



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**H.C. CRIMINAL CASE NO. 6 OF 2012**

**REPUBLIC----- PROSECUTOR**

**VERSUS**

**JOHNSTONE OKWARE IKAPEL**

**PATRICK OTINO OMUSE**

**JOHN ACHIYA OKONGO**

**MOSES OSWE ILAKU----- ACCUSED**

**STEPHEN EBUYE IKAPEL**

**EMMANUEL MABOGA MANDU**

**ALICE KORKONY IKAPEL**

**JUDGMENT**

1. JOHNSTONE OKWARE IKAPEL (A1), PATRICK OTINO OMUSE (A2), JOHN ACHIYA OKONGO(A3), MOSES OSWE ILAKU (A4), STEPHEN EBUYE IKAPEL (A5), EMMANUEL MABOGA MANDU (A6) AND ALICE KORKONY IKAPEL (A7) are jointly charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. It being alleged that on 17<sup>th</sup> February 2012 at Kororoma B village Kororoma Sub Location, Teso South location jointly murdered Stephen Oruma Ikapel (**the Deceased**).
2. Nine witnesses testified for the Prosecution while each of the Accused Persons gave sworn statements in their Defence.

The Deceased is the son of Philemon Kirikacha Ikapel (PW1) and Milka Narocho (PW2). The two are residents of Kororoma sub location and were at their home on the morning of 17<sup>th</sup> February 2012. The Deceased was also present at the home. It was the evidence of PW1 sometime between 8.00 and 9.00 a.m., A7 raised an alarm that the Deceased had stolen her brown hen. Leading the other Accused Persons, A7 stormed into the home of PW1 and demanded for the lost hen. It was the evidence of the witness that A1 was armed with a machete (panga), A2 an iron bar, A4 a wooden plank and A6 a wooden club. The invaders descended on the occupants of the home being the Deceased, PW1 and PW2 and started assaulting them. That PW2 sustained injuries to her shoulders and head and locked herself in the house. As for the Deceased and PW1, they were frog-matched to the shopping centre where they were both beaten. The Deceased was beaten to death. The witness says he sought treatment for his injuries at Kocholia District

Hospital.

3. On cross-examination, the Witness conceded that on that same morning, before the incident, his family had been confronted about a love affair between the wife of A1 and the witnesses son (David Ikapel.) The witness denied having confronted the visitors with arrows and a metal bar.
4. PW2 gave evidence in support of PW1. It was her evidence that A1, A4 and A6 entered their house while the other Accused Persons remained outside in the compound. That those who entered the house assaulted her while those on the outside beat up the Deceased. Later, she saw the Deceased being carried away by A1, A4 and A6. He also gave evidence of how the assailants were armed. That A1 was armed with a club, A2 with a machete (panga), A4 with a wooden plank and A6 with a club. She later learnt that her son had been killed at Kororoma Trading Centre. She denied that they kept any arrows at their home or that they were armed with a metal bar. She however conceded that before the invasion there had been a fight at their home on that morning. She nevertheless denied that the issue of elopement had been raised.
5. Augustine Obuya Etyang (PW3) resides within Kororoma village. His home is about 200 to 300 metres from Kororoma market. On 17<sup>th</sup> February 2012 at 8.30 a.m., while at his home he heard screams and wails from the direction of the market. And so he left for the market. There, he found many people including school children. It was his evidence that A1, A2 and A5 who well known to him had visited the home of PW1 in search of a lost hen which belonged to the A7. It was his evidence that the three were not armed. In anger, PW1 took out a weapon and hit A1 on the head, leg and arm. The same person also hit the 2<sup>nd</sup> Accused on the head, back and arm. He assaulted A5 on the head, chest and legs. All this while the Deceased had been locked by PW1 in the house. The three Accused Persons disarmed PW1 and in the process caused him some injuries on him. It was then the evidence of PW3 that later on that day he received information from the Village Elder by the name Peter Omuse that Deceased had been killed.
6. Ernest Onyongone(PW4) is a member of Community policing in Kororoma Village. At 8.00 a.m. on 17<sup>th</sup> October 2012, he heard screams coming from the home of PW1. On visiting the scene he found that PW1 had been beaten and was bleeding from his head and right hand. He had also sustained a fracture. The evidence of this witness is that as he made his way towards that home he met the Deceased running fast in the opposite direction and that all Accused Persons were chasing after him and they caught up with him. That A3, A4 and A6 brought the Deceased person back to the home of PW1. They held him by the shoulder and dragged him on his legs as he was unable to walk. The Deceased had injuries to his head, back and legs. The Accused Persons dropped him at the home of PW1. At this time PW2 had locked herself in the house while the assailants had sat down PW1 near the Deceased.
7. After a short time, the 3 Accused Persons again dragged the Deceased and PW1 to Kororoma Primary School. It was at a verandah at the shop near the school that the Accused Persons beat up the Deceased to death using a metal bar, clubs and pieces of wood. He was more specific when he stated that A1 was armed with a panga and that A2 and A3 were each armed with a club. And that A4 and A6 both used the metal bar in turns. It was his evidence that PW1 who was sitting 10 metres away could see the incident unfold. That the witness was however unequivocal that the A7 did not assault the Deceased.
8. In cross-examination the witness stated that he was throughout with PW3 right from the time he first reached the compound of PW1 upto the time the Deceased was killed. It was therefore his evidence that PW3 must have witnessed what he himself saw. It was his further evidence that many people including school children and their teachers witnessed the assault on the Deceased.
9. Patrick Oriama Oyese, (PW7) is one of the people who had been arrested by police in respect to the death of the Deceased. The witness owns a kiosk at Kororoma market. That on the morning of 17<sup>th</sup> February 2012 at about 7.20 a.m., he saw many people pass-by his kiosk going towards Uganda direction. Amongst them he could recognize A1 and A2. That he never saw them carry any weapon and nothing unusual happened on that day. It was his further evidence that although it had been said that the Deceased had been killed near his kiosk he did not witness any such incident.
10. Chief Inspector Benard Kenyatta (PW6) was at the material time the Officer in Charge of Malaba Police Station. On 17<sup>th</sup> February 2012, he received a report from the Assistant Chief of Kororoma sub location that members of the public had subjected the Deceased to mob justice on allegation of

- theft. He assigned Cpl. Samuel Rotich (PW9) to take up the matter. In the company of his colleagues, PW9 visited the scene and found the Deceased lying dead on a path. He had bruises to his chest and eyes. On inquiring as to why he had been beaten, he was told by members of public that the Deceased had been suspected of stealing the hen of a lady called Alice. The Police Officer and his colleagues removed the body of the Deceased to Bungoma Hospital mortuary where a Post Mortem was performed.
11. PW 9 told court that he was transferred from the station sometime in May 2012. This would be 3 months after the incident. It was his testimony that by the time he left that station, no names of any suspects had been brought to his attention. That evidence would somewhat contradict what he earlier told the court that the suspects fled immediately after the incident and were at large.
  12. When asked by the police to ascertain the cause of death of the Deceased, Dr. Raymond Damba returned an opinion that the cause of death was firstly, Cardio Respiratory arrest due to Severe Head Injury following blunt force trauma to the Head and secondly a massive Left-sided Haemothorax following blunt Chest Trauma. This opinion was returned after the Doctor had observed some injuries to both the external and internal appearance of the body. On the External Appearance, there were abrasions on the Anterior chest wall, abdominal wall and thighs. These were linear and the longest measured 150mm. On the Internal Appearance, the Doctor noted a massive Haemothorax on the left side with a collapsed left lung. The Doctor further noted a Bilateral Temporal Muscles Haematoma and a massive Bilateral Subdural Haematoma on the head. The Doctor captured his finding in a report that was produced on his behalf by Dr. Harun Ombongi (PW8).
  13. I now turn to highlight the Defence case. Johnstone Okwara Ikapel (DW1) is a resident of Kororoma sub location. On the morning of 17<sup>th</sup> February 2012, he woke up and left for his place of work. He would have to use a route that bypasses the home of PW1. When he reached near the compound of PW1, he found A7 and PW3 there. On exchanging greetings PW1 turned on him and hit him with a metal bar. In turn, A1 disarmed his attacker. As he did that, PW2 joined PW1 and hit him from the back with a metal bar. He struggled with the two and they overpowered him. He was only rescued when A2 came to his aid and disarmed the attackers. He denied killing the Deceased. In cross examination, he told court that the brother of the Deceased Daniel Ikapel eloped with his wife in year 2007.
  14. Patrick Otino Omuse (DW2) says that at the material time he found a scuffle on a road near the home of Philemon Ikapel (PW1). The people who were fighting were PW1 and PW2 on one side and A1 on the other. That PW1 and PW2 were both armed with metal bars. He intervened in the fight and helped to disarm PW2. That also present at the scene was PW3 and A7. He denied the charges.
  15. An alibi Defence was offered by John Achiya Okongo (A3) who says that on 17<sup>th</sup> of February 2012 he worked on his farm from morning until 12.30 p.m. That he only learnt of the death of the Deceased as he made his way home from some students he overheard talk of the killing of someone at Kororoma shopping centre. The witness told court that he led his usual life and continued with his normal course of life until 11<sup>th</sup> August 2012 when he was arrested from his house. In cross examination he was hard-pressed to explain why he was indifferent to the first news of the death of the Deceased. The witness nevertheless maintained that he attended the funeral of the Deceased.
  16. Another alibi Defence was made by Moses Oswe Ilaku (A4). It was his evidence that he knows nothing about the death of the Deceased. That on 17<sup>th</sup> February 2012 he left his home at Kororoma village at about 5.30 a.m. for River Malaba on the Ugandan side. He worked there until 7.30 p.m. when he returned home. He says that he was therefore surprised when he was arrested on 11<sup>th</sup> August 2012 on an allegation that he had murdered the Deceased. In cross examination, he says that he last saw the Deceased alive five months prior to his death but that he attended his funeral.
  17. Stephen Obuya Ikapel (A5) is a first cousin of the Deceased. It was his evidence that on 17<sup>th</sup> February 2012 he left his home at 6.00 a.m. for work at Malaba town. He left the site at lunch break and went to a place where he had left his mobile phone charging. On switching on the phone, he noticed that his clan chairman had tried to reach him. A5 belongs to Karuku clan. On calling the chairman he was asked to return home immediately. He was then informed by the

- chairman that the Deceased had been killed. The Deceased also belongs to that clan. After the meeting with the chairman he left for his home and on the way he met PW1 who was very angry and did not speak to him. A5 also told court that on 18<sup>th</sup> February 2012 there was a clan meeting in which money was raised for the funeral of the Deceased. He attended that meeting.
18. Emmanuel Mabonga Mandu (A6) says he spent the morning of 17<sup>th</sup> February 2012 at Bungoma town. There he distributed beans until 11.00 a.m. and left Bungoma for Malaba at 5.00 p.m. On his way to his home at Kororoma, he was told that the Deceased had been killed allegedly for stealing a hen belonging to his Aunt. Further that another issue had arisen as it had been alleged that the cows belonging to his family had eaten and destroyed the maize crop of PW1. That on 18<sup>th</sup> February 2012, PW1 in the company of his son Okongo visited him about the issue destroyed crop. PW1 then demanded that A6 pays some compensation for the destruction of the crop. After haggling on the amount it was agreed that A6 pays a sum of Kshs. 5000/- and one bag of maize. Available immediately was the one bag of maize and 500/- shillings. The balance was to be paid by 26<sup>th</sup> of May 2012. But because of PW1's insistence that the money be paid before the due date a quarrel ensued between PW1 and A6. That henceforth PW1 developed a grudge against him.
  19. Under cross-examination A6 explained that PW1 approached him for compensation because he had the ability to pay it. But that as it turned out it was the father of A6 who eventually paid the balance after the disagreement of A6 and PW1. As to why he never attended the funeral of the Deceased, A6 explained that his family was also bereaved and the funeral of his relative was on 24<sup>th</sup> of February 2012.
  20. Alice Korokoni Ikapel (A7) was a victim of a break-in on the night of 16<sup>th</sup> February 2012. In the break-in, she lost 3 hens. The next morning she reported the matter to the Village Elder. She told the Village Elder that she was not able to identify any of the people who broke into her kitchen. However, following footprints on the ground, she and the Village Elder were led to the compound of PW1. When PW1 was asked about this, he was enraged. PW1 entered his house and he emerged with PW2. PW2 then attacked A1 who was passing by. She hit her with a metal bar. PW1 also assaulted her and she ran away. Later the Village Elder disarmed PW2. A7 together with PW2 then left for the home of The Area Sub Chief. Later on that day A7 heard that someone had been killed at Kororoma market. She visited the scene where she joined a big crowd that was standing by a body. The body belonged to the Deceased. The Deceased is a nephew of A7 and it was her evidence that she attended his funeral.
  21. Taking questions in Cross-examination, A7 told court that the Village Elder who received her report of the stolen hens and who accompanied her to the home of PW1 is PW3. She denied that PW3 found her at the home of PW1. She insisted that PW2 assaulted A1. She also insisted that PW3 disarmed PW2. It was also her testimony that after A1 had been hit he left the scene and proceeded with his journey without reacting. Later, she changed an aspect of her testimony when she stated that A2 also came to the scene and disarmed PW2. That A2 did so with the help of PW3.
  22. The case for the Prosecution is that through the evidence of four eye witnesses it has established that all the Accused Persons are responsible for the death of the Deceased. These eye witnesses are PW1, PW2, PW3 and PW4. It was submitted by Mr. Owiti for the State that the witnesses recognized the Accused Persons as they are related to them and hail from the same area. That the Accused Persons were, in broad daylight, seen pursuing and dragging the Deceased Person from his parent's home to Kororoma Centre. Mr. Manwari for the Defence was of a different view. In his submission, Counsel argued that the testimonies of PW1, PW2 and PW3 contradict each other in material particulars. It is to the evidence of PW1, PW2, PW3 and PW4 that this Court now turns to appraise.
  23. In his Examination in Chief PW1, told court that all the Accused Persons invaded his home on the morning of 17<sup>th</sup> February 2012 at between 8.00a.m. and 9.0a.m. in search of a stolen hen. The Accused Persons beat up the witness, his wife (PW2) and his son (the Deceased). That some of the attackers were armed. A1 was armed with a panga, A2 with a metal bar, A6 with a wooden club while A4 carried a wooden plank. It was the testimony of the witness that the Accused Persons first assaulted the three in his compound and later forced him and the Deceased to the shopping centre. There, they beat up the Deceased to death.
  24. In cross-examination PW1 denied that on the same morning he was confronted about the issue of

- the love affair between his son (David Ikapel) and the wife of A1 A2. PW1 denied assaulting any of the Accused Persons with a metal bar. The witness denied that he was armed with a metal bar or arrows.
25. Substantially in support of the evidence of PW1 was the testimony of PW2. On that morning, she saw A1, A4 and A6 enter her house and assault. The rest of the Accused Persons were on the outside beating her son. The three named assailants then carried the Deceased to the Centre where they killed him. In her evidence Okwara (A1) was armed with a club, Oswe (A4) carried a wooden plank and A6 was armed with a club. She said nothing about the metal bar.
26. PW3 and PW4 are said to have witnessed the assault on PW1 and his family. It was the evidence of PW3 and PW4 that on the morning of 17<sup>th</sup> February 2012 at about 8.00 a.m., they responded to screams from the home of PW1 and went to that scene. PW4 was emphatic that he was with PW3 as the incident unfolded and expected PW3 to have seen what he saw. Yet the Account of the two witnesses was dramatically different.
27. According to PW3, A1, A2 and A5 had visited the home of PW2 to enquire about the stolen hen of A7. That the three were not armed. Their visit infuriated PW1 who removed a weapon which he used to hit the three. The Accused Persons disarmed PW1 of 2 metal bars and assaulted him as they did so. In Re-examination he emphasized;

**“Philemon first attacked the 3 Accused Persons and so they struggled and disarmed him, in the process they injured him”**

Philemon is PW1. Clearly the evidence of this witness did tally with that of PW1 and PW2. And as will be apparent shortly, that evidence also differed with that of PW4.

28. When PW4 got to the home of PW1 (this would be about 8.00a.m.) he found PW1 bleeding from his head and his right hand was fractured at the elbow. A fight was on. According to this witness all the Accused Persons were present but it was A5 who was assaulting PW1. The witness stated that as he made his way to the home of PW1, he saw all the Accused Persons chase and catch up with the Deceased. They then brought him back to the compound of PW1. Specifically, it was A3, A4 and A6 who dragged back the Deceased who was injured on his head, back and stomach.
29. Later A3, A4 and A6 dragged the Deceased and forced PW1 to Kororoma Centre where they beat up the Deceased to death. That all the Accused Persons save A7 were armed. That A1 who had a panga used it to cut pieces of wood that were used to beat up the Deceased. A2 and A3 were armed with clubs, A6 hit the Deceased used a wooden plank and A4 hit him with a metal bar.
30. It was not plain sailing for PW4 at cross-examination. He conceded that at the time of recording his statement with the police he stated upon reaching the scene he saw 7 people fight with Philemon. In Court he stated that it was A5 who was fighting Philemon. On another aspect the witness had stated as follows in his statement

**“The owner of the chicken run to her home and brought a white chicken”**

This was not the same as his evidence in Court that it was A3 who went into the house of A7 and brought out a white hen. The witness further conceded that no names of the alleged assailants or weapons used to assault the Deceased were mentioned in his statement to the Police. He blamed this omission on the Police Officer who recorded his statement.

31. Aside from the internal inconsistency of the evidence of PW4, which could make him an unreliable witness, there are some specific aspect of his evidence that differ from that of PW3 who was present with him throughout the incident. PW3 stated that PW1 attacked A1, A2 and A5 using an iron bar and the three assaulted PW1 as they disarmed him. PW4 says nothing of this and maintained that it was A5 who was assaulting PW1. PW2 never mentioned an assault on PW1 while PW1 himself stated that he was assaulted by the Accused Persons but was not specific as to who assaulted him.
32. PW3 testified that A1, A2, and A3 were not armed. This witness never saw the other Accused Persons. While the evidence of PW1 and PW2 was consistent as to how A4 and A6 were armed. That A4 carried a wooden plank while A6 was armed with a club. There was however

- inconsistency on A1. PW1 stated that he was armed with a panga but PW2 said that he was armed with a metal bar. Let us juxtapose this with the evidence of PW4.
33. According to PW4, A2 and A3 were armed with clubs. For the first time there is evidence that A3 was armed at all. As to A2, the evidence of PW1 was that he was armed with a metal bar not a club. The evidence of PW4 was that it was A4 who was armed with the metal bar and assaulted the Deceased with it. There is nevertheless some convergence of the evidence of this witness with that of PW1 in respect to the arms possessed by A1 and A6.
34. Some evaluation now needs to be made of the evidence of these key 4(four) witnesses in respect to the incident around the Deceased. According to PW1, when the Accused Persons got to his compound they assaulted the Deceased, his wife and himself. Then he stated under cross examination.

**“When the Accused Persons were asking who is this who stole the hen from Mama Alice, the Deceased escaped to a relative. He ran away after he was beaten and then they caught up with him”**

PW2 did not give any evidence about a chase of the Deceased. As for PW3 he stated,

**“I never saw any of the Accused Persons attack the Deceased.”**

35. PW4's account was the most detailed and supported that of PW1 but had a startling difference with that of PW3. PW4 stated that as he made his way to the home of PW1, he saw all the Accused Persons chase after the Deceased who was running away fast. They caught up with him and A3, A4 and A6 dragged him back to the compound of PW1. By this time the Deceased had injuries on his head, back and stomach. Later, the trio took the Deceased to the scene where the final blows were inflicted on him. I say that this account is dramatically different from that of PW3 because PW3 said that he never saw any of the Accused Persons attack the Deceased. Further this witness (PW3) did not say anything about how the Accused Persons chased and caught up with Deceased as he tried to escape.
36. From the above evaluation, the Prosecution case was fraught with inconsistencies. There were three version of the confrontation between PW1 and the Accused Persons. There was inconsistency in respect to how some of the Accused Persons were armed. Significantly, there were two versions on whether the Accused Persons attacked and assaulted the Deceased. The evidence of the 4 star witnesses is therefore without some difficulty.
37. The weakness of the evidence of these 4 witnesses is somewhat compounded by the evidence of Cpl. Sammy Rotich (PW9) who was part of the team that investigated the matter. That witness was transferred from Malaba Police Station in May 2012. That would be about three (3) months after the incident. In his testimony he stated,

**“By the time I left no names of suspects had been brought to my attention. That was 3 (three) months after the incident.”**

38. The inconsistency in the evidence of the alleged eyewitnesses to the incident coupled with the failure of witnesses to name the suspects to the police immediately after the occurrence of incident raises a doubt that must be resolved in favour of the Accused Persons.
39. I am unable to find that any of the Accused Persons was responsible for the death of Stephen Oruma Ikapel. I acquit each and every Accused Person. They shall be set free unless detained for some other lawful course.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 7<sup>TH</sup> DAY OF JULY 2015**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**OILE.....COURT CLERK**

**OWITI.....FOR ACCUSED**

**MANWARI.....FOR REPUBLIC**