



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 50 OF 2014

BETWEEN

REPUBLIC.....PROSECUTOR

AND

GODFREY OGOLLA GILL alias ONYALO.....1ST ACCUSED

WASHINGTON OTIENO ABONGO alias OTIS GORDON.....2ND ACCUSED

JUDGMENT

1. **GODFREY OGOLLA GILL alias ONYALO** and **WASHINGTON OTIENO ABONG'O alias OTIS GORDON** 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 2nd day of June 2014 at Wasamo Aol village in Kang'o Sub-location, Muhoroni Sub-County within Kisumu County the accused persons jointly with others not before Court murdered **MORRIS OMONDI OKAKA**. The prosecution case was that the accused persons murdered the deceased on revenge mission over a fight that had happened previously.

2. The prosecution marshalled 12 witnesses and at the conclusion of the prosecution case, I put entered a verdict of not guilty against **WASHINGTON OTIENO ABONG'O alias OTIS GORDON** and discharged him from these proceedings while I called upon **GODFREY OGOLLA GILL alias ONYALO** ("the accused") to make his defence.

3. The prosecution key witness, Oscar Onyango Ogonde (PW 1), was with the deceased moments before he met his untimely death. He recalled that on 2nd June 2014 at about 8.00pm, as they were walking home from Wagogni trading centre, where they had been watching soccer, they were accosted by four people among them the accused. The accused drew a panga and cut the deceased on the neck. PW 1 fled leaving the deceased behind and when he returned with members of the public who responded to his cry for help he found the deceased lying in a maize plantation dead. PW 1 testified that he was able to clearly see the accused persons with the help of a torch and he recognised them as they came from the same village and he had known them before.

4. After PW 1 raised alarm, several villagers responded to the alarm and went to the scene including Erick Onyango Okaka (PW 2), Justus Akode Nyakinda (PW 3), Joseph Onyango Ouma (PW 5) and Samuel Odhiambo Oloo (PW 6). The area Assistant Chief, Adolphinus Mboya Ogoya (PW 4) recalled that at around 11.25pm, on the material night he received a phone call from one of the village elders who informed him of the murder. He went to the scene and ascertained that the deceased was lying dead in a maize field. He called the officer in-charge of Muhoroni Police Patrol Base who came to the scene with

other officers and collected the body of the deceased. PW 4 told the court that before the police arrived, the villagers got agitated and attacked the suspects and their relatives and burnt their houses. PW 4 further testified that prior to the incident, on 1st June 2014 at around 2.00am, he was informed that the deceased had assaulted the accused's brother, Elly Obisa Gill ("Obisa"). On the same day, Obisa reported the matter to him and he advised him to obtain a medical report (P3 form).

5. A police officer from Ombeyi Police Patrol Base, PC Aaron Bett (PW 7), testified that on the material day, he was notified of the incident and immediately left for the scene. On the way they met the Commanding Officer and they proceeded to the scene where they met PW 4 who directed them to where the deceased's body lay and also where the wounded suspects were. They took the 2nd accused and Obisa to the Jaramogi Oginga Odinga Teaching and Referral Hospital ("JOOTRH") and the deceased body to the Hospital mortuary.

6. Dr Dixon Mchana conducted the post-mortem on the deceased's body on 12th June 2014 at JOOTRH after it was identified by PW 2. According to a post mortem report produced by Dr Solomon Sava (PW 9), the key observation the body was a left upper neck transverse cut wound approximately 15cm X 3cm and 5 cm deep severing the muscles and neurovascular bundle. He concluded that the deceased died as a result of external bleeding secondary to a deep cut wound of the left neck following assault.

7. The investigating officer, Sergeant David Kirinya Mugambi (PW 12) testified that after receiving a report from Ombeyi Police Patrol base he proceeded to the scene of crime in the company of PC John Mutwiri (PW 8), and other officers. At scene they found blood at the point where the deceased lay in PW 5's farm. They also found torched houses and slashed maize fields and upon inquiry they received information that the houses and maize fields belonged to the suspects and they were destroyed by angry members of the public. PC Abdullahi Jillo (PW 11) took photographs of the scene and of the deceased's body at JOOTRH.

8. PW 12 told the court that he recorded witness statements and established that the deceased was killed in a revenge mission after he fought with Obisa over a woman. Following such investigations and the decision to charge him, the accused was arrested at JOORTH when he went to visit his co-accused and Obisa following a tip off from PW 6.

9. When put on his defence, the accused gave sworn testimony. He denied any involvement in the deceased's death. He stated that on 2nd June 2014 he travelled to Kisumu to work at a construction site at ACK church. He stayed there and travelled back home on 8th June 2014 where on arrival he found his house had been torched on suspicion that he had killed murdered the deceased. He discussed the matter with the deceased's family of the deceased and they promised to get back to the matter after the funeral. The accused stated that on 17th June 2017, he felt sick and went to JOORTH for treatment and it is while there that he was arrested.

10. There is no doubt that the deceased was murdered. All the witnesses who went to the scene confirmed that the deceased had a deep cut on the left side of the neck. This is corroborated by the autopsy report by Dr Mchana which shows that the deceased died as result of external bleeding following the cut. The fact that the deceased neck was severed is clearly indicative of malice aforethought. The key issue for consideration is whether it is the accused who murdered the deceased.

11. The incident took place at about 8.30pm and the prosecution case hinges on a single identifying witness. Our courts have taken the position that evidence of visual identification particularly in difficult circumstances 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 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). This requirement is, 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.

12. The accused and the deceased were known to each other as they were from the same village hence this is case of recognition rather than identification of a stranger. I have scrutinised the key testimony of PW 1 and he was clear that it is the accused who had a panga and that among the people he was with, he cut the deceased. The question for the court is whether the identification is free from the possibility of error? In this case, PW 1 did not give any evidence of how far he was from the accused and deceased, the nature of light that enabled him identify the accused and the time the incident took. As to the nature of light, PW 5 testified that it was a dark night while PW 6 stated that there was moonlight. In light of this evidence, it is difficult to assess the conditions of lighting that would give the court an assurance that recognition was free from error.

13. What has weighed heavily on my mind is the fact that although several people came immediately after the incident and met PW 1, they did not testify to the fact that PW 1 told them that it is the accused who assaulted the deceased. The fact that a witness was able to name a person he knew, to the third parties immediately after the incident is a factor to consider in weighing the totality of the evidence. In fact, PW 5, who heard PW 1 call for help, heard him say, "*Come and assist me, someone has killed Omo.*" Since he knew the assailant, why didn't PW 1 name him. PW 6 reacted to PW 1's call and went to the scene. At no time did he hear PW 1 point to the accused as the assailant. The Court of Appeal in **George Bundi M'Rimberia v Republic, NYR CA Criminal Appeal No. 352 of 2006 [2007]eKLR** stated that the failure of a witness to mention the name of an assailant at the earliest opportunity tends to weaken evidence of recognition.

14. PW 4, PW 7, PW 8, PW 11 and PW 12 all testified to the notorious fact that the deceased had been involved in a fight with the accused's brother, Obisa and that the matter had been had been reported to PW 4. This evidence points to motive but given the notoriety of the fact that there had been a prior altercation, is it possible that the public who had gathered assumed that the accused and other suspects are the one who murdered the deceased?

15. The sum of the evidence is not watertight to justify the accused's conviction on the basis of identification by a single witness. I therefore acquit **GODFREY OGOLLA GILL alias ONYALO** of the murder of **MORRIS OMONDI OKAKA**. He is set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 15th day of January 2018.

D.S. MAJANJA

JUDGE

Ms Wafula, Advocate for the accused.

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