



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 105 OF 2014**  
**(FORMERLY KISII HCCR CASE NO. 38 OF 2005)**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**PAUL OTIENO NDEJWE.....1<sup>st</sup> ACCUSED**

**PAUL OUMA OTIENO.....2<sup>nd</sup> ACCUSED**

**JUDGMENT**

1. The prosecution case was that on the night of 5<sup>th</sup> April 2004, the deceased and his son were picked up from their home by some unknown people. They were driven to a place near River Kuja where they were tortured and thrown into the river. The deceased died but his son survived. The deceased's body was recovered from the river and investigations were launched leading to the arrest of the accused. As a result, this court was informed that the accused, **PAUL OTIENO NDEJWE** and **PAUL OUMA OTIENO** had murdered **Domnic Osando Oginya** ("the deceased") on the night of 5<sup>th</sup> April 2004 at Rapogi area in Migori District with others not before the court contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. Before I consider the evidence, it is worth noting that this matter has been in court since the accused were arraigned in court in 2005. After some interlocutory applications and several false starts, the trial commenced before Asike-Makhandia J., who heard the prosecution case and put the accused on his defence on 29<sup>th</sup> July 2011. Before the matter could proceed further, he was transferred and replaced by Sitati J., who ordered the matter to start afresh on 17<sup>th</sup> February 2013 in accordance with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The matter was heard in part before she was transferred. In the meantime, the High Court at Migori was established and I was charged with hearing the matter. The matter once again started afresh and proceeded apace but was further delayed because a new judge was posted to Migori and I had to deal with it from Homa Bay in order to obviate the need to start the matter afresh.
3. The accused denied the charge and the trial proceeded with the prosecution marshalling 6 witnesses. The 2<sup>nd</sup> accused was acquitted after the prosecution case as he had no case to answer while the 1<sup>st</sup> accused ("the accused") gave sworn testimony without calling any witness. The

prosecution case was as follows.

4. One of the deceased's wives, Karen Anyango Osando (PW 2) recalled that on the night of 5<sup>th</sup> April 2004, she was at home with the deceased when four unidentified people came in a white saloon car asking for the deceased. She opened her door and stepped out after talking to her son, Joshua Owino Osando (PW1), who was with them. PW 1 explained that the people were police officers from Migori who wanted to see her husband. The deceased also came out of the house and was taken away alongside PW 1. PW 2 told the court that the next morning, she went to Migori Police Station with her co-wife and children to see the deceased but was informed that her husband had not been taken by the police. She later heard that her husband had been killed and his body dumped in River Kuja. She told the court she was present when the deceased's body was recovered.
5. Christopher Oywera Ape (PW 3) testified that he worshipped in the same church as the deceased. He recalled that on 6<sup>th</sup> April 2004, he was informed that the deceased had been killed. He went to the river and found people searching for the body. At about 5.00pm the following day, they saw a sack in the water. The sack had been tied around the deceased's neck. When the body was removed from the water, PW 3 observed that the deceased hands had been tied behind his back and the legs tied together. He was dressed in a vest and the hands had been tied with a shirt that had been cut.
6. The deceased's eldest son, Ismael Odhiambo Osambo (PW6), who was in Nairobi at the time, recalled that when he was called with the news that his father was missing. He travelled back to the village and joined the search party at River Kuja and was present when the deceased body was recovered near the Rapogi bridge. He noted that the deceased had a sack tied over his head. The police were contacted and came to the scene and removed the deceased's body.
7. Among the officers who came to the scene was the investigating officer, PC Jacob Obiero (PW5). A scene of crime officer took photos which PW 5 produced in evidence. He organised for the deceased's body to be taken to Rapcom Hospital Mortuary for post-mortem.
8. Dr Aggrey Idagiza Akidiva (PW 5) conducted the post-mortem on the deceased's body on 12<sup>th</sup> April 2004 at Rapcom Hospital Mortuary after it was identified by Esther Ochola Osembo and Ismail Odhiambo Osando (PW 6). The significant findings by PW 5 were that the deceased had bruises on the right posterior palm, right shoulder and right cheek. The skin was peeling off from the left posterior elbow. He had a bruises over the left anterior thigh. PW 5 noted that there was evidence of bleeding from ears and nose and a deep cut wound on the back part of the head. There was a fracture of the skull at the back which led to lacerations of the brain. PW 5 concluded that the cause of death was due to severe brain damage and that the probable weapon used to inflict the injuries was a sharp object.
9. The circumstances of the deceased's death were narrated by his son, Joshua Owino Osando (PW 1). He told the court that on the night of 5<sup>th</sup> April 2004, he was asleep in his house which was in the deceased's compound when he heard a vehicle drive into the compound. The vehicle's occupants started hooting and calling out for the people so he got out of his house and went to check what was happening. As he moved closer to the vehicle, he noted it was a white saloon car whose full registration numbers he could not recall but he could remember it had KAD. The visitors, who he could not identify, introduced themselves as police officers from Migori Police Station and asked for the deceased.
10. His attempts to get the "officers" to identify themselves or to produce arrest warrants bore no fruit and they soon got hold of him and dragged him to PW 2's house. He woke up PW 2 who then woke up the deceased. The men reiterated that they were officers who had been sent from Migori Police Station to collect PW1's father. They dragged the deceased to the vehicle and bundled him into the boot. As this point PW 1 noticed that there were three assailants. PW 1 was also thrown into the boot but before they left, the assailants told PW 2 to go to Migori Police Station on the

following day if she wanted to know about the deceased.

11. The assailants drove off but after about 20 – 30 minutes, PW1 managed to open the boot from inside. They stopped the vehicle and came out to shut and the boot after threatening PW 1 and the deceased. They drove off again for some distance until PW 1 heard one of the assailants say that they had reached the spot they were looking for. From his knowledge of the road and the distance, PW 1 figured out that they were by a bridge on River Kuja near Riat Market.
12. When the vehicle stopped, the assailants dragged them out of the car, tore up the deceased's shirt and used it to tie them up. Although PW 1 confirmed that there wasn't enough light, he was able to count four men but could not identify them. The assailants pushed them both to the ground and one of them stepped on him. One of the assailants asked the other two to shine their torches on his face so that PW 1 and the deceased could see him properly.
13. The assailant who removed his cap and mask asked if the deceased knew him and the deceased identified him as *Otieno Ndejwe*. PW 1 also recognized him when he removed the mask. PW 1 told the court that he knew the accused as Paul Otieno son of Ndejwe as they were from the same clan and village. They had also attended the same primary school although he was two classes ahead of PW 1. He further told the court that he knew the accused by voice and appearance.
14. The accused began assaulting the deceased as PW 1 watched, supposedly out of anger because the deceased had reported him to the police for stealing the village water pump and turned the villagers against him. According to PW 1, the accused was the only one talking as he assaulted the deceased. The assault took a dangerous turn when the accused asked the deceased whether he had ever been shot with a gun. PW 1 heard a loud bang shortly thereafter and his father suddenly went silent. The accused then asked for a sack from one of the other assailants.
15. After trying unsuccessfully to tie the sack around both PW 1 and the deceased's neck, the accused tied the sack around the deceased's neck and carried him towards the bridge helped by two assailants leaving another to take charge of PW 1. When the three returned, the accused decided that PW 1 had to be killed since he had recognized him. PW 1 pleaded for his life but his pleas fell on deaf ears. The accused tied a sisal rope around PW1's neck and asked one of the assailants to shoot PW 1. He tried to fire the firearm but it did not shoot. The accused took the gun but he too could not get it to fire. They transferred bullets from one gun to another and a gun that was placed on PW1's face finally fired. PW 1 heard a loud bang but he did not feel a thing. He pretended to be dead and the men carried him to the bridge and threw him into the river.
16. PW 1 recalled that after a spell of unconsciousness, he struggled to free himself after he hit the water. He managed to free his legs about a hundred meters downstream but he stayed still until he saw the vehicle turn and drive off. He got out of the water and tried to call out to his father but there was no response. He finally got out of the river and sought help in the nearest home but the old lady he found advised him to get help elsewhere.
17. He found help in the home of Jared Okode whose wife nursed his wounds then sent a messenger to PW 1's home. By the time the messenger reached PW 1's home, some members of the family had already left for Migori Police Station to find out what had happened to the deceased. PW 1 also called some friends in a bid to get help in searching for his father. Word finally reached the police and local administrators who came to PW 1. He then proceeded to the scene and narrated their terrifying ordeal. He was taken to Rapogi Administration Police Post as the search for his father was conducted. He later heard that the body was retrieved on 7<sup>th</sup> April 2004. PW 1 confirmed that he was able to pick the accused from the identification parade after the accused was arrested
18. PC Jacob Obiero (PW5) was the investigating officer in the case. He testified that he interviewed PW 1 who narrated their horrendous ordeal in the hands of four assailants. PW1 indicated in his statement that he was able to identify the accused among the four assailants. He also established

that the motor vehicle that the four used to execute the murder had been stolen from Paul Oluoch Nyandiga (PW 4) on the same night at Awendo. PW 4 testified how he was car-jacked from his home by unknown assailants and his car driven away. He received confidential information that DW 1 was hiding in Sophia Estate Homa Bay where he was arrested.

19. PW 5 stated on cross examination that he was not aware that an identification parade was done for the two accused. He however stated that an identification parade had been conducted by an Inspector Alfred Ouko and Inspector Leyambata in respect of a case of robbery with violence. This was in respect of an incident that took place on the night of 5<sup>th</sup> April 2004 prior to the murder. He confirmed, however, that an identification parade of the accused was conducted in the June 2004 with PW 1 as the identifying witness.

20. In his sworn testimony, the accused denied any involvement in the deceased's death. He stated that he lived and did business in Sofia, Homa Bay from where he was when he was arrested on 2<sup>nd</sup> June 2004 then charged both with robbery and with the present murder. He stated that he was with his wife in Homa Bay on the night the deceased was allegedly murdered. The accused confirmed that he and PW1 know each other very well as they are cousins and close neighbours. He questioned the testimony from PW 1 who said that he had reported the attack and murder to the Migori Police Station on 5<sup>th</sup> April 2004 since there was no mention of any such report in the police station's Occurrence Book (OB) for that day. The relevant OB entry only mentioned the fact that a body of a man who had been taken by persons masquerading as police officers had been found in the river. He stressed that he was not named in the OB report which also recorded the movement of the officers but did not name any suspect. DW 1 confirmed that PW 1 picked him out from an identification parade. He wondered why PW 1 who knew him very well did not name him at the earliest opportunity if at all he was involved in the killing.

21. He also stated that the vehicle that was reportedly used by the killers was not found in his possession. Additionally, there was nothing in the vehicle that was linked to him. To buttress his case, he relied on the Occurrence Book for Migori Police Station for the period 25<sup>th</sup> March 2004 to 3<sup>rd</sup> June 2004, particularly the following entries of 6<sup>th</sup> April 2004 and two entries for 8<sup>th</sup> April 2004.

22. The offence of murder is proved when the prosecution establishes the death of the deceased and the cause of such death; that the accused committed the unlawful act which caused the death of the deceased; and, that in causing such an unlawful act the accused had malice aforethought.

23. In respect of the first ingredient, the deceased's lifeless body was recovered from River Kuja in the presence of many people, including PW 2, PW 3 and PW 6. The injuries observed by PW 5 are consistent with the assault described by PW 1. Although, PW1 testified that he saw a gun placed on the deceased's head followed by a loud bang, PW 5 did not find any evidence of a gun-shot wound. This is consistent with the testimony of PW 1 that when the assailants tried to shoot him, the gun failed although it made a loud bang. What is clear though, is that the deceased suffered serious assault which led to his death. The only evidence shows that the deceased was assaulted when he was kidnapped and thrown into the river.

24. Given the nature and location of the injuries inflicted on the deceased, it can only be concluded that whoever inflicted them acted with malice aforethought as the injuries could only have been inflicted with the intention to cause grievous harm or death within the meaning of **section 206(a)** of the *Penal Code*. He had a deep cut wound on the back part of the head and a fracture of the skull which resulted in serious brain damage.

25. The key issue in this case is the identity of the killers. The prosecution case was based on the direct testimony of PW 1 who was kidnapped with the deceased on the night of 5<sup>th</sup> April 2004 by four men in a white saloon car. He was not immediately able to identify the men as it was a dark and there was insufficient moonlight. He stated that by the time they were removed from the car

boot, “there were no lights except the torches they had. The moon was not bright, it was setting.”

26. The deceased was killed at night in circumstances that were not exactly favourable to positive identification of the assailants. The principles guiding the court’s approach to matters of identification in difficult circumstances are well settled. Our courts have emphasised that unless handled with care, evidence of visual identification can occasion a miscarriage of justice (see **Karanja & Another v Republic**, [2004] 2 KLR 140 and **Wamunga v Republic**, [1989] KLR 424). In **Republic v Eira Sebwata** [1960] EA 174, and **Kiarie v Republic** [1984] KLR 739, the Court of Appeal was even more categorical on reliance on such evidence holding that the evidence must be “*absolutely watertight*” to justify conviction. In **Wamunga v Republic (supra)** the Court of Appeal warned that;

*[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.*

27. 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 the 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).

28. Where the assailants are not strangers, the Court of Appeal in **Anjononi & Others v Republic** [1980] KLR 59 observed that, “*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.*” But even in such cases of recognition, the court must exercise caution as mistakes can be made as the Court also warned in **Wamunga v Republic (supra)** that “*Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.*”

29. The accused cast doubt on the testimony of PW 1 who stated that he was able to identify him during the attack. The accused insisted that if indeed PW 1 identified him during the attack, nothing stopped him from mentioning his name to the police when he reported the killing. PW 1 testified that he knew the accused very well even before the attack as they were relatives and neighbors. More importantly, he testified that as their captors assaulted them, one of them removed his cap and mask and asked two of his companions to shine their torches on his face so that the deceased could identify him. When this happened, the deceased managed to see the accused whom he identified by name. The accused insisted that the deceased called him by his two names, and he only appeared satisfied once the deceased named him. This is the moment PW 1 managed to identify the accused. The light from the torch was sufficient to see him. There were two torches that were shone. The beating that PW 1 and his father received at the riverside also lasted long enough for PW 1 to take a good look at the suspect whom he knew. PW1 was also familiar with the accused’s voice and he also confirmed as much in cross-examination.

30. I have taken note of the caution that a court is required to heed when dealing with identification by one witness in circumstances that are not favourable for positive identification. With that in mind, I still find that PW 1 was not mistaken when he identified not only physically but also through his voice when he was interrogating the deceased. Finally, I found PW 1 testimony consistent and detailed and his demeanour was that of a person who had been traumatised by the event. There was no reason for him to lie or implicate the accused as there was no prior grudge between him and the accused. It is also clear that the accused actions were deliberate. He intended to kill the accused and deceased and expected that the both would be dead by the end of the ordeal hence he acted confidently in exposing himself to them. I find and hold that PW 1 was able to identify the accused.

31. One of the issues the accused raised is the identification parade wherein PW 1 picked him out as the assailant. He also contended that the PW 1 did not identify him in the first report to the police

station. In my view the identification parade was not necessary since the witness knew the accused. Questions over identification parades for known suspects and the failure to name known suspects to the police were addressed by the Court of Appeal in **Martin Oduor Lango & 2 Others v Republic Criminal Appeal No. 282 of 2012** where the Court stated that:

*There was sufficient time for the witnesses to observe, hear and register in their minds the features each testified to have done during the robbery. It is true, as it was freely admitted by the witnesses, that they did not disclose the names to the police in their first report. That was the same result the appellants wanted to achieve by asking for the Occurrence Book to show that they were not mentioned. The submission made on their behalf that the non-production of the OB caused any prejudice thus becomes invalid. The appellants were under no duty to prove anything. As stated by the High Court, the witnesses did inform the police when they recorded their statements that they could identify their attackers. As the witnesses indicated that they had recognized the two appellants as people they had known, it was pointless to hold an identification parade and the record does not disclose one was held for those appellants. The ground of appeal on identification therefore fails.*

32.The case I have cited also deals with the issue raised by the accused namely PW 1 did not mention his name at the first instance when he reported the incident to the police. It is true that the OB records do not reflect or show that the accused reported or named the accused as one of the assailants. PW 1 recorded a detailed statement on 8<sup>th</sup> April 2004 on the day the deceased's body was recovered. The accused was named therein and was arrested two months later in Homa Bay after following investigations.

33.I would also point out the fact that in view of the direct and credible evidence of PW 1 identifying the accused as the person who assaulted him and the deceased, the testimony of PW 4 regarding the vehicle is not necessary to sustain the charge against the accused nor is the fact that both PW 4 and PW 5 could not connect the accused to the motor vehicle. It is clear that PW 1 could not recall the registration number of the vehicle and even if he knew it, it would merely buttress the prosecution's cogent case.

34.The motive behind the killing appears to be the fact that the deceased had reported DW 1 to the police for stealing a water pump from the village. Generally speaking, motive is not essential to prove a crime; it may however become relevant where the case is based purely on circumstantial evidence. **Section 9(3)** of the **Penal Code** which states that,

***Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility.***

In **Musili Tulo v Republic NRB CA Criminal Appeal No. 30 of 2014[2014]eKLR**, the Court of Appeal observed that;

*In that sense, motive is not mens rea. As stated the above, the person who caused the death of the deceased in this matter did it of malice aforethought and the offence was complete, the motive notwithstanding.*

35.In the present case, I have concluded that the testimony of PW 1 was sufficient to implicate the accused as one of the people who murdered the deceased. The accused's defence was exploded this evidence and the presence of motive only fortified the findings I have made.

36.I therefore find **PAUL OTIENO NDEJWE** guilty of the murder of **Domnic Osando Oganya** contrary to **section 203** as read with **section 204** of the **Penal Code** and I convict him accordingly.

**SIGNED AND DATED at NAIROBI this 14<sup>th</sup> day of July 2016**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MIGORI this 19<sup>th</sup> day of July 2016.**

**A.C. MRIMA**

**JUDGE**

Mr Abisai instructed by Abisai & Company Advocates for the accused

Ms Owenga, Principal Prosecution Counsel, instructed by the Director of Public Prosecution for the Prosecution.