



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 70 OF 2014**

**BETWEEN**

**REPUBLIC.....PROSECUTION**

**AND**

**MICHAEL ODHIAMBO OUKO.....1<sup>ST</sup> ACCUSED**

**DAN KODI ODERO.....2<sup>ND</sup> ACCUSED**

**JULIUS OKER MUNGO.....3<sup>RD</sup> ACCUSED**

**GEORGE OMONDI OBONYI.....4<sup>TH</sup> ACCUSED**

**JUDGMENT**

**1. MICHAEL ODHIAMBO OUKO, DAN KODI ODERO, JULIUS OKER MUNGO and GEORGE OMONDI OBONYI** were charged with the offence of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence are that on the 8<sup>th</sup> and 9<sup>th</sup> day of October 2014 at Otwenya Location, Seme Sub-County within Kisumu County the accused persons jointly with others not before Court murdered **LEAH MUNJA OBADHA** (“the deceased”).

2. At the conclusion of the prosecution case, I found that the prosecution had made out a prima facie case against **JULIUS OKER MUNGO (DW 1)** and **GEORGE OMONDI OBONYI (DW 2)** and entered a verdict of not guilty against **MICHAEL ODHIAMBO OUKO** and **DAN KODI ODERO**.

3. The sad events in this matter began with an accident suffered by DW 1’s brother called Ochieng. Ochieng fell from a tree and injured his spine. Ochieng’s family faulted the deceased and accused her of causing Ochieng’s misfortune through witchcraft. They began bullying and threatening to kill her. The deceased sought help from the law enforcement authorities but no material step was taken to protect her. The deceased intended to leave the village in order to save her life but she was killed before she could escape. Her grandson, Dennis Obong’o Ouma (PW 9), testified that the deceased called him asking for money to enable her leave the village but she murdered before she left.

4. Janet Sewe Kodi (PW1) testified on 6<sup>th</sup> March 2014 at about 7.30pm while she was in her house, 1<sup>st</sup> accused and 2<sup>nd</sup> accused went her house which neighboured the house of the deceased and began shouting and warning them that they would be killed for causing the misfortune that befell Ochieng. They reported the matter to the area chief and the assistant chief took them Maseno police station to report the matter.

5. Benta Achieng Ouma (PW 2) testified sometime before the deceased's death, DW 1 and his brother, Albert Aloo Mungo, went to the house of the deceased and frog marched her to their home. After a while the DW 1's wife went to her house where she was with her son Paul Juma Ouma (PW 3) and informed them that they were required at DW 1's home. Both PW 2 and PW 3 testified that DW 1 chased them away leaving the deceased behind. They later learnt that the DW 1 and his brothers had forced the deceased to consume the faecal matter in order to cleanse Ochieng.

6. On the night of the murder, the deceased's grandson, PW 3, was asleep in the deceased's kitchen. At around 2.00am, he heard a liquid being poured on him. He recalled that when he woke he smelt gasoline and the door was locked from outside. He forced the door open and shouted to his grandmother warning her not to strike a match. Once outside he found two of the assailants standing they flashed their torches and he saw that they held pangas. He was also able to see their faces and he recognised them DW 1 and DW 2 who were well known to him before as they were neighbours. The other assailants were banging on the deceased's door and upon seeing what was happening, PW 3 yelled for help. The assailants chased him and he ran towards the house of PW2 who had also heard the commotion and was screaming.

7. PW 3 testified that PW 2 restrained him and prevented him from going back to the deceased's house for fear that he would be harmed. After a while when it was quiet they went to check what happened and they found the deceased lying inside her house with her head severed. PW 3 recalled that prior to the incident, DW 4 had threatened to kill the deceased before Ochieng was buried while they were at a drinking den. PW 2 called Henry Ogecha (PW 7), the area assistant chief who later came with the police.

8. The area Chief Morris Otieno Nyawina (PW 5) testified that on the morning of 9<sup>th</sup> October 2014 he was informed that the deceased had been murdered. He went to his home and found that the police had already collected the body. PW 5 recalled that the deceased had reported to him that she had received death threats from the 1<sup>st</sup> and 2<sup>nd</sup> accused. He requested the area assistant chief to escort them to Maseno Police report the matter.

9. PW 5 further testified that on 22<sup>nd</sup> September just days before Ochieng's death, the deceased in the company of PW 1 again went to his office and reported that they had been threatened this time with death. He asked the assistant chief to hold a baraza over the issue but the deceased was murdered before the baraza could be held. The area assistant chief, Ibrahim Noti Wadegu (PW 6) testified that failed to conduct the baraza because the suspects had disappeared when they received information that the chief intended to call a baraza.

10. Inspector Edward Kisanga (PW 8), the investigating officer, testified that when he received a call from PW 7 he went to the scene with other police officers and found the deceased lying inside her house. PW 8 told the court that he searched the house and in the second room of the house he found plastic bags which contained gasoline and the window to that room was broken. PW 8 recalled that he found a P3 form in the room which had not been filled. The P3 form indicated that the deceased had made a complaint of assault against the 3<sup>rd</sup> accused at Maseno Police station. Outside the house they found more plastic containers containing gasoline. PW 8 produced this items as exhibits as exhibits.

11. PW 8 further testified that he and his officers took the body of the deceased to the mortuary and he began investigating the matter. He stated that he sent word to Maseno Police station and received information that the deceased had made three reports to the station regarding the threats. He further took witness statements and established that the accused had murdered the deceased on the belief that she bewitched Ochieng. He also organised for a post mortem to be conducted on the body and from the Post Mortem report filled by Dr Francis Okuta and produced in Court by Dr Macrine Adhiambo (PW 11) it was clear that the deceased severe haemorrhage. Based on these findings PW 8 and his officers arrested the accused persons and he charged them with the murder of the deceased.

12. DW 1 and DW 2 denied any involvement in the deceased's death when put on their defence. They called witnesses in support of their cases. In his sworn testimony, DW1 told the court that on the night of the murder he was at his mother's home making Ochieng's funeral arrangements. After the funeral arrangements meeting, he went back home where he slept till morning. He denied ever issuing threats to

the deceased and stated that on the day the deceased was brought to their home he was away and he did not participate in any of the vices alleged.

13. Likewise, DW 2 stated on oath that on the material night he was at home and did not leave till morning. He stated that there existed a grudge between him and PW 3 and that is why he named him as one of the assailants. DW 2's step-mother, Rose Adhiambo Mungo (DW 3) testified that DW 2 was at her home on the night of the murder and only left with his wife after the funeral arrangements meeting. She also denied that DW 2 was involved in harassing the deceased as alleged and that it is the deceased who went to their home as she had quarrelled with PW 3 and that PW 3 had even burnt her clothes. She recalled that the deceased went to her home because she offered to assist her resolve the issue with PW 3 and that is the reason why DW 2's wife Pamela Anyango Oker (DW 4) went to call PW 2 and PW 3. She also denied that DW 2 forced the deceased to take faecal matter. DW 4 testified that after they left PW 3's home they went home with DW 2 and that he did not leave the house till morning. She told the court that she did not hear any commotion on that night.

14. The central issue for determination is whether the DW 1 and DW 2 caused the death of the deceased with malice aforethought. The prosecution case was founded on the identification of the accused by a single witness is admittedly difficult circumstances which call for careful examination of the evidence to exclude the possibility of mistaken identity. Such evidence must be watertight before a court can return a conviction (see ***Abdalla Bin Wendo & Another v R* [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**). These requirements are, however, relaxed when dealing with the case of recognition because, "*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other*" (see ***Anjononi & Others v Republic* [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

15. In testing the evidence of recognition, it is expected that the witness gives the name of or describes the assailant at the first available opportunity. In ***Simiyu & Another v Republic* [2005] 1 KLR 192**, it was stated there is no better mode of recognition than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises. If the name is not given to the police at the first opportunity, then giving the name subsequently is either an afterthought or the evidence given is not reliable and tends to weaken the evidence. (see ***Morris Gikunda Kamunde v Republic* NYR CA Criminal Appeal No. 332 of 2012 [2015]eKLR**). It is against these legal precepts that the evidence of identification must be examined to determine the quality of evidence and see whether it meets the standard necessary to support a conviction.

16. PW 3 was the principal witness for the prosecution. There is no doubt that he knew the accused as they were his neighbours hence this was a case of recognition as opposed to identification of strangers but were the circumstances favourable for positive identification? PW 3 testified that he saw DW 1 and DW 2 standing with pangas while DW 1 had a torch. He did not tell the court how far he was from them or how bright the light was in an admittedly dark night. As counsel for the accused pointed out, PW 3 did not record the fact that the assailants had a torch his statement. This was material fact that ought to have been stated as the nature of light was critical in the circumstances as this was a dark night.

17. As I have pointed out, what happened after the incident is also relevant in assessing the evidence of recognition by PW 3. When he ran away screaming, PW 3 told the court that he went to inform his mother, PW 2. When PW 2 testified, she stated that PW 3 told her that the deceased was being killed. However, PW 2 testified that she found PW 2 in the bush and when she asked him what was happening, he informed her that the deceased was being killed. It is strange that in these circumstances, PW 3 would not mention to PW 2 the names of the person he saw at the deceased's home the statement to his mother. Moreover, when his statement to the police was put to him, the names of the assailants were not

mentioned at all.

18. Although there is clear evidence that the accused had a motive to murder the deceased and had indeed done acts in the past that would implicate them in the murder, the duty of the prosecution is to prove their guilt beyond reasonable doubt. Having considered the evidence of recognition, I am far from satisfied that the prosecution has proved its case. Strong suspicion is not a substitute for proof. I have no option but to acquit **JULIUS OKER MUNGO** and **GEORGE OMONDI OBONYO**. They are set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 22<sup>nd</sup> day of January 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Ochuka, Advocate for the accused.

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