



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 25 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

KEVIN OCHIENG ADERO *alias* VIN.....ACCUSED

JUDGMENT

1. **Geoffrey Owuor Obondo *alias* Tony** (hereinafter referred to as '**the deceased**') lost his life in the early hours of 30/06/2015 due to injuries he sustained during a fracas at the Forte Club in Migori town within Migori County.
2. Resulting from police investigations, **Kevin Ochieng Adero *alias* Vin**, the accused person herein, was charged in this case with an information on the murder of the deceased on 23/07/2015. He denied the charge and a trial was held.
3. A total of nine witnesses testified in support of the information. **PW1** was **No. 225532 Cpl. Jackton Owuor Odila** who was a friend to the accused person and who had spent a good part of the night in issue with the accused person herein. **Nicholas Song** testified as **PW2**. He worked at the Forte Club as a *Dee Jay*. **John Mwanga Kishe** worked at the Forte Club as a Security Officer. He was **PW3**. A Bouncer at the Forte Club one **Walter Akongo Amimo** testified as **PW4**. Martin Luther Opati who had just been employed at the Forte Club as a Bar Attendant testified as **PW5**. **Joseph Ochola Onyango (PW6)** and **Elias Kirando Obondo Omondi (PW7, the father to the deceased)** identified the body of the deceased for the post mortem examination and also witnessed the procedure. **No. 73671 Cpl. Walter Chepkwony** attached at the DCI's office at Migori town was the investigating officer and testified as **PW8** whereas **Dr. Kamau Gabriel Mwangi** produced the Post Mortem Report while testifying as **PW9**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.
4. The prosecution's case is that the deceased and the accused person met at the Forte Club and took some drinks in the night of 29/06/2015. That, in the course thereof and during the wee hours of 30/06/2015 they differed and a commotion ensued. That, the two were separated by the Club security personnel and forcefully removed from the Club. While outside the Club the accused person in the company of two security officers then working at the Club stabbed the deceased with a knife. The incident was witnessed by **PW3**. The deceased fell down and was rushed to hospital but pronounced dead on arrival. The body was then returned to the scene by the one who had rushed him to hospital and the police visited the scene and collected the body in the morning of 30/06/2015 and also recovered a blood-stained knife and a phone from the scene. That, the body was taken to Migori County Referral Hospital Mortuary for preservation.
5. **PW8** commenced investigations. He recorded statements from various witnesses and established that the deceased and the accused had initially differed inside the Club and were separated, but later on they again differed and were thrown out of the Club. That, while in the company of two other security officers, the accused person who was armed with a knife stabbed the deceased and they all left. That, the two security officers are still at large and **PW8** is still pursuing them.
6. On 30/06/2015 **PW8** accompanied **PW6** and **PW7** who identified the body of the deceased and witnessed the post mortem examination on the body of the deceased conducted by one Dr. Jared Ndiege. That, the accused person surrendered to the police on 21/07/2015 and he was arrested and on 22/07/2015 he was mentally examined and found fit to stand trial thereby arraigned before Court accordingly. **PW8** produced the knife as an exhibit.
7. **PW9** produced the Post Mortem Report prepared by the said Dr. Jared Ndiege since the Doctor was pursuing further studies out of the country. The body had a penetrating wound intrusion to the umbilicus. That, the spleen was ruptured and there was a penetrating wound on the lower lobe of the liver with massive *haemoperitorium* (collection of blood in the abdominal cavity). The probable cause of death was opined to be the *haemoperitorium* secondary to penetrating abdominal injury causing haemorrhagic shock. The Post Mortem Form was signed. **PW9** produced it as an exhibit.
8. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony without calling

any witnesses. The accused person stated that on the 29/06/2015 he accompanied PW1 to drink at a certain bar and relocated to the Forte Club later in the night. That, the two were searched at the entrance and confirmed not to have any offensive items and allowed inside the Club. That, as they settled at the Counter and continued taking drinks the deceased, who appeared to know PW1, approached PW1 and asked to be bought beer but PW1 declined. The accused person did not know the deceased before that day. The deceased who was drunk and in the company of two ladies had occupied a table and he was generally rowdy and kept on disturbing the other revellers in the Club and at times the security officers had to restrain him. That, PW1 left at a certain point when the accused person had gone to the latrine and on coming back the accused person saw two security officers who were very hostile on, forcing the deceased out of the Club as he was constantly harrasing the other customers. That, he then left to his home and spent the rest of the night.

9. In the morning of 30/06/2015, the accused person was informed by one of the tenants in the house he stayed, who was a Doctor by profession, that he had met a group of people planning to attack the accused person on account of having caused the death of the deceased. Shortly, some of the accused person's friends visited his home and also told him of the planned attack. That, the accused person immediately left with his family to his brother's house where he stayed indoors for three weeks as he feared for his life. That, on 21/07/2015 he went and surrendered to the police where he was arrested, interrogated and later charged. He denied committing the offence either as alleged or otherwise.

10. At the close of the defence case, the Court directed that written submissions be filed.

11. From the above evidence, this Court is now called to find if the ingredients of the offence of murder have been proved in this case. The offence of murder carries three ingredients which are: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will consider each ingredient separately.

(a) Proof of the fact and the cause of death of the deceased: -

12. There is no doubt that the deceased died. That was attested to by PW6, PW7, PW8 and PW9. The first limb is hence answered in the affirmative.

13. As to the cause of the death of the deceased, PW9 produced a Post Mortem Report which was filled in by Dr. Ndiege after conducting the autopsy in his presence. The report confirmed the injuries and opined that the possible cause of the death of the deceased was *haemoperitorium* secondary to penetrating abdominal injury causing haemorrhagic shock. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person: -

14. The accused person denied committing the offence. Out of all the witnesses called by the prosecution it was PW3 who was the eye-witness. PW1 left the Club before the incident. PW2 only witnessed the deceased quarreling with one of the security officers but it all settled down. That, after he switched off the music system and as he was leaving for home, he saw the deceased carried on a motor cycle but fell. He looked at him and saw the intestines protruding and he knew that the deceased had been stabbed. A taxi took the deceased to hospital but returned with the news that the deceased had already died. The body was removed from the taxi and placed where it was initially lying. PW2 left and was later summoned by the police where he recorded a statement.

15. PW4 was one of the security personnel at the Club. He only saw the deceased falling from a motor cycle and learnt from his colleagues that he had been stabbed. He did not witness the incident. PW5 had just been employed as a Bar Attendant at the Club. That, as he was leaving for home he saw a body lying near an electric post and called his boss in Kisumu and updated him accordingly. He did not go near the body and did not know what had happened. PW6 and PW7 were family members to the deceased who identified the body of the deceased for the post mortem examination. They did not witness the incident.

16. PW3 stated that the deceased and the accused person had been engaged in verbal exchanges inside the Club as he was at the entrance. That, the security officers had to intervene and separate them at one point in time. At one point PW3 stated that he witnessed the accused person stab the deceased with a knife in front of the Club that very early morning. However, PW3 changed and stated that he did not see who stabbed the deceased but saw the knife left inside the stomach of the deceased.

17. PW3 further stated that he had met the deceased as he was going out of the Club and asked him not to leave but the deceased pushed him, and he fell. That, he then saw the deceased charging at the accused person outside the Club. As PW3 arose, two security officers then working at the Club attacked him and he again fell. By then the accused person, the deceased and the two security officers fought. That, he later found the deceased stabbed with a knife which was still inside the stomach and he was rushed to hospital. He accompanied the Club Manager and reported the matter to the police who collected the body of the deceased at around 06:00am from the scene.

18. That was the account of the eye-witness. He was not forthright as to whether he witnessed the deceased being stabbed and if so by who.

PW3 kept on changing position. At first, he stated that he saw the accused person stabbing the deceased. He then immediately changed and denied seeing that happened. Again, he changed and said he witnessed the stabbing. PW3 had been beaten and fell twice at a very short interval. He was pushed to ground by the deceased. As he rose he saw the deceased charging at the accused person and he was again hit by the two security officers and fell again. He then saw the deceased bleeding having been stabbed.

19. A witness must be straight-forward in his or her evidence otherwise a Court will have an impression that the witness is untrustworthy and render the evidence highly doubtful. PW3 despite the instability, was hit and fell twice. Further, according to PW3 there was a fight inside the Club and the patrons ran towards the entrance. The magnitude of the commotion was not clearly explained. It is still unclear if PW3 sustained any injuries especially when he was attacked and fell twice and whether he still was able to clearly see the events in that state. It is also not clear whether the people who were scampering for their safety through the entrance obstructed PW3 from clearly seeing the events as they unfolded outside the Club. PW3 also did not state how far he was from the scene as for the Court to ascertain the visibility aspect. I watched the witness testify before me. He was an old man and if he was hit and fell twice almost intermittently and in the midst of the commotion, I highly doubt whether he was still able to clearly see the events as he allegedly stated. It is still PW3 who had searched the accused person and allowed him inside the Club. Did he find him with a knife or any weapon? If so, what did he do? If not, where did the accused person get the knife from?

20. PW2 who was the Club's *Dee Jay* and right inside the Club did not see the deceased and the accused person engaged in any confrontation, but the deceased and the security officers. However, PW3 who was at the entrance of the Club alleged to have seen the accused person and the deceased exchange harsh words. The incident also took place at night although PW3 stated that the entrance was well-lit. I have also carefully gone through the PW3's evidence and it seems PW3 did not explain how he knew the accused person although he kept on referring him by his name. Did PW3 know the accused person that well as to recognize him amid the fracas in that night? For how long had he known him? Could PW3 have mistaken the accused person with any other person during the commotion? And the questions may be unending.

21. This Court is under a legal duty to weigh the evidence of PW3 who is the only identifying witness with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs. Republic (1989) KLR 426** stated as under: -

“It is trite law 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 conviction.”

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarievs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

22. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:-

“... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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 reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

23. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas MuthanwaNtoribivs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows: -

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

24. Again, the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night: -

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen

items did not in any way point to the innocence of the appellants.”

25. Suffice to add, even in cases of uncorroborated single-witness-evidence there can still be a legal conviction. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it.This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."

26. Apart from the evidence of PW3 there is the evidence of PW8 which is also worth touching on. PW8 while testifying as the investigating officer stated that the investigations into the matter were not yet complete as he was still waiting for a report from the Government Chemist on the outcome of the blood found on the knife. That was two years post the recovery of the knife. It is hence not known how long the investigations would take if they are still pending after two years. And, if so, on what basis was the accused person then charged?

27. There was also the aspect of the recovery of the knife allegedly used in stabbing the deceased. It was PW8 who stated to have recovered it from the scene together with a phone. PW3 however stated that the knife was inside the stomach of the deceased. Could the knife which was recovered by PW8 be the same one which was inside the stomach of the deceased? Did the knife connect with the accused person in any way?

28. The issue of the phone is also unsettled. PW8 stated to have recovered a phone alongside the knife. Whose phone was it? How did it find its way to the scene? Did it connect the accused person with the incident? What happened to the phone?

29. Another important issue was raised by the then State Counsel, **Mr. Ndung'u**, in his opening address. Counsel stated that the prosecution had lined up nine witnesses out of which five were eye-witnesses. If only one eye-witness testified, where did the four end up? Why didn't they testify? Any reasonable justification given?

30. Going by the above evaluation of the evidence and on the strength of the case law, this Court finds that PW3 could not have positively identified or recognized the accused person as the one who stabbed the deceased with a knife. Likewise, the whole of the prosecution's evidence raises more doubts and questions than clarity and answers. From the incomplete investigations to the evidence of PW3, there are many loose ends that create doubts as to whether it was the accused person who stabbed the deceased.

31. I hence find and hold that in the unique circumstances of this case and in view of the nature of the evidence tendered before Court, it is unsafe to rely on the single-witness evidence of PW3. Having so found, I return the verdict that the prosecution did not sufficiently prove that it was the accused person who caused the death of the deceased. That being so, the consideration of the third ingredient in this matter will not add any value to this judgment.

32. The upshot is that the accused person herein, **Kevin Ochieng Adero alias Vin**, is found **NOT GUILTY** of the murder of **Geoffrey Owuor Obondo alias Tony** and he is hereby acquitted accordingly. He is therefore set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Ojala Counsel for the Accused person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant