



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 44 OF 2012
BETWEEN
REPUBLIC PROSECUTOR

AND

BOB SAM OTIENO ACCUSED

RULING

1. The accused **BOB SAM OTIENO** (“the accused”) is charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information were that on the 25th December 2012 at about 10.00pm at Sindo Township in Suba District within Migori County, the accused jointly with others not before the court murdered **EVANS OKINYI BAMBA** (“the deceased”). The prosecution called 5 witnesses. I am now called upon to decide whether the accused should be put on his defence.
2. In order to secure a conviction for the offence of murder, 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.
3. The fact and cause of death is not in dispute. The post-mortem on the deceased’s body was conducted by Dr Henry Owuor of Suba District Hospital, Sindo. The post mortem report was produced by Dr Julius Ochieng Odingo (PW 2) who confirmed that he had worked under Dr Owuor and was familiar with his handwriting and signature. The post-mortem was performed at Suba District Hospital Mortuary on 2nd January 2012. The significant observations were that the deceased had bruises on his upper lips and blood clots on the nose, mouth and trachea. The spleen was bruised and had blood clots and there was 500ml in the outer layer of the spleen. The head had bruises and swellings on the right side of the neck and the spinal column was transected around the neck. Dr Owuor concluded that the cause of death was blunt head trauma with a broken neck.
4. The investigating officer, Chief Inspector Marko Pologis (PW 5), was at the material time the Commanding Officer of Mbita Police Station. He recalled that on 26th December 2012 at 12.45am, he received a call from Zedekiah Omollo of Gingo Village informing him that the deceased was walking home on the night of 25th December 2012 at about 10.00pm when he was attacked by two people whom he identified as Bob and Cliff. He was informed that the deceased

was in the company of his uncle, George Omore, who was also attacked and injured. The deceased was rushed to Sindo District Hospital where he died on arrival.

5. PW 5 proceeded to the scene at Sindo Township in the early morning but he did not find anything remarkable at the scene at time had been tampered with. He learnt that the deceased was attacked by the accused, Nelson Ochieng and Clifford Ochieng. By the time he arrived the accused had been arrested by Administration Police Officers from Sindo DO's office.
6. APC Philip Teigut (PW 1), who was based at Sindo DO's Office, recalled that on 26th December 2012 at about 8.30am he received a report from one Helen Ochuka that a suspect had committed a murder. He proceeded to arrest the accused with APC Silas Owino (PW 3). They found the accused sheltering near Emirates Bar. PW 1 stated that he called the complainant, George Omore, who came and identified that accused as one of the people who had killed the deceased. After arrest, the accused was handed over to Mbita Police Station.
7. At this stage I am only required to decide whether there is sufficient evidence to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases among them among them **Ramanlal Trambaklal Bhatt v R [1957]EA 332**, **Wibiro alias Musa v R [1960]EA 184** and **Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
8. The key evidence against the accused is the testimony of PW 1 and PW 2 who were the arresting officers and who were informed by Hellen Ochuka that the accused was one of the people who had killed the deceased. There was also the testimony of PW 5 who stated that he was informed by Zedekiah Omollo of the incident and that George Omore, who had been injured in the attack, and who told him that the accused was one of the people who had attacked the deceased. Unfortunately, the said George Omore had died by the time the matter was being heard. When pressed in cross-examination, PW 5 stated that George Omore had recorded his statement after he had been released from Hospital at 7.00pm on 26th December 2014 wherein he mentioned that the deceased was attacked by three people but did not mention the names of the attackers in the said statement. He stated that the statement of George Omore was taken by PC Nyongesa who did not come to produce it in evidence.
9. The case against the accused is based entirely on visual evidence of identification in difficult circumstances since it is said to have occurred on Christmas night. It is trite that such evidence 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 Regina [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**). In addition, the court must consider whether the witnesses named or gave a description of the assailants to those whom they made the first report (see **Maitanyi v Republic [1986] KLR 198**). Although more reassuring, in the case of recognition the court must be satisfied that the parties are familiar with each other (see **Anjononi & Others v Republic [1980] KLR 59**).

10. The only direct evidence of identification of the accused is the statement that George Omore made to PW 5 that he knew the three assailants by name. However, PW 5 testified that in the statement taken by PC Nyongesa, on the night after he had been discharged from hospital, he had seen three assailants but did not name them. The court is left to speculate why in the formal statement the witness could not name persons he could so readily identify and whom he had named to PW 5 earlier on. It is also important to recall that when the statement was recorded, the accused had already been arrested by PW 1 that morning. PW 1 also testified that George Omore came and identified the accused when he was arrested on that morning yet from the testimony of PW 5, he was nursing injuries in hospital and was only discharged in the evening after which he recorded the statement. Apart from the credibility of the evidence, it is difficult to tell the conditions of identification and if indeed it was a case of recognition and the factual basis of such recognition. Likewise Zedekiah Omollo, who called PW 5 early in the morning and who named the accused, did not record a statement or give evidence.
11. PW 1 and PW 3 recalled that Hellen Omore identified the accused as one of the assailants yet there is no indication as why her statement was not recorded or why she was not called as a witness to explain under what circumstances she knew the accused as an assailant of the deceased. It is also strange that the accused was arrested within the vicinity of the incident almost 7 hours after the incident. Absent any other evidence, this fact is inconsistent with the accused's guilt as he would have run away.
12. Asking the accused to defend himself would amount to relieving the prosecution of its burden to prove its case beyond reasonable doubt by requiring him to fill in the gaps in its case. Even if the accused elected to remain silent, the prosecution case would fail. This is a case where, on the scales of justice, the suspicion outweighs the evidence. Accordingly under **section 306(1)** of the ***Criminal Procedure Code (Chapter 75 of Laws of Kenya)***, I am required to enter a verdict of not guilty which I hereby do against **BOB SAM OTIENO**. The accused is acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 22nd day of December 2015

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the accused.

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



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