



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL MURDER CASE NO.1 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

KEVIN OUMA ODHIAMBO ALIAS “WAU WAU”1ST ACCUSED

LAVINUS AHERO GWASI ALIAS AHERO.....2ND ACCUSED

SAMUEL OKOTH OUMA.....3RD ACCUSED

DAVID DIVAL KWACH ALIAS OKIKI.....4TH ACCUSED

GORDWINS ONANO OMONDI ALIAS JUNIOR.....5TH ACCUSED

JUDGMENT

1. The first accused, **KEVIN OUMA ODHIAMBO**, also known as “Wau-Wau” and the third accused, **SAMUEL OKOTH OUMA**, were jointly charged with three others for the murder of **MOSES OUMA OTIENO**, also known as **OJWANG** (deceased), contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

2. The three others were the second, fourth and fifth accused who were acquitted after the close of the case for the prosecution for want of sufficient evidence to warrant that they be placed on their defence. The first and third accused were however, placed on their defence and hence, this judgment which only relates to them.

3. Basically, the case for the prosecution as that on the material 18th December 2016, at about 2.00 p.m., a political function was in progress at the Diplomat Hotel within Homa Bay Town. Among those in attendance were a group of Youths assigned the role of providing security for a local politician.

DAN ANDERSON ODHIAMBO (PW1), a resident of Nairobi, was part of the group. They arrived in Homa Bay from Kisumu and in the course of their duty, they were ambushed and attacked by a local rival group which was armed with crude weapons and said to have been led by the first accused, commonly known as “Wau-Wau”.

4. The deceased was in the group from Kisumu. He suffered serious injuries after the attack and was rushed to a hospital where he succumbed to his injuries while undergoing treatment. The incident was reported to the police and in the course of investigations, **PC LAWRENCE MUSEMBI (PW2)**, was given a list of ten people suspected of having been in the group which attacked and fatally injured the deceased. The list included the name of the first accused and some of his group members, among them, the third accused.

5. Part of the group including the first and third accused were traced in Kisii Town and arrested. They were eventually arraigned in court for the offence of murder after the post mortem report (**P. Exhibit 1**) revealed that the deceased died from head injury and intracranial hemorrhage. They all pleaded not guilty to the charge.

6. In their defence, both the first and third accused denied the offence and each raised an alibi.

The first accused implied and contended that he had travelled to Nairobi prior to the material date to attend a meeting of the Orange Democratic Movement (ODM) in his capacity as a Youth Leader. He was in Nairobi for two days from 16th December 2016 and travelled back to Homa Bay on the material 18th December 2016. His journey to Homa Bay commenced at 11.00 a.m. such that he arrived in Homa

Bay Town at 6.00 p.m.

7. He (first accused) thus implied that he could not have been in the group of people who attacked and fatally injured the deceased as he was on his way to Homa Bay from Nairobi at the material time of the offence. In that regard, his evidence was supported by that of **GEORGE KASUKA ODUNGA (DW1)**, who stated that he accompanied him (first accused) to and from Nairobi using his (DW1's) vehicle.

8. On his part, the third accused implied that he was not at the scene of the offence at the material time as he was at his rural home in Homa Bay supervising some workmen putting up a house for his sick mother. He remained there throughout the day and returned to the town on the following day. His witness, **DANIEL NYAGOL ORALA (DW2)**, confirmed as much.

9. From the evidence and the final submissions presented by the first and third accused through the learned defence counsel, **MR. OBACH**, the main issue arising for determination is whether the accused were positively identified as having been part of the group of people who assaulted and fatally injured the deceased.

Apparently, the deceased was a victim of a criminal act undertaken by a rival group of youths who are normally at the beck and call of politicians for purposes of providing so called **"security services"** even when it is obvious that they are hirelings for **"dirty jobs"** and go by a litany of descriptions such as goons, hooligans, bouncers, body guards etc.

10. The manner in which some of these hirelings execute their assignment leaves no doubt in the mind of any reasonable person that they do so with total disregard to their own safety and while under the influence of toxic illicit liquor such as **"changaa"** or narcotic substance such as **"cannabis-sativa"** (bhang).

Be that as it may, those who assaulted the deceased for whatever reason, had a clear intention of causing him bodily harm which unfortunately turned out to be grievous harm which proved fatal.

11. The investigations carried out by PC Musembi (PW2) indicated that two groups of hired youths, one from Kisumu and one from Homa Bay, confronted each other on the material date and caused mayhem within the Homa Bay town and more particularly, at the venue of a political meeting. Unfortunately, the deceased being a member of the Kisumu group became a mortal victim of the brawl that ensued. In the circumstances, it would be difficult for this court to hold that his death was intended by those who assaulted him as he was part of the brawl and was **"felled down"** while in a war like environment or combat.

12. Nonetheless, those who assaulted the deceased became culpable for the offence of manslaughter upon his death from the injuries occasioned by the assault. The two accused herein contended that they were not part of the Homa Bay Youths who assaulted the deceased as they were nowhere near the scene of the offence when it occurred.

13. An alibi is an accepted defence for a person facing a criminal charge and once it is raised, the burden to establish it does not lie on the accused (see, **SAID –VS- REPUBLIC [1963] EA 6** and **KIMOTHO KIARIE –VS- REPUBLIC [1984] e KLR**).

The burden of proof in criminal cases always lies on the prosecution throughout the trial.

14. In **MACHARIA –VS- REPUBLIC [2001] KLR 155**, the Court of Appeal stated that:-

"When the appellant put forth an alibi as his defence it was upon the prosecution to disprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused remains on the prosecution throughout the trial.

In **SEKITOLEKO –VS- UGANDA [1967] EA 533**,

Sir Udo Udoma C.J. said:-

"In Republic –vs- Johnson [1961] 3 All ER 969, the general principle of law applicable, to the defence of an alibi was enunciated.

It was laid down as a general rule of law that if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving his defence and that the burden of proving his guilt remains throughout on the prosecution".

15. Herein, the two accused having raised alibis as their respective defence, it became the prosecution's obligation to disprove those alibis and thus establish beyond reasonable doubt that the two accused were at the scene of the offence on the material date and that they were positively identified as having been among those who actually assaulted the deceased and caused him fatal injuries.

16. In that regard, the prosecution relied on the evidence of a single witness (**PW1**) who was in the company of the deceased on the material date and time. Both were in the group of the youths from Kisumu. Their presence in Homa Bay town appeared not to have impressed the youths from Homa Bay hence, the costly brawl leading to the death of the deceased.

In his testimony, PW1 stated that they were ambushed by a group of people armed with crude weapons at about 2.00 p.m. and that he saw and recognized some of them and in particular the third accused.

17. In cross examination, the witness (PW1) indicated that he was familiar with the third accused and not any other attacker including those charged with him (A3) in court save the first accused who popularly went by his nickname “Wau-Wau”. He (PW1) however, did not mention the first accused as having been part of the attackers. Indeed, the evidence by the investigating officer (PW2) strongly indicated that the first accused was arrested and charged simply because he was the perceived leader of the offending Homa Bay group and was found together with the third accused and other suspects in Kisii.

18. Being a member or the perceived leader of the Homa Bay group was sufficient enough to cast suspicion upon the first accused as being part of the attacking group. This was however, not enough in establishing his actual involvement in the offence for the main reason that there was no evidence or corroborating evidence placing him at the scene of the offence. His alibi remained intact and was never at any stage dislodged or disproved by any evidence from the prosecution. It is therefore the finding of this court that he was not positively identified as having been one of those who attacked the deceased and occasioned him fatal injuries.

19. With regard to the third accused, identification evidence led against him by PW1, placed him at the scene of the offence and disproved his alibi. However, the reliability of the evidence in showing his criminal culpability was doubtful because, **firstly**, it was never corroborated by any other direct or circumstantial evidence. **Secondly**, it was not clear whether the key witness (PW1) had previously known the third accused as to identify him by recognition. He (PW1) did not expressly state that the third accused was a person previously known to him. He engaged in conjecture when he stated in cross-examination that the third accused was among the attackers because he looked familiar to him.

20. Being familiar and looking familiar are two different things. The key witness (PW1) was therefore uncertain on whether the third accused was one of those who actually attacked the deceased, his presence at the scene notwithstanding. Being at the scene where a brawl took place between two warring groups of youths would raise suspicion but would not translate to a person taking part in the actual assault of another particularly in the absence of credible corroboration.

The third factor showing that the identification evidence against the third accused by PW1 was doubtful was the statement by PW1 in cross-examination to the effect that he suspected that the attackers were led by the third accused yet the investigating officer (PW2) indicated that they were led by the first accused who was apparently not placed at the scene of the offence.

21. The fourth factor is the failure by the investigating officer (PW2) to arrange for an identification parade after the arrest of all the suspects yet he had reasonable grounds to believe that the identification of the third accused in court would be dock identification there being inadequate evidence of any other form of identification.

In sum, the prosecution evidence of identification against the third accused was neither cogent nor credible for a finding from this court that he (third accused) was positively identified as one of those who attacked and fatally injured the deceased.

22. Ultimately, it is the holding and finding of this court that the prosecution case against the first and third accused was not proved beyond reasonable doubt. The two are hereby found not guilty as charged and are acquitted accordingly.

J.R. KARANJAH

JUDGE

20.02.2019

[Delivered and signed this 20th day of **February, 2019**].