Vincent Obange Akuku (PW 8) at about 8.30pm. PW 8 informed him that the deceased was being beaten by the boda boda riders. PW 1 called the officer in charge of Mirogi Administration Police Camp and requested him to intervene. He also called Bernard Otieno Gor (PW 2) and asked him to go to the scene and ascertain what was happening. On the following morning, he travelled back to Mirogi and on reaching there, he met a group of boda boda riders who were headed towards the home of the deceased's brother Patrick after burning one house. He stood at a distance and witnessed as the group set Patrick's home on fire. He was able to identify A1, A4, A5 and A6 as part of the group.

5. PW 2 told the court that after PW 1 called him, he proceeded to the scene at Mirogi bus stage. He arrived there at about 9.00pm and found the deceased being assaulted by several people among them boda boda riders. He was able to identify A1 and A4 as there were street lights. He was at the scene for 10 minutes before the crowd chased him away. During that time, he was forced to participate in bearing the deceased under the threat of violence. He stood at a distance of about 500 metres and witnessed the deceased being set on fire. He recalled that on the next morning, the boda boda riders went and burnt houses belonging to the deceased's relatives although he did not identify the people involved.

6. On the material day, Iska Akeyo Odhiambo (PW 3) was selling fruits at Mirogi market. At around 8.00pm, she saw boda boda riders gathering at the motorbike repair. One of the people came to her and told her to tell her son, Mulinge, not to hide the deceased who was her brother-in-law. She went to a nearby hotel where her son and the deceased were and which was by now surrounded by the boda boda riders but when the group saw Mulinge, they retreated. PW 3 was ordered remove her belongings and her motorbike as they would be burned which she did and soon left with her son. PW 3 told the court that she left the deceased behind standing under a tree.

7. As she was at home, PW 3 heard screams coming from the roundabout at Mirogi where the boda boda riders had gathered earlier. She proceeded there and found the multitude of boda boda riders assaulting the deceased and with the help of the street lights she was able to identify A1, A4, A5 and A6 as among those assaulting the deceased. The group were accusing him of stealing while beating him with various weapons. She stood close by and decided to watch the entire ordeal unfold which she narrated as follows:

The boda boda beat Apesa and took him to a ditch next to the road. That is where he died.

The people I had identified were all there at the scene all this time. They were still participating in beating him. After sometime I moved to another location. While there I saw someone holding Apesa by the waist and taking him to the roundabout. Then another took a tyre and took it there. Another removed petrol from a motor cycle. 4th accused is the one who took the tyre. 5th accused took the petrol. The 4th Accused put the tyre on Apesa's leg. The 5th accused gave him a matchbox and he lit Apesa. Apesa started to burn. They left and I also left to my house.

8. PW 3 came back the next morning and found the deceased's body had been mauled by dogs. The deceased's sister-in-law, Goretti Anyango Nicholas (PW 4), trader at Mirogi, also testified that she saw the deceased's remains on the morning of 5th June 2013. She stated that his lower limbs were burnt and some parts had been mauled by animals.

9. Benta Atieno Agumba (PW 5), a shopkeeper at Mirogi, recalled that at about 5.00pm on the material day, she was told by one of her neighbours that the deceased had been apprehended by boda boda riders. She went with the neighbour to inform the police to come and rescue the deceased but she found officer who told her that he could not leave since he was alone. When she came back, she found that the

deceased had been beaten senseless. At about 10.00pm while she was in her shop she saw a group drag the deceased in front of the shop and one of the people brought a tyre and set him aflame. She identified A4 as the person who brought the tyre and burnt him.

10. The deceased's sister-in-law, Rosemary Anyango Ouma (PW 6) testified that she heard screams on the material night and although she went outside her house, which was within Mirogi, she feared going to the scene. From afar, she saw someone being burnt and the following morning she was able to identify the deceased's body.

11. The deceased's brother, Vincent Obange Akuku (PW 8), testified that on the material day, he had been with his brother at about 4.00pm at Mirogi before he left to go to Koderia Forest. At about 8.00pm, he was called by his brother's wife who told him that the deceased was being assaulted by boda boda riders. He called A6, whom he knew to be the chairman of the boda boda riders' association. A6 told him that the deceased was suspected of stealing and there was nothing he could do to stop the mob. In the background, he could hear loud cries which he suspected came from the deceased. He came back the next morning and found the deceased's partially burnt and mauled body by the roadside. He recalled that some of the boda boda riders were still celebrating and threatening to attack him and included A1, A4 and A5.

12. The investigating officer, PC Rose Cheptoo (PW 9) recorded the witness statements and established that the deceased was killed by members of the public and boda boda operators from Mirogi centre after being accused of stealing a motorbike, generator and television. She told the court that from the statements, several suspects were named and A1 and A2 arrested on 2nd July 2013 while the other accused were arrested on 26th July 2016. She stated that other suspects were still at large.

13. When put on his defence Erick Opiyo Agunda (A1) opted to give a sworn statement and denied any involvement in the deceased's death. He stated that on 4th June 2013 at around 7.00pm he was at home. He heard noises outside and he went to investigate its source. He got to the scene and found a mob beating the deceased but did not get involved in it.

14. John Odhiambo Opiyo (A4) also gave a sworn statement. He stated that on that day, he was walking from work at around 8.00pm. He was accosted by two people who forced him to go to the scene and threatened him with death if he did not oblige. They dragged him to where the deceased was being beaten and forced him to the ground. He stated that at the scene he saw A5 and A6 participating in beating the deceased but denied any involvement.

15. William Odienge Otete (A5) gave a sworn statement and denied any involvement in the deceased's death. He testified that they arrested the deceased on suspicion of theft of a motor cycle but that it is the other members of the public who came and began beating him. He told the court that they, as the boda boda operators, did not participate in beating him. They only arrested him and wanted to transport him to Kisii so that he could show them where he had hidden the stolen motor cycle.

16. Andrew Odhiambo Milar (A6) also gave sworn evidence and denied any involvement in deceased's death. He stated that he was called by PW 8 who told him to assist in stopping the mob from killing the deceased. However, he was afraid to do so as he comes from the Akuku family and the angry mob did not want to see any member of the Akuku family. He denied going to the scene.

17. The main issue in this case is whether the accused caused the death of the deceased by an unlawful act or omission. From the evidence, it is not in doubt that the deceased was severely assaulted by a mob before being set ablaze. The witnesses all gave varying estimates of the size of the crowd but what is clear is that it was a sizeable crowd. This fact coupled with the fact that the incident took place at night made the circumstances of identification of the assailants difficult. Our courts have taken the position that evidence of visual identification particularly in difficult circumstances should always be approached with great care and circumspection. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo & Another v R* [1953] 20 EACA166, *Wamunga v Republic* [1989] KLR 42 and *Maitanyi v Republic* [1986] KLR 198). Before acting on such evidence, the trial court must make

inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See **R v Turnbull [1967] 3 ALL ER 549**). This requirement is, however, relaxed when dealing with the case of recognition because, “*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other*” (see **Anjononi & Others v Republic [1980] KLR 59**).

18. The incident herein took place at Mirogi Centre which was well lit with street lights according to the testimonies of PW 2, PW 3, PW 5 and A5. PW 2 testified that he was present at the scene and he identified A1 and A4 with the help of the street lights as among the people who beat up the deceased. PW 3 was present at the scene when the whole ordeal transpired in her unchallenged evidence she stated that A1, A4, A5 and A6 were among the people who assaulted the deceased and that it was A4 and A5 who set him on fire. Her evidence was corroborated by the evidence of PW 5 who stated that she watched from her shop nearby as A4 burnt the deceased using a tyre at the roundabout.

19. All the accused admitted that they were at the scene but they all denied being involved in the deceased’s death. From the evidence tendered by the prosecution witnesses, there were many people in the crowd when the deceased was being beaten and there is also no evidence of a prior grudge between the accused persons and the Akuku family or any of the prosecution witnesses. The question that comes to my mind is why would the prosecution witnesses randomly choose to frame the accused persons out of the entire mob? What also comes out of the evidence is that the witnesses were traders at Mirogi while the accused were boda boda riders, working or living within the centre, and were therefore not strangers to each other.

20. A4 in his testimony stated that he was forced to the scene and that he did not participate in any of it and he proceeded to implicate A5 and A6 as the people who were involved. His evidence is that of an accomplice must be viewed with scepticism. Nothing emerged from the cross-examination of the prosecution witnesses that suggested he was working elsewhere as he was well known by PW 3 and PW 5. I therefore reject his defence as PW 3 and PW 5 clearly saw him, from different positions, burning the deceased using a tyre.

21. The fact that all the accused persons were at the crime scene and were identified by different people leaves no doubt in mind that they were involved in assaulting the deceased. The accused complicity in the whole event is confirmed by the fact that on the very next morning, they went on a burning spree of the deceased’s relatives houses and were identified by PW 1 and PW 8.

22. The other important issue is whether there was in fact a premeditated plan by the accused together with the mob to carry out the fatal attack on the deceased. On this, I am guided by the decision of the Court of Appeal in **Dickson Mwangi Munene & Another v Republic NRB CA Criminal Appeal No. 314 of 2011[2014] eKLR** where it was stated;

[56] [C]ommon intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku s/o Afia v R [1963] E.A.363 where “there was no evidence of any agreement formed by the appellants prior to the attack made by each” it was held that “that is not necessary if an intention to act in concert can be inferred from their actions” like “where a number of persons took part in beating a thief.

23. The prosecution established that the mob that had gathered particularly the boda boda riders had the intent of “disciplining” the deceased for allegedly stealing. PW 3 testified that by the time she left Mirogi, the mob had started looking for the deceased. The witnesses testified to the fact that the deceased was subjected to violent trauma by the mob as he was being questioned about the thefts that had taken place. I therefore find that the accused engaged in unlawful acts that ultimately led to the death of the deceased even if such death may not have been intended or anticipated by the accused. Although there is no evidence of an initial pre-meditated agreement or joint purpose to kill, the same can be inferred from the mob action of lynching the deceased in which the accused took part in. Death or grievous bodily harm was a probable consequence of the mob’s actions in terms of **section 206(a)** of the **Penal Code**. I thus

find that malice aforethought as an ingredient for murder established beyond reasonable doubt.

24. I therefore find the accused **ERICK OPIYO AGUNDA (A1)**, **JOHN ODHIAMBO OPIYO (A4)**, **WILLIAM ODIEGE OTETE (A5)** and **ANDREW ODHIAMBO MILAR (A6)** guilty of the offence of murdering **MICHAEL ODHIAMBO AKUKU alias APESA** and I convict them accordingly.

SIGNED and DATED at KISUMU this 7th day of July 2016.

D.S. MAJANJA

JUDGE

DATED and DELIVERED at HOMA BAY this 19th day of July 2016.

H.A. OMONDI

JUDGE

Mr Odero instructed by Odero Nyakwana and Company Advocates for the 1st, 5th and 6th accused.

Mr Osoro instructed by Osoro and Company Advocates for the 4th accused.

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