



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL CASE NO. 25 OF 2014**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**FREDRICK JUMA AGUNGA ..... 1<sup>ST</sup> ACCUSED**

**DANNISH ODHIAMBO OTIANGO ..... 2<sup>ND</sup> ACCUSED**

**RAPHAEL OWUOR AUKO alias APPOLLO ..... 3<sup>RD</sup> ACCUSED**

**MICHAEL AKAL OSONGO ..... 4<sup>TH</sup> ACCUSED**

**KEPHAS OCHIENG ALUOCH ..... 5<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. On 17<sup>th</sup> May 2014, at Ngere village, West Kanyada of Homa Bay County, **JOHANA OMONDI OGUDA alias KWELA** (“the deceased”) was attacked in his homestead and in the course of fleeing to his neighbour’s homestead for safety, he was attacked by a gang of people and severely beaten. He died as a result of the injuries. The accused **FREDRICK JUMA AGUNGA (A1)**, **DANNISH ODHIAMBO OTIEGO (A2)**, **RAPHAEL OWUOR AUKO ALIAS APOLLO (A3)**, **MICHAEL AKAL OSONGO (A4)** and **KEPHAS OCHIENG ALUOCH (A5)** were later arrested and jointly charged with the deceased’s murder contrary to **section 203** and **204** of the *Penal Code (Chapter 80 of the Laws of Kenya)*.

2. In order to secure a conviction for the offence of murder under **section 203** of the *Penal Code*, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had malice aforethought. The prosecution called both direct and circumstantial evidence through 8 witnesses to prove its case while the accused elected to give sworn testimony and called witnesses to support their respective defences.

3. The fact and cause of death is not in dispute. Dr Nicodemus Odundo (PW 7), a senior Medical officer at the Homa Bay Referral Hospital, produced the post-mortem form prepared by Dr Ayoma Ojwang under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Dr Ojwang conducted the post mortem on the deceased’s body on 22<sup>nd</sup> May 2014 after it had been identified by Clement Odhiambo Kaumba (PW 2) and Clement Oguda Omwayo (PW 3). The significant findings recorded by Dr Ojwang were that the deceased’s body had 9 cut wounds on the scalp of various sizes with

a lot of haematoma formations. The deceased's lips were severed at a right angle in 3 places while the chest wall had signs of bleeding. Internal examination of the head revealed that the skull was severely fractured at the vault while the right side of the skull was smashed at the right cheek leading to bleeding in the brain. Dr Ojwang certified that the cause of death was the result of head injury, severe skull fractures and violent trauma. Dr Odundo opined that the injuries could have been caused by a sharp object while the skull fractures indicated the use of blunt object.

4. The events leading to the deceased's death were narrated by the deceased's next door neighbour, Elizabeth Opiyo Adhola (PW 1) and the deceased's wife Lilian Akinyi Omondi (PW 4). The deceased and PW 1 were neighbours and shared a common fence. PW 4 recalled that on 17<sup>th</sup> May 2014 at about 7.30 pm, she was at home with her two children, when the deceased came back but left immediately after. After a short while, she heard some noise outside. The deceased came back took his torch and spear and as he going out, he was confronted by A1, A3 and A4 who had rungu. She told the court that A2 did not have any weapon and was pleading with the others not to beat the deceased. She further described how A3 hit the deceased with a panga and rungu and cut him near the mouth while A4 hit him near the throat. While he was being beaten, the deceased ran to PW 1's homestead for safety. The assailants chased, caught up with him and continued to beat him. As she feared for her life she went to Rodi where she stayed until the next day.

5. PW 1 testified that on the night of 17<sup>th</sup> May 2014 at about 8.00 pm while she was in her house with her two children, she heard a scream but did not think much of it. After the second scream, she asked her son to check what was happening. Her son told her that he suspected it was robbers. She decided to go towards her bathroom with a torch to investigate the noise she was hearing. When she shone the torch, she saw a man, whom she could not identify, being beaten. From a distance of about 2 metres, she was however able to see A1, A2 and A4 whom she knew as they were from the village. As she stood shining her light, she could see A1 hitting the deceased on the head with a rungu. Although A4 had a rungu, she did not see him beat the deceased while A2 stood there.

6. PW 1 further testified that when the assailants saw her, they started going away. She pleaded with A4 not to kill the man but he did not respond but left. A2 also left while A1 continued to beat the man before leaving. As they left, she decided to raise alarm attracting one of her neighbours Clement Odhiambo Kwemba (PW 2) while A1 was still there. She gave PW 2 the torch she was holding and showed him where the incident had taken place. He went there but came back without a torch. He told her that A1 had grabbed the torch from him. By the time the Chief, Kenneth Omondi Achieng (PW 5) arrived, the assailants had already left. She showed him the scene whereupon he called police officers.

7. The deceased's uncle, Clement Odhiambo Kaumba (PW 2) recalled that on the material night, while in his house, he heard PW 1 screaming. He went towards her homestead and found her standing by her door step with her two sons. PW 1 told him that someone was being killed behind her house. She gave him the torch she was holding and he went behind the main house to the bathroom. When he shone the torch, he saw the person, whom he could not recognize immediately, lying down groaning while bleeding profusely. He testified that he saw A1 holding a big stick while A3 was holding a rungu. PW 2 testified that A1 snatched the spotlight from him and threatened to beat him. He saw the A1 hit the injured man, whom he later recognized as the deceased, three times while A3 was standing there with the rungu he had. As he was leaving the scene, PW 5 arrived at the homestead.

8. The Chief of West Kanyada where Ngere Village is located, Kenneth Omondi Achieng (PW 5), recalled that on 17<sup>th</sup> May 2014 at about 8.00pm he heard noise from a distance. He received a call from A1 who informed him that the deceased had entered his house by force while armed with a panga with the intention of stealing causing him and his wife to alert the neighbours who came. When the deceased heard people coming, he ran away and hid in the nearby sugar plantation. PW 5 decided to go to A1's home but before he could reach there, he received a call from PW 1's husband, Moses Onyango, requesting him to go to his home as some people had arrested a suspect. He also received a call from PW 1 informing him that some assailants had beaten someone in the homestead. When he arrived at PW 1's homestead, he found the deceased bleeding profusely. He called Police Officers from Homa Bay Police Station whom he directed to the scene. They took the deceased's body to Homa Bay District Hospital Mortuary. PW 5 also

testified that PW 2 told him that there was a mob and that he tried to intervene. PW 1 told him that the assailants who entered her homestead were A1, A2, A3 and A4. PW 5 told the court that by the time he arrived at the scene, he did not find any assailants.

9. One of the officers who arrived at Ngere Village on the material night was Corporal Ben Kiplagat (PW 8), the investigating officer. He recalled that he and other officers were met by PW 5 and led to PW 1's homestead where they found the deceased lying in a pool of blood within the homestead. PW 1 and PW 2 were present as were other members of the public whom he could not identify since it was dark. The deceased, who was identified as Johana Omondi Oguda, had several injuries on the head and face. His lifeless body was taken to Homa Bay District Hospital where he was pronounced dead.

10. PW 8 recalled that PW 1 narrated to them what had transpired outside her house and she was able to identify A1, A2 and A4 while PW 2 told them he was able to identify A1 and A3 when he arrived and that A1 threatened him and snatched the torch from him. PW 8 also testified that when he spoke to PW4, she stated that A1, A2 and A4 were the ones who came to assault her husband.

11. A1 denied murdering the deceased. He recalled that on the night of 17<sup>th</sup> May 2014, at around 8.00pm, he heard some people knocking at the door. He demanded to know who they were but they did not respond instead they started cutting the door with a panga. One of the assailants tried to pry the door from its frame with the panga. A1 and his wife tried to push back while screaming for help. As they struggled with the assailants, the panga fell. He recognized the deceased as the person who had the panga. As neighbours responded to the alarm, the assailants ran away towards the sugar cane plantation. A1 further testified they remained in the house as they were very scared.

12. A1 told the court that he called PW 5 and informed him of the attack. PW 5 told him that he had heard some noise from villagers. PW 5 arrived at his house and he handed over the panga but PW 5 told him that he should keep the panga so that he could surrender it to the police the next day. A1 testified that on 20<sup>th</sup> May 2014 when he went with his wife and PW 5 to record a statement he surrendered the panga. He was arrested on 22<sup>nd</sup> May 2014.

13. A1's wife Maureen Adhiambo (DW 6) confirmed that A1 did not leave the house on the material night. She recalled that they were attacked. She told the court that they screamed as the assailants tried to get into the house but the assailants left when the neighbours responded. She further testified that A1 called PW 5 who came at about 10.00pm with a village elder and they informed him that the deceased was one of the attackers. PW 5 told them that the deceased had been killed at PW 1's homestead. DW 6 further testified that on 20<sup>th</sup> May 2014, they went to Homa Bay Police Station where they reported the incident. She confirmed that on 22<sup>nd</sup> May 2014 at around 3.00 p.m., the Assistant Chief and village elder came and arrested A1.

14. A2 denied that he participated in beating the deceased. He testified that when the incident took place on 17<sup>th</sup> May 2014 at about 8.30pm, he had left Church and gone to his grandmother's home to have dinner. While there, he heard screams and went out to inquire what was happening. He went to PW 1's house where the screams were coming from. When he arrived, he found PW 1 in the company of PW 5 and another man. He was shown where the alleged robber had been killed. After he was told what had happened, he decided to leave and head home. A2 also recalled that he was arrested on 23<sup>rd</sup> May 2014 on suspicion of murdering the deceased.

15. A2's brother, Laban Omondi Otieno (DW 7), recalled that he was with A2 in church on 17<sup>th</sup> May 2014 at about 8.00pm. They left church together but A2 went to visit their grandmother while DW 7 went home. When A2 returned, he told him he heard screams coming from PW 1's homestead. They proceeded together to PW 1's home where they found PW 1 and PW 5. PW 5 told them that the deceased had been killed. He stated that A2 was arrested on 23<sup>rd</sup> May 2014 when he reported to Rodi AP Camp.

16. A3 denied murdering the deceased. He recalled that on the material night, he was taking supper with his wife when he heard screams. As the screams were coming from the direction of his mother's house,

he went there and found her standing by the door screaming. She told him that she had been attacked by thieves. He thereafter went to find out what was happening from the village elder but did not get him so he went back home. On the next day, the village elder informed him that the thief had been murdered at PW 1's home.

17. Mary Auma (DW 10) testified that A3 was her nephew and that on the material day, she was with him from 1.00pm upto 8.00pm. She recalled that A3 came to her home when she was wailing as other people were wailing. When he arrived, she made supper for him and they ate together. After dinner, he told her he was leaving for home. She only heard that the deceased had been killed on the next day.

18. A4 denied the charge against him and testified that on the night of 17<sup>th</sup> May 2014, he was at home talking supper with Samuel Otieno Okeyo (DW 8) who had come to visit him. After hearing screams from outside, they all got out of the house but could not tell where the screams were coming from. As they went back to eat, PW 1's husband called A4 on phone and informed him that the screams were coming from his home. He proceeded to PW1's home with DW 8 whereupon they found PW 5. PW 1 and PW 2 together with police officers. PW 5 told him that the deceased had gone to attack A1 who raised alarm causing people to come and attack the deceased. A4 further testified that he was arrested on 23<sup>rd</sup> May 2015 at 6.00pm when he had gone to record a statement at the police station.

19. DW 8 confirmed that on the material night he was with A4 where he had gone to ask him to plough his shamba. A4's wife and children were present. He confirmed that he heard the A4's phone ring and that A4 told him that PW 1's husband had called him. They both went to PW 1's homestead where they found PW 5 and police officers. By that time, the deceased's body was already in the vehicle.

20. A5 denied that he murdered the deceased. He recalled that on 17<sup>th</sup> May 2014 at about 8.00pm, he had gone to pick his wife, Millicent Adhiambo (DW 9), from Rodi where she does business. They arrived home had supper and went to bed. He only heard that the deceased had been murdered when he went on the next day in the evening. On 23<sup>rd</sup> May 2014, the Assistant Chief called him and they went to the police station together where he was arrested. DW 9 told the court that on the material night, her husband picked her up from Rodi and they went home together. She did not hear anything on that night and only heard that the deceased had been killed the next day. She confirmed that her husband was arrested on 23<sup>rd</sup> May 2014.

21. The key issue is whether the accused persons committed the unlawful act that led to the deceased's death. The incident took place at night hence our courts have taken the position that evidence of visual identification 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). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

22. The prosecution relied on the direct testimony of PW 1, PW 2 and PW 4 to implicate the accused. Their testimony clearly establishes that the prosecution witnesses and the accused were all neighbours in Ngere Village, they knew each other and interacted regularly hence the case is one of recognition rather than identification of strangers therefore lessening the chances of mistaken identity.

23. The incident took place in the PW 1's compound. PW 1 told the court that she had a torch with three batteries and was about 2 metres away where the deceased was being hit. She recognized A1, A2 and A4

beating the deceased. When PW 2 came, he was given the torch by PW 1 and was able to recognize A1 and A2 beating the deceased before A1 snatched the torch from him. The deceased was at his home earlier and was attacked and chased whereupon he ran to the home of PW 1. PW 4 stated that she saw all the accused persons attack the deceased except the A5. According to PW 4, the attack started when the accused entered her house. In such a small confined space, it would not have been difficult for PW 4 to recognize people she clearly knew from her village. Moreover, she testified that when the accused were assaulting her husband, she came out of the house and stood about 5 metres away and that she had a torch and had on that day bought new batteries. I am therefore satisfied that at both locations, that is the deceased's and PW 1's homestead, the circumstances were favourable for positive recognition of the assailants. Moreover, having heard the witnesses, I did not get the impression that they were lying to the court or that they had even a reason to implicate the accused given the clear evidence of what transpired on that night.

24. A1 gave an alibi defence supported by his wife, DW 6. In considering an alibi defence, I am alive to the principle that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. In ***Karanja v Republic [1983] KLR 501, the Court of Appeal*** held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

25. While PW 5 confirmed that A1 called him about the attack by amongst others, the deceased, no question was put to him in cross-examination to suggest that in fact he went to the A1's house and was shown the panga which one of the assailants left behind and which PW 5 told him to keep and give him on the next day. Had PW 5 been to A1's home as suggested, he would have said so in his statement or even contradicted what both PW 1 and PW 2 told him about A1. Further, A1 stated he surrendered the panga to the police yet this issue was not put to PW 8 in cross-examination. I find A1's alibi is an afterthought in light of the clear testimony of PW 1 and PW 2 placing him at PW 1's home beating the deceased on the head. The alibi is further weakened by the fact that A1 did not report the incident on the very next day after the attack.

26. A2 admitted he was at PW 1's home but denied participating in beating the deceased as he had only gone to see what was happening. His brother DW 7 confirmed his story. In her testimony, PW 1 stated that A2 was just standing there and did not have anything in his hand. In cross-examination, PW 2 stated that he did not know A2 and did not see him at the scene. There is also the testimony of PW 4 who stated that A2 was pleading with the assailants not to beat the deceased. Accordingly, I accept his defence that he may have been part of the group that reacted to the alarm raised in the village and went to see what happened. As he did not have any weapon, I also accept that he did not beat the deceased.

27. A3 also gave an alibi defence which was supported by his mother DW 10. In her testimony, PW 1 did not mention A3 as one of the assailants although she confirmed in cross-examination that she knew him. He was however seen by PW 2 carrying a rungu standing near the deceased while A1 was beating him. Earlier on PW 4 had seen at her house when he hit the deceased with a club and a panga and chased him. PW 4 clearly saw him with the torch she had. Although PW 1 did not see him, he may have arrived there when PW 2 came and PW 1 had left. I therefore reject his alibi.

28. A4's defence was that he was at home with DW 8 who escorted him to the scene when alarm was raised. When they reached PW 1's home, they found PW 1, PW 2 and PW 5. According to PW 1, he was at the scene with a rungu but did not beat the deceased and left the scene when she implored him not to kill the deceased. PW 2 did not see A4. However, PW 4 identified A4 as one of the people who came to attack her husband and he hit him with a club near the throat. She insisted in cross-examination that she had seen him and even mentioned his name to the police.

29. A5 gave an alibi supported by his wife, DW 9. PW 1 and PW 2 did not see him at the scene and admitted as much in cross-examination. PW 4 did not see him at the deceased's homestead. PW 5 stated that his name came up in the investigations. In his case, there was no evidence connecting him to the

deceased's death.

30. Having considered the evidence, I conclude that the on the material night there was an incident at A1's house. The deceased attacked A1 who, together with his family raised alarm and even called PW 5. However, A1 decided to follow the deceased to his home. Other villagers responded to the alarm and came carrying weapons. As confirmed by PW 4, they came into the deceased house, flushed him out and began beating him. A1, A3 and A4 beat him while A2 pleaded with them to stop beating the deceased. The deceased started running away towards the PW 1's homestead where he was cornered and beaten further. This is where PW 1 saw A1 beat the deceased while A2 and A4 standing there.

31. The prosecution's case is that the accused was part of the mob that inflicted the injuries that led to the deceased's death. It is not clear which of the accused landed the fatal blow hence in order to find the accused guilty of murder, the prosecution had to prove that the accused persons acted together and shared a common intention to kill or to cause grievous bodily harm (see generally **Augustino Orete & Others v Uganda [1966]EA 430** and **Dracaki s/o Afia & Another v R [1963]EA 363** and **Peter Gachoki Njuku & Another v R NYR CA Crim. App. No. 115 of 2002 [2002]eKLR**). Section 21 of the **Penal Code** defines common intention as arising;

*When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

32. The provision was illuminated by the Court of Appeal in **Njoroge v Republic [1983] KLR 197, 204** where it noted as follows;

*If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.*

33. As to whether there was a premeditated plan by the accused to carry out the fatal attack on the deceased, I am also 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]EA 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."*

34. Although the incident may have started out as a spontaneous action after alarm was raised, A1, A3 and A4 flushed the deceased out of his home and beat him and according to PW 4, A4 expressed a clear intent of harming him when he stated that they have now caught a thief and that his days were over. The fact that they chased him and he ended up at PW 1's compound where the assault continued demonstrates that the common intention evolved once the accused started beating him at his homestead. Although PW 1 and PW 2 did not see A3 and A4 assault the deceased, the fact is that they were part of the group that flushed the deceased out of his house, assaulted him and chased him. I find and hold that this is sufficient evidence to implicate them and displace any evidence of disassociation from the common intent. The fact that the deceased suffered violent trauma in the form of multiple injuries only completes the evidence that implicates them.

35. I therefore find that the accused, **A1, A3** and **A4** engaged in an unlawful act that led to the death of the deceased and even if such death may not have been intended or anticipated by the accused, death or grievous bodily harm was a probable consequence of their actions in terms of **section 206(a)** of the **Penal Code**. I therefore find and hold that the prosecution proved malice aforethought.

36. I therefore find the accused **FREDRICK JUMA AGUNGA (A1), RAPHAEL OWUOR OUKO alias APOLLO (A3) and MICHAEL AKAL OSONGO (A4)** guilty of murdering **JOHANA OMONDI OGUNDA** and I convict them accordingly.

37. I hereby acquit **DANNISH ODHIAMBO OTIEGO (A2)** and **KEPHAS OCHIENG ALUOCH (A5)**. They are set free unless otherwise lawfully held.

**SIGNED and DATED at KISUMU this 7<sup>th</sup> day of July 2016.**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at HOMA BAY this \_\_ 19<sup>th</sup> \_\_ day of July 2016**

**H.A. OMONDI**

**JUDGE**

Mr Ongoso instructed by Ongosa Ayoma and Company Advocates for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused.

Mr Osoro instructed by Osoro and Company Advocates for the 2<sup>nd</sup> and 5<sup>th</sup> accused.

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