



**Republic v Ogembo & 2 others (Criminal Case 1 of 2020)  
[2023] KEHC 2387 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2387 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL CASE 1 OF 2020  
KW KIARIE, J  
MARCH 28, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DANIEL JUMA OGEMBO ..... 1<sup>ST</sup> ACCUSED**

**CALVINCE OMONDI OWUOR ..... 2<sup>ND</sup> ACCUSED**

**PAUL ONYANGO OMOLLO ..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. Daniel Juma Ogembo, Calvince Omondi Owuor and Paul Onyango Omollo are charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the January 5, 2020 at Kachien location in Rachuonyo South Sub County within Homa Bay County, jointly with others not before court murdered Stephen Onyango Otieno.
3. The deceased was brutally beaten to death by a mob of about twenty people at about 2 am on the material night.
4. The incident took place in a dark night and the source of light was the spotlights the assailants had. Whenever an identification or recognition is disputed and the circumstances obtaining are not favourable for positive identification, then care must be taken to ensure that there is no miscarriage of justice. Lord Widgery CJ in the celebrated case in identification and recognition of *R v Turnbull and Others [1976] 3 All ER 549* stated as follows:

"Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded



in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

...

Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

5. In the instant case the evidence of purported recognition was by Judith Adhiambo Ogweno (PW1) and that of her son Victor Odhiambo Ogweno (PW2).
6. According to Judith Adhiambo Ogweno (PW1) she saw a group of about eighteen people who were beating her son. When she purported to identify the accused persons with the help of the light of the spotlights they had, the spotlights were directed at her son, the deceased herein. At the time, his assailants had surrounded him. This was the gist of the evidence of Victor Odhiambo Ogweno (PW2).
7. I therefore find that it was not possible for these two witnesses to recognize anybody under the prevailing circumstances.
8. Judith Adhiambo Ogweno (PW1) testified that she also identified Onyango Omollo (accused 3) for he was talking. He said the deceased was not going to be helped. The Court of Appeal in the case of *Simeon Mbelle v Republic [1982] IKAR 578*. The Court said:

"In relation to the identification by voice, one it would obviously be necessary to ensure: -

- (a) That it was the accused person's voice;
- (b) That the witness was familiar with it and they recognized it and
- (c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

This evidence is rendered suspect by the evidence of her son (PW2) who testified that he did not hear anybody say any specific thing".

9. Has the prosecution established a prima facie case against any of the accused? In the *Black's Law Dictionary, 10th Edition* prima facie case is defined as follows:

Prima facie case. (1805)

- I. The establishment of a legally required rebuttable presumption.
2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.



10. The Court of appeal in the case of *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 at 334 and 335, defined *prima facie* case as follows:

It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

11. Article 50 (2) (i) of the *Constitution* of Kenya provides:

- (2) Every accused person has the right to a fair trial, which includes the right-
- (i) to remain silent, and not to testify during the proceedings;

If each accused person opts to exercise his constitutional right hereinabove stated, I cannot convict him based on the evidence on record. This therefore means that the prosecution has not established a prima facie case against any one of them. I accordingly acquit each of the offence of murder under section 306 (1) of the *Criminal Procedure Code*. Each is set at liberty unless if otherwise lawfully held.

**DELIVERED AND SIGNED AT HOMA BAY THIS 28<sup>TH</sup> DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

