



**Omondi & 2 others v Republic (Criminal Appeal 3 of 2018)  
[2023] KECA 847 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 847 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 3 OF 2018  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
JULY 7, 2023**

**BETWEEN**

**GEORGE OMONDI OMONDI ..... 1<sup>ST</sup> APPELLANT**

**PHILIP NYAGOL OGADA ..... 2<sup>ND</sup> APPELLANT**

**KEPHA ODHIAMBO OJANO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the High Court of Kenya at  
Migori, (Mrima, J.) dated 11th October, 2017 in HCCRC No. 108 of 2014)*

**JUDGMENT**

1. In the early hours of February 1, 2014, Calvin Omondi (the deceased) met his death at the hands of an irate mob. George Omondi Omondi (the 1<sup>st</sup> appellant), Philip Nyagol Ogada (the 2<sup>nd</sup> appellant) and Kepha Odhiambo Ojano (the 3<sup>rd</sup> appellant) are said to have been part of the killer mob and were charged with and convicted of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The prosecution case in Migori High Court Criminal Case No 108 of 2014 comprised the evidence of six witnesses. Key amongst them were Irene Achieng Ochieng (PW1) and Jared Ochieng Ndege (PW2).
3. PW2 hails from Anyuola in Kagam of Homa Bay County. The deceased is a son of PW2's uncle, presumably, then, a cousin. At around 3.00am, he was woken up from his sleep by noises from outside his house. A distressed voice called out 'Mama Junior help me these people are killing me.' He recognized the voice to be that of the deceased. He responded to the distress call.



4. He found the deceased being beaten by a mob of about 20 people. They were armed with sticks and pangas. PW2 was able to identify four of the people; Baba Odhis, Omondi Jeshi, Kepha and Seth. PW2 knew them by name and was able to see them because of light from torches and telephone handsets. It was his testimony that a bright moon shone the night. On seeing that the mob was unrelenting in its anger and violence against the deceased, he called out PW1 whose house was about 10 meters from the scene.
5. PW1, too, had heard noises outside her house. The main door to her house was hit and someone asked about the whereabouts of her husband. Later she had a knock to the back door and the voice of PW2 who told her 'Mama Junior fungua Omondi anauwawa.' On opening the door and reaching the front door, she saw the deceased who had been brought there. He was still under assault. The area is well lit by security lights and she was able to recognize some of the assailants; Omondi Jeshi, Kepha, Baba Odhis, Baba Senti and Baba Tevin. They either hailed from or worked in her neighbourhood. She implored the crowd to stop assaulting the deceased, whom they accused of theft, and take him to the police instead. They would not hear of it. She left the scene to Kamagambo police station where she made a report of the incident and with two police officers returned to find the mob still gathered. The deceased was taken in a police vehicle to Rongo District Hospital. He died at the hospital as PW1 was preparing to take him for further treatment at a referral hospital.
6. One of the police officers who accompanied PW1 back to the scene was PC Daniel Choge (PW5). The report was made at about 6.30am on February 1, 2014 and he, together with PC Makhokha and PW1, left for the scene. There, he met a large crowd with a person lying on the ground, injured. He rescued the besieged and badly injured person and took him to Rongo District Hospital where he died while undergoing treatment.
7. The death of the deceased was painful. He suffered extensive injuries as shown in the post mortem report prepared by Dr Douglas Marita and produced on his behalf by Dr Kamy Gabriel Mwangi (PW6). Externally, the body had multiple bruises all over, including the upper limbs, trunk, head, face and chest. He had three deep cut wounds to the skull one on each side of the head measuring 3cm x 3cm with a depth of 2cm each. He had multiple fractures, bruised wounds on the mouth, between the neck and waist. He sustained 3 deep wounds to the skull. The doctor returned an opinion that the cause of death was severe hemorrhage and cardiogenic shocks due to blunt injuries.
8. In his defence, the 1<sup>st</sup> appellant stated that on that morning, at about 4.30am, he was asleep in his house when he heard screams from the outside. He rushed out and met many people. In fear he returned to his house. He later gained some courage when he heard his neighbours opening doors to their houses. He did the same and went out. There, he saw a person lying down in the midst of many people. The crowd told him that thieves had broken into a neighbour's house. He returned to his house.
9. Later he met PW1 who told him that she was a relative to the person who was being assaulted. She informed him that the people assaulting the deceased had prevented her from reporting the matter to the police. He advised her to leave the scene and to reconnect at a distance so as to go to the station, which they did. It was his testimony that he and a fellow rider are the ones who called the police officers and brought PW1 back to the scene. A week later one Lucas Ngoche thanked him for the role he had played and requested him to be a witness but he declined because he did not witness the assault. Lucas then told him that he will ensure that he was charged with the murder of his relative.
10. The 2<sup>nd</sup> appellant, on the other hand, testified that he heard noise at around 3.00am of that day, but it faded only for him to hear screams at around 4.30am. At around 6.30am, he saw a police vehicle heading in the direction of the noise. He followed the vehicle. He found many people and a person lying down. He denied assaulting the deceased.



11. The 3<sup>rd</sup> appellant also testified that he heard the noises and commotion. He left his house to see what was happening. He saw many people with torches who talked about a thief. Shortly, a vehicle with lights off drove towards the crowd and on the lights been switched on, the people in the mob ran helter-skelter. He was later approached to be a witness against the persons who allegedly assaulted and killed the deceased but he declined because he did not witness the assault. He thought that he was charged because he refused to cooperate.
12. The High Court (Mrima, J) found that the three appellants had been positively identified and recognized by PW1 and PW2 as amongst the persons who assaulted the deceased and the three had common intention to cause the death of the deceased.
13. This first appeal substantially raises three grounds. That the trial Judge erred in law and fact in; convicting the appellants when no evidence directly pointed to them as having killed the deceased; convicting the appellants when malice aforethought was not proved; and imposing a harsh sentence.
14. At plenary, Mr Akidiva who appeared for the appellants, highlighted his written submissions of October 19, 2022.
15. Counsel submitted that the prosecution failed to show, directly or indirectly, that the appellants indeed assaulted and/or had the malice aforethought and/or the intention to kill the deceased. It is contended that the testimony of PW2 was that the 1<sup>st</sup> appellant escorted her to the police station to report the case and that the 1<sup>st</sup> appellant was a good Samaritan called to ferry the police to the scene. It is argued that the 1<sup>st</sup> appellant did not assault the deceased and if by any chance he did, then he had no malice aforethought to commit murder.
16. The appellants further argue that although PW2's testimony was that the 1<sup>st</sup> and 3<sup>rd</sup> appellants had sticks and the 3<sup>rd</sup> appellant a panga, none of the weapons were produced as exhibits. It was asserted that the testimony of PW2 exonerated the 2<sup>nd</sup> and 3<sup>rd</sup> appellants in that although they were part of the crowd they did not take part in the assault.
17. Counsel also argues that the trial court relied on circumstantial evidence and cited case law regarding circumstantial evidence. Those arguments however miss the point because, as pointed out by Mr Okango counsel for the respondent in his reply, the conviction was based entirely on direct evidence.
18. Counsel for the respondent submitted that contrary to the assertions of the appellants, PW2's testimony was that he saw the appellants assault the deceased and that corroborates the evidence of PW1. It is argued that under the doctrine of common intent anyone who assaulted the deceased was guilty of murdering him.
19. This is a first appeal in which our role is as restated in the case of *Okeno V Republic [1972] EA 32*:  

' An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R, [1957] EA 336) and to the appellant court's own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M Ruwala v R, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.'



20. The overwhelming evidence, which is not doubted by the appellants, is that the deceased met his tragic death in the hands of a mob who assaulted him. Second, although the assault was in the night, the appellants have not sought to fault the following findings of the learned trial Judge:

' Whereas the incident took place at night I am satisfied that there was sufficient and bright light from moon, security lights, spotlights and phone lights that enabled those who were at the scene to see clearly. PW1 and PW2 knew the accused persons as their neighbours which fact is not disputed. The incident also took long and that gave ample opportunity to PW1 and PW2 to further see the assailants. Further both PW1 and PW2 actually engaged the people who were beating the deceased to stop doing so. Again the evidence of PW1 and PW2 tallied on the weapons the accused persons carried. George and Philip also admitted to have been at the scene and saw the deceased assaulted and that they too knew PW1 and PW2.'

21. On our own understanding of the evidence, there was sufficient light from the moon, security light, spotlight and phone lights. Indeed, support for the evidence of the sufficiency of the light at the scene came from an unlikely quarters. In his defence, the 3<sup>rd</sup> appellant says of the scene:

' I then took few steps forward and saw many people with torches who were shining on people and saying that there was a thief'

22. The evidence is that PW1, PW2 and the appellants were neighbours and people who were known to each other. In addition, at one time or other between 3.00am and when the police got to the scene at 6.30am, all the three appellants were at the scene.

23. In the circumstances the only real issue is whether PW1 and or PW2 saw the appellants assault the deceased.

24. The evidence of PW1 was as:

' The first accused person is OMONDI JESHI, the second person is BABA ODHIS and the third person is KEPHA.

The deceased was being beaten by the people. Omondi Jeshi was beating him with a piece of Kay Apple Stick and a whip. Baba Odhis was holding a panga in his hand. He was slapping the deceased with a panga. Kepha had a stick and was beating the deceased as well'

25. This evidence, which withstood cross-examination, squarely points to the appellants as part of the assailants and finds strong support in the following testimony of PW2;

' I identified four people in the crowd who were assaulting Omondi. Three of them are the ones in the dock. They are OMONDI JESHI who is the first accused person. He was armed with a thorn and kept on assaulting Omondi with it. The second accused person is BABA ODHIS who had a panga but did not hit Omondi with it. The third accused person is KEPHA. He is also a neighbor and a friend and had a wooden stick. He threatened to beat him with the stick, but did not beat the deceased.'

26. There is homogeneity in the evidence as to the role of the 1<sup>st</sup> appellant. Regarding the other two appellants, the testimony of PW2 is that although he saw them armed with the weapons, they did not assault the deceased. Is this inconsistent or in contradiction with the evidence of PW1? We do not think so. The assault was for an extended period of time and it was possible that two people, both at the scene, would see different episodes of that assault. What is critical is that the evidence of PW1



was unshaken and found material corroboration from the evidence of PW2 as to what the 2<sup>nd</sup> and 3<sup>rd</sup> appellants carried as arms on that night.

27. Section 206 of the Penal Code defines malice aforethought as follows:

' Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance: -

- a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- c. An intent to commit a felony;
- d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.'

28. At plenary hearing the Court pointed out to Mr Akidiva that malice aforethought within the meaning of section 206 is conceptually different from the meaning of malice in common parlance. This Court, in *Isaack Kimanathi Kanuachobi Vs Republic (2013) eKLR* (Court of Appeal at Nyeri Criminal Appeal No 97 of 2007, explained:

' There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in furtherance of a felony (for example, rape or a robbery) or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought. (See REPUBLIC VS STEPHEN KIPROTICH LETING & 3 OTHERS (2009) eKLR High Court at Nakuru Criminal Case 34 of 2008).'

29. The evidence on record supports the following findings by the trial court as to why the appellants had malice aforethought:

' In this case there is evidence that the deceased was arrested at around 03.00am and was persistently beaten with inter alia sticks until when he was rescued by the police at around 06:30am. That was a period of around 3 hours. The deceased was taken from one place to another while being assaulted and pleas to take him to the police fell on deaf ears. It is clear that the assailants were intent on killing the deceased or causing grievous harm and that demonstrates malice'.

30. On sentence, there was agreement by both sides that the appellants deserve a review of their sentence following the jurisprudence in *Francis Karioko Muruatetu & another v Republic (2017) eKLR*. Counsel for the appellants proposes a custodial sentence of 15 years but taking into account the period spent in custody during trial and the period already served, while counsel for the respondent thinks a term sentence of 30 years to be appropriate.



31. It is far too often that we see Kenyans taking the law into their own hands in the justification that they are meting out instant justice for wrongs to society. The mob acts as accuser, prosecutor and judge and metes out punishment, invariably, far disproportionate to the alleged crime. Say in this case death for an alleged theft. This warped sense of justice is to be frowned upon and we have no doubt that the appellants are deserving of a harsh sentence.

32. That said, we have noted the pleas of mitigation the three made at trial which include remorse on their part. We have come to a conclusion that their despicable conduct notwithstanding, they are not deserving of the harshest available sentence in our Penal Code and do hereby set aside the death sentence. Each of the appellants is hereby sentenced to a prison term of 20 years with effect from the date of sentence at trial. Any period spent in custody during trial shall be excluded in accord with section 333(2) of the *Criminal Procedure Code*;

(2) 'Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody'

33. Save for the limited success on the appeal on sentence, the appeal fails and is dismissed.

**Dated and delivered at Kisumu this 7<sup>th</sup> day of July, 2023.**

**P.O KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR.**

