



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL CASE NO. 29 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MICHAEL OTIENO ODERO.....1<sup>ST</sup> ACCUSED**

**PETER ODHIAMBO ABONYO.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused persons herein **Michael Otieno Odero** and **Peter Odhiambo Abonyo** are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of which are that on the evening of 13/11/2017 at near Bondo Cereals Board, the accused persons jointly with others not before court murdered Rodgers Nalianya. The accused persons pleaded not guilty. The prosecution called twelve witnesses in support of their case which is summarised herein below.

**Prosecution's Case**

2. **PW1 Dorosila Apiyo Nalianya** and **PW2 Pamela Makonjo Munyendo**, the deceased's mother and widow respectively did not witness the incident and only viewed and identified the deceased's body in the mortuary after receiving information that he had been killed on the 13.11.2017. They both witnessed the deceased's post-mortem.

3. **PW3 Jacklyne Awino Adiwa Nalianya**, the deceased's other widow testified that on the 13.11.2017 at 8.45 p.m. the deceased informed her that he had a case in Court so she made lunch for him and he left. It was her testimony that at 7.00 p.m. she called him as he had not arrived back home and the deceased informed her that he was in a noisy place and would call her but by 9pm he had not done so prompting PW3 to call him to no avail. She testified that she also tried to call the deceased at midnight but was not successful.

4. It was her testimony that the following day at 11.00 a.m. the deceased's brother, Bernard called her to inquire as to the deceased's whereabouts and later revealed that he had been informed by PW2, her co-wife that the deceased had been attacked and injured at Bondo. PW3 testified that she went to Bondo where the Officer Commanding Station told her that the deceased had been seriously injured and referred her to the Officer Commanding Police Division Siaya where they were told to return the following day to be escorted to Bondo to view the body.

5. PW3 testified that before parting with the deceased on 13.11.2017, the deceased informed her that during elections time the area residents wanted only Luo Police Officers and threatened to kill non-Luos to which she advised him to seek for a transfer as he was not a Luo but he refused.

6. **PW4, Charles Oduor Omboko** testified that 13.11.2017 at or about 8.45 p.m. he was at Bondo Police Station together with the deceased a Police Officer, and three other Police Officers whose names he could not recall, arresting a suspect. He further testified that they later left for Siaya with the deceased but on reaching Bondo Cereals Board they saw many people standing on the road having put a road block. It was his testimony that some of the crowd had motor cycles while others were on foot and thus their driver stopped the vehicle.

7. PW4 testified that he sat in front with the driver while the deceased was behind in the rear cabin when one person came in front and shouted that "**ako kwa hii gari.**" It was his testimony that the area was well illuminated with lights all over. He further testified that the deceased came out of the vehicle and he was chased by the people who were on the road whereas the driver drove off to Siaya where they reported what had happened.

8. PW4 testified that the vehicle was a private car from which the deceased sought a lift. He further testified that at the road block the driver put on full lights when one person came in front of the vehicle and said “*toka toka*’ come out come out. He identified the individual as the 2<sup>nd</sup> accused herein. He further stated that the 1<sup>st</sup> Accused was also in front of the vehicle. It was PW4’s testimony that he had not known the Accused persons before and he was later called to record his statement at Bondo Crimes Office and subsequently to identify the Accused persons at an identification parade carried out at Siaya Police Station where he identified the 2<sup>nd</sup> Accused on a parade of 8 people but not the 1<sup>st</sup> Accused person who was not on the parade.

9. In cross-examination by Mr. Odongo advocate for the 1<sup>st</sup> accused, PW4 stated that the time was approaching 9.00 p.m. at night but that there were street lights as they neared Cereals Board. It was his testimony that the vehicle was a private car and that he told the Police in his statement that there were about 100 *boda boda* people on the road saying *stop “he is in the vehicle.”* He further reiterated that the 2<sup>nd</sup> Accused was on the frontline. He however admitted that he did not indicate in his statement the description of the 1<sup>st</sup> Accused.

10. In cross-examination by Mr. Ooro for the 2<sup>nd</sup> accused, PW4 stated that on the material night he was with the deceased at Bondo Police Station and further that he was also with the deceased in the vehicle. It was his testimony that he did not see the person who beat the deceased up as he ran away from the vehicle. He further stated that the crowd was in the middle of the road in front of the vehicle as they moved but one person, the 2<sup>nd</sup> Accused came in front of the vehicle after it stopped at Cereals Board. He stated that there were bright security lights in the area and he thus identified the 2<sup>nd</sup> Accused. He further stated that the deceased got out of the vehicle on his own volition and that nobody told the deceased to get out of the vehicle. PW4 reiterated that he identified and recognized the 2<sup>nd</sup> Accused because he came right in front of their vehicle and held his hands on the screen so PW4 was able to see him well. He further stated that the 2<sup>nd</sup> Accused did not say “*toka*” come out. PW4 further stated that he reported to the Police immediately that a Police Officer had been attacked and they left for the scene. It was his testimony that in his statement he gave details of what transpired and that he had not seen the 2<sup>nd</sup> Accused person during daytime.

11. **PW5 No.54194 CPL Abraham Kibet Rop** who was then attached to Bondo Police Station testified that on the material day at 5.30 pm or thereabouts he was in the station with one Police Officer from Kogelo Police Station who had gone to work in their area as he wanted to arrest a suspect of Burglary and Stealing. It was his testimony that the aforementioned police officer wanted to be assisted with one other Police Officer to accompany him and thus one P.C. Julius Chemutai Ngeno was assigned to assist the Officer and they left.

12. PW5 testified that at around 6.30 p.m. he heard noises of hooting by motorcyclists and other noise and so he got out to find out what was happening and found the said Officer from Kogelo who said he had run back into the station for safety because he was attacked by the many people as they went to arrest the suspect. It was his testimony that at the gate to Bondo Police Station were many Boda Boda riders and the OCS was calming them down telling them not enter the Police Station. He further testified that the said Officer from Kogelo said that he wanted to go to Kogelo but PW5 warned him not to go as the situation was hostile.

13. It was his further testimony that the officer asked PW5 to guide –the officer –now deceased to the stage at the Police canteen where the said officer stood for some time and PW5 went and stopped a small vehicle and asked for the officer a lift. It was his testimony that the Officer had other 3 persons he had gone with but he left with only one because one of them was said to be a thief so he was placed in custody.

14. PW5 testified that the officer boarded the vehicle and PW5 returned to the house but as he was cooking, he heard a whistle and was told that a Police Officer had been assaulted. He testified that he went to the scene and found the Officer from Kogelo had been beaten up badly lying at a junction, injured on the neck. He testified that they escorted him to Bondo Sub-County Hospital where the officer was examined and found to be injured on his ribs as well. PW5 was not cross-examined.

15. **PW6 No.86640 CPL Douglas Wamalwa** of scenes of crime Department Siaya County testified that on 13.11.2017 at around 8.50 p.m. while at Siaya Police Station he received a call P.C. Linus Omuse of C.I.D. Bondo requesting him to accompany him to an alleged scene of murder at Bondo where there was a deceased body of one CPL. Rodgers Nalianya of Kogelo Police Station.

16. It was his testimony that he arrived at Bondo Police Station and met CPL Nalianya the deceased’s body at the morgue at Bondo where he took the following photographs:

*1 – General view of the body at the mortuary.*

*II General Front view of the scene body.*

*III – General close up facial view of the same body*

17. PW6 certified that the photographs were taken under his supervision *as a Police Officer gazetted vide Gazette Notice 217 of 28.12.2017* and that original prints were in his custody and could be produced on request. The 3 photographs and the certificate were subsequently produced as P. Exh 1 – 3 respectively. PW6 was not cross-examined.

18. **PW7 Dr. Willis Ochieng Odhoch** a Medical Officer holder of Bachelor of Medicine and Bachelor of Surgery from Kampala International University who by then used to work at Bondo Sub-County Hospital until 22.7.2019 when he left for Migori testified that he was the one who prepared the deceased’s post mortem report on 15.11.2017 whose body was identified by Dorosila Apiyo Nalianya and Jackline Awino at Bondo County Referral Hospital.

19. It was his testimony that there was no rigormortis because the post mortem was done in less than 72 hours after death. Externally he observed that there were multiple bruises on the head with a cut-wound measuring 5.6cm whereas there were 5 anterior chest bruises. He

further testified that internally, the deceased suffered frail chest syndrome which are multiple rib fractures with collection of the blood in the chest cavity. Dr. Odhoch further noted that there was a moderate blood collection in the abdominal cavity due to ruptured spleen and that on the head the deceased had suffered extensive skull fractures with all 4 lobes of the skull with fractures and as such the brain was under increased inter cranial pressure.

20. It was the Dr's testimony that the cause of death was Asphyxia resulting from frail chest syndrome, severe head injury, hypovolemic shock due to excessive blood loss. He testified that he issued Burial Permit No. 708475 and signed the Post mortem form on 15.11.2017 which he produced as an exhibit 1.

21. **PW8 no 101915 P.C. Linus Omuse** currently attached at C.I.D. Wajir Airport was the investigating officer in the matter then based at D.C.I. Bondo doing investigations when the incident occurred on 13.11.2017. He testified that the deceased Rodgers Nalianya was a Police constable at Kogelo Police Station and that on the 13.11.2017 he –PW8 was at the Station at 13.00 hours when a motor vehicle, make Isum registration No. KBD 709- was driven by one Caleb to the Station being chased by Boda Boda riders. PW8 testified that he could not recall off head the last letter on the vehicle's registration number.

22. It was his testimony that apart from the deceased who was alive then, the vehicle's occupants included one Peter and Charles. He further testified that upon interrogating them as to what was happening, they revealed to him that they had gone to effect an arrest in Bondo and they met CPL Rop who also gave them another Police Officer CPL Julius Ngeno to assist them in the exercise.

23. He further testified that he advised them to wait for the situation to calm for them to be released to go to Kogelo but the same day at about 2000 hrs, P.C. Rodgers Nalianya and Charles decided to return to Siaya but the other car occupants felt unsafe and remained at Bondo Police Station. It was his testimony that later he was called by the then D.C.I.O. C.I.P. Abwogi who informed him that P.C. Nalianya had been murdered and he was instructed to rush to the scene of crime which was about 1 km from the station at the junction to Siaya near Bondo Law Courts.

24. PW8 testified that he went to the scene and found a body of P.C. Nalianya Rodgers lying in a pool of blood besides the road and when he observed the body he saw injuries on the upper head, the chest and the back. He testified that it looked like something was riding on the deceased's body. He testified that he was part of the team that removed the body to Hospital and subsequently to Bondo Sub-County Mortuary.

25. It was his testimony that investigations were launched and it was discovered that the 1<sup>st</sup> Accused person herein Michael Otieno Odero had made 10 calls to Caleb their witness where they had hatched a plan. He further testified that the 1<sup>st</sup> accused used phone No. 0700531555 whereas Caleb's number was 0722866821. It was his testimony that Caleb was a Complainant in a case where P.C. Nalianya was going to effect the arrest.

26. He further testified that they got data and arrested the 1<sup>st</sup> Accused and recorded statements. He further testified that on interrogating the 1<sup>st</sup> Accused person, he told them that there was Peter Abonyo who was to assist the Police Officer to arrest in a case of burglary. It was his testimony that he recovered the phone which the 1<sup>st</sup> Accused used to communicate with Caleb and preserved it as an exhibit and the Accused was charged.

27. PW8 further testified that the second 2<sup>nd</sup> Accused was arrested later, an identification parade conducted and he was charged too. He testified that they recovered the 2 phones from the 1<sup>st</sup> Accused but found that he only used the Techno phone to communicate. He produced the same as P. Ex.5. He stated that the phone had two an IMEI No.355940078528062 and 355940078528070.

28. In cross-examination by Mr. Odongo for the 1<sup>st</sup> accused, PW8 stated that Caleb informed them that Michael, the 1<sup>st</sup> accused spoke to him to come for him so that he could help arrest the person (suspect). He specified that the deceased did not set out to arrest the 1<sup>st</sup> Accused but a suspect in respect of an offence of burglary. He further stated that he was not present when P.C. Nalianya was murdered. He further admitted that he did not have voice call logs.

29. PW8 further stated that he found out that the deceased was accosted and murdered by Boda Boda Operators but that he did not establish whether the 2<sup>nd</sup> Accused was a Boda Boda Operator. It was his testimony that he got information that P.C. Nalianya had gone to arrest a suspect in Cr. Case No. 493/2017 at Siaya Law Courts, one Peter Abonyo, a case in which Caleb was the complainant. He further stated that Charles, PW4, informed them that he could identify some suspect who killed the deceased. He further testified that Peter Abonyo was before the Court as the 2<sup>nd</sup> Accused and that he was arrested after an identification parade was conducted.

30. It was his testimony that the 2<sup>nd</sup> Accused was arrested in Kakamega and that he did not arrest him personally. He further stated that the basis for arresting the 2<sup>nd</sup> Accused was on information from an informer whom he could not disclose and that after the 2<sup>nd</sup> Accused was arrested he was subjected to an identification Parade. He reiterated that it was not true that the 2<sup>nd</sup> Accused was arrested on mistaken identify. He further stated that he had not confirmed if Peter Abonyo before the Court was in any criminal case before Siaya Law Courts.

31. **PW9 Peter Otieno** testified that he did not know the deceased but that he was with him on 13.11.2017, from about 4 p.m. He testified that they left Siaya for Bondo Police Station where they were given another Police Officer to accompany them to the scene of Burglary where his cousin, Caleb Omollo had lost his property. He testified that they left Bondo Police Station as a group of 5 people and proceeded to where it was alleged by Caleb that the burglars had been seen.

32. It was his testimony that they were told that the burglars were near the hospital but then the caller informed them not to go towards the hospital as they were proceeding towards the hospital and they returned. He further testified that the Officer from Bondo informed them that he knew where the suspect could be as he was a boda boda rider so he took them towards the boda boda riders' stage but did not find him. He testified that they were looking for Otieno who was giving information on the whereabouts of the suspect.

33. PW9 testified that they then dropped the Officer from Bondo Police Station near Total Petrol Station and as they were pondering on the next step, they were invaded by boda boda riders who started chasing them using stones to hit their vehicle. He testified that Caleb drove off and even knocked another person's car and they went to Bondo Police Station and a huge crowd of people followed them into the Police Station but remained at the gate baying for their blood. He testified that a Senior Police Officer came out and tried to calm them down saying it was a police Officer on duty but the crowd responded that they wanted Caleb and not Rodgers, the deceased. He testified that the Officer then requested the crowd to calm and to appoint a representative to go to the station and negotiate on what they wanted done.

34. It was his testimony that the crowd gave out Otieno who went and spoke to the Senior Officer. He further testified that Caleb was placed in the cells whereas he and the deceased were in the station. He testified that the owner of the vehicle which had been knocked went to the Police Station and they were referred to the traffic department where he went and recorded a statement on what had happened, in the company of the owner of the vehicle which had been knocked.

35. He further testified that in the meantime, Rodgers, the deceased, and another person with whom they had gone with from Siaya were escorted to the bus stage to leave and that at the time, the crowd had dispersed. It was his testimony that while he was still at the Police Station, he received information that the boda boda people had waylaid the vehicle which was carrying Rodgers Nalianya and that they had killed him.

36. He further testified that when the crowd agreed to select one representative, Otieno is the one who emerged as the representative but when Rodgers Nalianya was being escorted to the bus stage, he did not see Otieno. PW10 identified Otieno as the 1<sup>st</sup> accused and stated that he recognized him as he was the representative of the boda boda riders. He stated that he later recorded his statement with the police while at prisons Siaya because he feared for his life.

37. In cross-examination by Mr. Odongo counsel for the 1<sup>st</sup> accused, PW9 stated that the crowd was big such that it was not possible to recognize people and that Otieno, the 1<sup>st</sup> Accused volunteered to represent others.

38. **PW10 No.73968 CPL Julius Kimutai Ngeno** testified that on 13.11.2017 he was at the Police Station when CPL Abraham Rop introduced him to a Kogelo Police Officer namely Rodgers Nalianya at about 5.30 p.m. who informed him that he was on official duty to arrest a suspect of Burglary and stealing which took place in the jurisdiction of Kogelo and he was the investigator. He testified that the deceased was accompanied by three people namely, Caleb Omollo the Complainant, his brother and their friend.

39. It was his testimony that Caleb informed him that he had traced the Accused over the phone at Bondo Sub-County Morgue but it turned out not to be the right person after which PW10 took them to Barkowino Stage junction where the Accused operated from after which they started returning to town and on reaching near the Police Station, PW10 alighted and left the rest proceeding to Kogelo.

40. It was his testimony that shortly, CPL Owalo called him to go to the station and brief the OCS on what had happened because the people he had been in company of were being chased by boda boda operators. He stated that he took some time and when he arrived at the station, his colleague Rodgers Nalianya had been killed and Caleb was in the Police Cells. He stated that he recorded his statement at DCI Bondo. PW10 was not cross-examined.

41. **PW11 NO. 236337 IP. Ayub Ghati** testified that on 3.12.2017 he was at Siaya Police Station where he conducted an identification parade as requested by Bondo DCIO, of Peter Odhiambo Abonyo the 2<sup>nd</sup> Accused (witness points at the 2<sup>nd</sup> Accused). It was his testimony that he prepared 8 members of the parade, inquired from the suspect whether he consented to appear on the parade and he accepted.

42. It was his testimony that he also asked the suspect if he desired a friend or advocate to be present and the suspect said no and further asked him to choose the position to stand among the 8 members and he chose position between 4 and 5, before PW11 called the witness Charles Oduor Ombok who was being accommodated at the crime office. He further testified that the witness was then called and he positively identified Peter Odhiambo Obonyo, the 2<sup>nd</sup> accused by touching. It was his testimony that he inquired from the suspect if he was satisfied with the process and the suspect accepted saying he was satisfied and signed the form on 3.12.2017. PW11 produced the identification parade form as exhibit 6.

43. In cross-examination by Mr. Ooro counsel for the 2<sup>nd</sup> accused, PW11 stated that the witness was to identify the suspect in respect of this case and that it was not true that the Accused was made to stand with handcuffs.

44. **PW12 James Makobi** working with Safaricom Limited as a Law enforcement liaison officer based at Kisumu working within Western and Nyanza region testified that he received requests for call data records and processing of Mpesa statements and processing court orders. He testified that he had call data records for mobile phone number 0700531555 as requested by letter from DCIO Bondo dated 18.1.2017 requesting for call data record between 1.11.2017 to 14.11.2017.

45. It was his testimony that the mobile phone was registered with Safaricom in the name of Michael Odero ID/No.20816918 and that the request was processed on 15.11.2017 for records from 1.11.2017 to 14.11.2017 and sent to the investigators. He produced the call data as P. Ex 7 and also prepared certificate of Electronic Evidence dated 14.2.2020 which he produced as P. Ex 8. And a request letter produced as exhibit 9. In cross-examination by Mr. Ooro for the 2<sup>nd</sup> accused he stated that exhibit No. 7 only showed call data.

### **Defence Case**

46. DW1 Michael Otieno Odero testified on oath and stated that on the 13/11/2017 at about 9.00 pm he was in his home with his family watching news after eating dinner. He testified that he was arrested on 14/11/2017. It was his testimony that he was at work in Seme at 1.00 pm when he was called by a person who introduced himself as a police officer from Bondo Police Station and informed him that his motorcycle registration no. KMEC 643C which had been lost and found on 16/6/2017 was being claimed by another person and as such he

should return it to the police station for verification.

47. He further testified that he went to the police station at Bondo between 3 and 4 pm and on arrival, called the person who had called him, one Omuse who led him to a room where he explained to him how he lost his motorcycle and later recovered it. It was his testimony that he was then handcuffed and brought to Siaya Police Station where he was placed in cells and after some days arraigned in court and charged with murder.

48. DW1 denied knowing Peter Otieno and stated that he did not know which Otieno he was referring to. He stated that he was never subjected to an identification parade. He further denied participating in the deceased's murder.

49. In cross-examination by Mr. Okachi for the state, DW1 stated that his middle name was Otieno, his home was in Barkowino sub location within Bondo Township and that he had never been a motorcycle rider. He further stated that he did not have the motorbike on 13/11/2017 as he had sold it to Lazarus. It was his testimony that he knew the deceased who had called him on 2/10/2017 saying his –DW1's cousin had been arrested for burglary and the deceased was given his number so he should go to Siaya Police Station.

50. It was his testimony that he went and spoke to the deceased and his cousin at Siaya Police Station and subsequently saw the deceased at the Siaya court when he was processing bond approval for his cousin on the 4/10/2017. DW1 denied shouting and stating that the deceased was in that vehicle on the on 13/11/2017 at 8.45 pm or thereabouts, thereby attracting people and killing the deceased.

51. **DW2 Peter Odhiambo Abonyo** testified that on 13/11/2017 he was at work in Kakamega in Bukhungu Stadium working for Harmony Construction where he worked as a Mason Instructor. He testified that he was taken to Kakamega on 2/11/2017 to do renovations of Bukhungu stadium, where he was on 13/11/2017 from morning to evening at 5 pm after which he went to his rental house at Kakamega town where he lived alone in that house.

52. He further testified that on the 25/11/2017 his brother called him in the night and told him that some people went to his home and identified themselves as police officers from Bondo Police Station looking for Peter Odongo Abonyo which was not his name as he was called Peter Odhiambo Abonyo.

53. It was his testimony that in the morning he went to Kakamega Police station and reported what his brother had told him and on the 26/11/2017 when he returned to Kakamega Police Station he was detained and when the police from Bondo police station came, one of them, PW8 Linus Omuse asked whether he knew about Peter Odongo Abonyo and he denied knowing him.

54. He further testified that he was taken to Siaya Police Station where he stayed in the cells for about one week and he was later taken to an identification parade outside the police cells. He testified that he found some other people there and while he was still in handcuffs, he was told to stand beside those people when somebody went and touched him at the parade and he was ordered back to the cells.

55. It was his testimony that he was not satisfied with the parade and that his family never knew where he was while he never knew the person who identified him at the parade. He stated that the next day he was taken to court and to prison. DW2 denied being in Bondo on 13/11/2017. He testified that he had his employment card issued by National Construction Authority to him in 2016 which he showed to court. He further denied being a boda boda rider or that he knew Siaya Cr. Case No, 4/2017 or any other pending criminal case in court. He stated that he was not arrested by the deceased officer.

56. In cross-examination by Mr. Okachi for the state he stated that on the 13/11/2017 at 8.45 pm he was in his single room at Kakamega having gone there on the 2/11/2017. It was his evidence that he was attached to Harmony Construction Company though he did not produce any evidence of the same. He further stated that he worked at Bukhungu Stadium with other workers though he did not know their names.

57. DW2 further denied knowing Charles Oduor Ombok and stated that he first heard of the name in court. He stated that Charles touched him at the identification parade. He further denied knowing the deceased. DW2 reiterated that his identification was wrong identification.

### **1<sup>st</sup> Accused's Submissions**

58. It was submitted that none of the prosecution witnesses mentioned the 1<sup>st</sup> accused as being on the scene and that neither was an identification parade carried out to point to the 1<sup>st</sup> accused as the guilty party. It was further submitted that in such cases a conviction can only be sustained if the issue of identification is resolved in favour of the prosecution. Reliance was placed on the case of **R v Turnbull & Another 63 Cr. App. R. 132.**

59. It was further submitted that as the alleged incident took place at around 8pm and it involved a large rowdy crowd, the issue of identification was a crucial element which must be proved by concrete irrefutable evidence which the prosecution in the instant case failed to do.

60. It was submitted that the evidence of PW8 confirmed that at the time of the incident which led to the demise of the deceased, PW8 was inside the police station and only later came to hear that the deceased had been assaulted by a mob.

61. Consequently, it was submitted on behalf of the 1<sup>st</sup> accused that there was no direct or circumstantial evidence pointing to the 1<sup>st</sup> accused as a perpetrator of the alleged offence and further that the 1<sup>st</sup> accused evidence in defence was unshaken even on cross-examination and as such the 1<sup>st</sup> accused ought to be acquitted.

### **2<sup>nd</sup> Accused Submissions**

62. It was submitted that the evidence of PW4 on the identification of the 2<sup>nd</sup> accused was self-contradictory and should not be relied upon because while being cross examined by counsel for the 2<sup>nd</sup> accused he indicated that 'I did not see the person who beat him up as he ran away.' He further stated 'the 2<sup>nd</sup> accused did not say toka'. Reliance was placed on the cases of **Wamunga v Republic (1989) KLR 424 AT 426** where it was said that ***'where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.'*** Reliance was also placed on the case of **Nzaro v Republic (1991) KAR 212** where the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

63. It was further submitted on behalf of the 2<sup>nd</sup> accused that though PW4 claimed that the area where the incident occurred was well lit with street lights and that the vehicles' headlamps were on, the witness did not give any description of how the assailant or the alleged 2<sup>nd</sup> accused was dressed at the material time and further, that apart from stating in court that he saw the accused at the scene and claiming to have identified him at the police station, there was no concrete material placed before court to enable it reach a firm conclusion that the 2<sup>nd</sup> accused had indeed been placed at the scene by the said witness.

64. It was submitted that even the alleged identification parade was not conducted according to the laid down procedure as the rights of the accused were violated by not being granted an opportunity to have counsel present and was further rendered an academic exercise when the witness was allowed to see the accused before the parade and the 2<sup>nd</sup> accused further placed on the parade while handcuffed. It was submitted that PW 11 who conducted the parade did not know for what offense he was carrying out the parade and as the witness did not know the 2<sup>nd</sup> accused before the incident, the purpose of the identification parade was to test the correctness of his alleged identification on the material night which was not achieved and consequently, the court ought to discard the evidence of the identification parade.

65. It was submitted that what happened was akin to dock identification and that in **Nathan Kamau Mugwe v Republic** it was held that dock identification was generally worthless and the court should not place much reliance on it.

66. It was further submitted that the prosecution failed to establish a nexus between the suspect in Siaya Criminal Case No. 493 of 2017 who was said to have been the suspect sought by the deceased officer and the 2<sup>nd</sup> accused in this case. Consequently, it was submitted that the prosecution had failed to prove their case against the 2<sup>nd</sup> accused and as such he ought to be acquitted.

#### **Analysis of the Law**

67. Having considered that evidence for the prosecution, the defences proffered by the accused persons herein and their respective counsel's submissions, in my humble view, the issues for determination are twofold: -

- a) **The fact of the death of the deceased, its cause and whether it was caused by an unlawful act or omission of the accused.**
- b) **Whether such act or omission if proved was caused by malice aforethought on part of the accused.**

68. The law applicable is Section 203, 204 and 206 of the Penal Code.

***"Section 203 of the Penal Code provides:***

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

***Under Section 204 of the Penal Code,***

***Any person convicted of murder shall be sentenced to death.***

***Section 206 of the Penal Code defines malice aforethought as:***

***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***

***(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."***

69. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of PW1,2,3 and 6 all who testified that they saw the deceased's body either at the scene of the incident or at the morgue. The cause of death was confirmed though the evidence

of PW7 Dr. Odhoch who carried out the post-mortem on the deceased's body in the presence of PW1 and PW2, the deceased's wives and arrived at the conclusion that the cause of death was Asphyxia resulting from frail chest syndrome, severe head injury, hypovolemic shock due to excessive blood loss. Dr. Odhoch further testified that the deceased died as a result of the injuries he had sustained.

70. The only issue in dispute is whether the said death was caused by unlawful act of omission or commission on the part of the accused persons. Both the accused persons challenged the evidence presented by the prosecution on their identification. There is no doubt that the deceased, from the cause of death given by Dr Odhoch and the state in which his body was found, was unlawfully killed as there is no defence of self defence or defence of property or defence of insanity. There is also no evidence of suicide on the part of the deceased Police Officer.

71. The question whether the unlawful killing of the deceased was caused by the accused persons herein and whether the prosecution has proved beyond reasonable doubt that the accused persons herein unlawfully killed the deceased Rodgers Nalianya. PW4 testified that the vehicle they were in was stopped at a roadblock prompting the driver to switch on full lights when one person came in front of the vehicle and said "toka toka' come out come out. He identified the individual as the 2<sup>nd</sup> accused. He further stated that the 1<sup>st</sup> Accused was also in front of the vehicle. He further testified that his identification was aided by the fact that in addition to the car's full lights there were street lights that made it possible for him to see. It was PW4's testimony that he had not known the Accused persons before and he was later called to record his statement at Bondo Crimes Office and subsequently to identify the 2<sup>nd</sup> Accused person at an identification parade carried out at Siaya Police Station where he identified the 2<sup>nd</sup> Accused on a parade of 8 people but not the 1<sup>st</sup> Accused person who was not on the parade. In cross-examination, PW4 was firm and reiterated that he identified the 2<sup>nd</sup> accused from the crowd as the 2<sup>nd</sup> accused went in front of the car. This was recognition of the 2<sup>nd</sup> accused by the witnesses. Recognition is more reliable than identification as was held in the case of **George Kamau Muhia v Republic [2014] eKLR**.

72. PW4 was adamant that there were street lights and further that the car they were in had switched on full lights. However, PW4 in cross-examination did not cite the 1<sup>st</sup> accused as being in his statement given to police.

73. PW8, the investigating officer testified that investigations were launched and it was discovered that the 1<sup>st</sup> Accused person herein Michael Otieno Odero had made 10 calls to Caleb their witness where they had hatched a plan. However, the investigating officer did not disclose what plans the 1<sup>st</sup> accused had made and how they were related to the deceased's death. He did disclose that the 1<sup>st</sup> accused was attempting to aid the deceased in arresting a burglary suspect.

74. From the above it is my considered opinion that the 2<sup>nd</sup> accused was positively identified and placed at the scene where the crowd stopped the vehicle the deceased was in and subsequently attacked and killed him. The 1<sup>st</sup> accused in my view was not positively identified as no identification parade was carried out on him.

75. The 2<sup>nd</sup> accused also faulted the identification parade carried out in that it violated the 2<sup>nd</sup> accused's rights as he was not granted an opportunity to have counsel present and further that he was handcuffed during the parade.

76. PW11 was firm in his testimony that he carried out the identification parade in accordance with the law and that the 2<sup>nd</sup> accused was positively identified. He further stated that that he inquired from the 2<sup>nd</sup> accused as to whether he wanted a friend or advocate to be present and he said no and further that at the end of the parade he inquired from the 2<sup>nd</sup> accused if he was satisfied with the process to which the 2<sup>nd</sup> accused acknowledged even signing the form on 3.12.2017. PW11 reiterated in cross-examination that the 2<sup>nd</sup> accused was not in handcuffs during the parade.

77. I am persuaded beyond reasonable doubt that the prosecution's evidence placing the 2<sup>nd</sup> accused at the scene of crime was cogent and was not shaken even in cross examination by the defence. However the evidence against the 1<sup>st</sup> accused was not watertight.

78. I find that the prosecution has proved beyond reasonable doubt that the 2<sup>nd</sup> accused PETER ODHIAMBO ABONYO with others not before the court committed an unlawful act which resulted in the death of the deceased Rodgers Nalianya.

79. The other issue for determination is whether the prosecution have proved malice aforethought against the 2<sup>nd</sup> accused person PETER ODHIAMBO ABONYO. Dr. Odhoch who carried out the post-mortem on the deceased testified that the cause of death was Asphyxia resulting from frail chest syndrome, severe head injury, hypovolemic shock due to excessive blood loss all caused as a result of the deceased having suffered numerous injuries which are in line with injuries sustained by a victim accosted by a mob as corroborated by PW4. It is in such circumstances that the provisions of **Section 21** of the **Penal Code** come into play. The section stipulates:

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*** See **Eunice Musenya Ndui vs. R [2011] eKLR**.

80. The conduct of the said 'crowd' who included the 2<sup>nd</sup> accused, of stopping the car the deceased was in and going after him as he ran from the car was evident of their concerted intention of taking matters in their own hands. To that extent, the case of **Mabel Kavati & Another vs. R [2014] eKLR** wherein this Court quoted with approval the following excerpt of **Rex vs. Tabula Yenka S/o Kirya & 3 others[1943] 10EACA 51** applies:

***“To constitute a common intention to prosecute an unlawful purpose...it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from***

***their presence, their action and the omission of any of them to disassociate himself from the assault.***” [Emphasis added].

81. Additionally, their vicious attack on the deceased was also a clear indication that they intended the consequences of their actions, that is, the death of the deceased. See **Stephen Ariga & Another vs. R [2018] eKLR**. Equally, it established *malice aforethought* as defined under section 206 of the Penal Code on the part of the 2<sup>nd</sup> accused with others.

82. Accordingly, I find the 2<sup>nd</sup> Accused PETER ODHIAMBO ABONYO GUILTY of the offence of murder as charged and convict him of the same. The 1<sup>st</sup> accused MICHAEL OTIENO ODERO is hereby found Not Guilty of the offence of murder and is hereby discharged from the information. Unless otherwise lawfully held, the 1<sup>st</sup> accused MICHAEL OTIENO ODERO is hereby set at liberty.

**Dated, signed and delivered at Siaya this 30<sup>th</sup> Day of November, 2020**

**R.E. ABURILI**

**JUDGE**