



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 26 OF 1993**

**REPUBLIC.....STATE**

**VERSUS**

**ALFAYO OTIENO OGUNGA.....ACCUSED**

**JUDGMENT**

The accused, Alfayo Otieno Ogango, is charged with murder contrary to section 203 as read with section 204 of the Penal Code.

Particulars are that on the 25th May 1992 at Korogocho village in Nairobi area the accused jointly with others not before the Court murdered Julius Ouma Mineka.

Evidence has been adduced in this Court that the deceased was suspected of being a thief having been involved in some thefts which had just taken place. His house was searched for stolen goods during the evening of 25th March 1992 as was the house of the other suspect, Jenerius Odhiambo, apparently a friend of the deceased.

Later that evening the two suspects were arrested by the group of people who had been doing the search. As the group grew into a mob, it became unruly and decided to administer mob justice to the suspects – although no stolen goods had been found with any of the suspects.

Jenerius Odhiambo who gave evidence as PW5 in this Court said that the accused, whom the witness referred to as Alpha, was one of the people in the mob. This witness claimed that the accused cut the deceased on the shoulder with a *panga* and that somewhat the deceased escaped and ran away up to his house. Jenerius Odhiambo said he remained in the hands of the mob and the accused cut him at the back of his head and followed it by cutting him on the left side of his head using a *panga*. He was stoned on the face and he fell to the ground. The witness claims he became unconscious but at the same time he could hear people speaking in *Dholuo* that he be burned as an example to others. He could later feel some paraffin being poured on him and some firewood being placed on him. He could hear members of the mob ask for a tyre. He could know that his cousin was running to go and call his brother who rushed to the Scene and rescued him by taking the witness to the witness's house and locked it with two locks.

Following morning, Jenerius Odhiambo learned that the deceased had been burned to death by the mob. This witness said he had known the accused and had been seeing the accused before this incident, although they had not been close.

Jenerius Odhiambo told the Court that the accused first pushed him saying they go to the house of the

deceased. As the witness turned, he felt a *panga* cut at the back of his head. Trying to look he felt the second *panga* cut. He then concludes that he saw it was the accused because it was the accused who was talking loudest.

It be noted that Jenerius Odhiambo mentions the accused only among the people who were in the mob. He was not present when the deceased was burned and by the time the witness was rescued from the mob, the deceased had escaped and ran away.

Stephen Onyango who gave evidence as PW4 is the other witness who claimed was at the scene. According to his evidence, he was in the mob which he joined when the mob went to search the house of his neighbour called Onyango. The mob had arrested the deceased and they went and arrested one Jairus after also searching his house.

Eventually the mob started beating the deceased and Jairus. Stephen Onyango said he did not participate in the attack on the two suspects. Jairus was cut on his head with a *panga* and Ouma was cut on his hand with a *panga*. The mob dispersed when administration police men were seen passing. Jairus' brothers took that advantage to take him away as the deceased walked back to his house.

After a while the mob re-grouped and Stephen Onyango says that the accused was in the mob. The witness was also present.

They went to the house of the deceased who had locked himself in the house. The accused took a stone and hurled it at the locked door. The door got broken. Accused got inside. He cut the deceased with a *panga* three times as Stephen Onyango and other people stood at the door watching. They pulled the deceased out of his house up to a road. These were the accused and other people pulling the deceased as he bled profusely and had become weak and not able to speak. The accused went to look for a tyre. Found it, came with it and put it round the shoulders of the deceased. At

this stage the witness Stephen Onyango moved far and after a short while he saw fire burning from the place. He did not know who lit the fire. He returned to his house and did not go out until 7.00 am the following day when he accompanied a brother of the deceased and they went and arrested the person who had been complaining the previous night that his things had been stolen. Stephen Onyango had known the deceased before this incident. He added that the mob was also beating the deceased and that at the deceased's house he remained outside as people got into the house.

The defence of the accused is that he never was in the mob which beat and burned the deceased to death. That defence was an alibi which the accused has advanced since the time of his arrest in the police custody, repeated the same during committal proceedings in Magistrate's Court and has repeated the same in his defence in this Court.

He told the Court that during the evening of 25th March 1992 he was in his house entertaining his girl friend Lilian Akinyi who had paid him a visit. While in the house he heard some people pass making noise speaking in *Dhuluo* and Kiswahili. Went outside the house to see them but it was difficult to know who they were as there was darkness. Although he heard them say they had arrested a person suspected of stealing, he knew such things were common in Korogocho area and did not therefore take much interest. He returned to his house. Ate some food and slept and remained in the house with his girl friend throughout the night till 6.00 am when he woke up. Took tea and left for work.

On the way to work he saw people crowded ahead. He reached them and saw a burned body of a human being. He proceeded to his place of work. Failed to get the person he wanted to meet. Returning to his house he found the dead body still at the same place, about 150 metres from his house. As he passed by proceeding to his house he met a woman who told him that there were some people armed with *pangas* and knives looking for him on the ground that he killed the deceased and that if they found him they would kill him. She said those people included Stephen Onyango. The accused became scared and decided to keep away from his house. He stayed with relatives for some time and when he saw that those people were still looking for him, he went to see the Chief of Mathare who gave him escort administration

police men who went with him to his house and he removed his things. He went to stay with his brother.

The accused claimed that Stephen Onyango gave evidence implicating the accused in this case because Stephen Onyango has a grudge against the accused as the accused has won the lady Lilian Akinyi whom Stephen

Onyango wanted to marry but the girl refused.

The accused said he did not know the deceased either by name or by appearance. He did not even know the person whose things were said to have been stolen by the deceased.

That is the summary of the evidence involving the name of the accused in this case.

For the rest there is no dispute that the deceased died. Dr Samwel Odera Ywaya who performed the postmortem on the body of the deceased found 95% burn of the body and body organs by fire flame and formed the opinion that the cause of death was that burn. He never said anything about *panga* cuts or knife injuries or injuries from weapons like stones or sticks.

In relation to the evidence of Stephen Onyango the question was raised during submission at the close of hearing whether or not he was an accomplice. That is a person who participated in the committing of this crime. In the circumstances of this case, it is difficult to say whether he was an accomplice, or not. He was in the mob for quite sometime as can be ascertained from his evidence. The characteristics of a mob is that it acts on emotions and it does so unreasonably. Stephen Onyango may have thrown a stone during the night of 25th March 1992 only to be sober the following morning and join the brother of the deceased looking for suspects in this case. He may have been so good as not to throw any stone.

In short whether he is taken as an accomplice or not his evidence needs to be handled with caution.

He is the most important witness in this case as he claims to have witnessed the most crucial stages in the case.

It be noted that he keeps on saying it was the accused who cut the deceased in the house in which the witness himself did not enter. He says he remained outside as other people entered the house. Later he says it was the accused looking for tyre and placing it on the deceased. He speaks therefore as if the case was not one of mob justice.

The same can be said of the evidence of Jenerius Odhiambo whom the mob had arrested together with the deceased. He talks of the accused having done all the cuttings by *panga* even when such a cut was done from behind where he could not see the person doing it in that mob justice. He could feel and know what was happening when he was unconscious.

One other thing to be borne in mind is that the mob justice was being administered at night, and the mob was moving with the deceased from place to place. No evidence had been adduced to establish that there was sufficient light at each crucial stage whereby witnesses were enabled to see and ascertain the action the accused was taking and to be sure that was the accused doing it and nobody else.

The accused is saying he was not in the mob. He wanted to bring Lilian Akinyi as a witness to support him in his alibi defence but failed to trace the lady. But that failure should not be taken as adversely affecting the defence case. If anything, it is the prosecution's case which should be adversely affected because the alibi defence of the accused having been known to the prosecution right from the time the accused was in the police cells, it was the duty of the prosecution to set out to disprove that alibi defence and one of the witnesses the prosecution should have gone for in an effort to disprove the alibi was the lady Lilian Akinyi. It follows that the failure by the prosecution to bring Lilian Akinyi as a witness draws an adverse conclusion against the prosecution in that the prosecution knew her evidence was going to be against the prosecution's case.

Another point to be noted is that Dr Ywaya in his post mortem report talked of the deceased having died from fire burn only. He talked of no other injuries other than those caused by fire burn. It follows that when considering who killed the deceased, the Court should be looking for the person who set fire on the deceased. That is the person who struck the fatal blow in this mob justice case. Who is that person? The Court has no direct evidence.

With regard to the evidence of cutting the deceased by *panga*, in the absence of medical evidence to that effect, the Court would be wrong to rely on the evidence of witnesses who claim to have seen the deceased being cut at night in the darkness.

Moreover there is police evidence that they did not see much blood in places like the house of the deceased where Stephen Onyango claimed the deceased received three *panga* cuts. The police inspector who went to the house was able to see only few blood stains.

In conclusion, the above is the situation in this case. There are other aspects of the case also needing comments but I feel what I have already commended upon is sufficient to have this case disposed off.

My considered view is that the prosecution has not succeeded in proving this case against the accused beyond reasonable doubt. I do not, therefore, find the accused guilty.

My conclusion agrees with the minority opinion of the assessors. Two of the assessors held opinions contrary to my conclusion as they concluded that it was the accused who killed the deceased. That conclusion was however almost retracted when the two gentlemen assessors told the Court that they found the accused guilty, not of murder, but of manslaughter and that that was because they were not sure it was the accused who lit the fire that burned the deceased causing his death.

I am not sure whether these two assessors understood what is meant by the prosecution proving its case against the accused beyond reasonable doubt.

I regret human life was lost clearly in an unlawful manner at the hands of mob justice. But the prosecution needed better evidence to prove the accused guilty especially since the life of the accused is at stake in this case.

Accordingly the case against the accused herein is dismissed and the accused acquitted.

He be released forthwith unless he is lawfully detained in some other cause.

**Dated and Delivered at Nairobi this 16th day of June 1994.**

**J.M.KHAMONI**

**JUDGE**