



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CRIMINAL CASE NO. 24 OF 2016**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**IBRAHIM LETTING.....1<sup>ST</sup> ACCUSED**

**KIBET LELGO.....2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused, **IBRAHIM LETTING** and **KIBET LELGO**, are administrative police officers. They are charged with the murder of **JOHN ABWAO ONYANYI** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)* which took place on 18<sup>th</sup> February 2014 at the compound of Masogo Sub-District Hospital, Muhoroni Sub-County within Kisumu County. The accused denied the charge against them and the prosecution called 15 witnesses to support the case that the accused assaulted the deceased thus causing his death. I am now called upon to decide whether I should put the accused on their defence but before I do so let me set out the facts that emerged at the trial.

2. The deceased’s cousin, Okeyo Joseph Oleche (PW 10) recalled that he was at his home at Masogo in the afternoon of 18<sup>th</sup> February 2014 when two administration police officers came to his house and informed him that he had been summoned by the Inspector in charge of Masogo Administration Police Post. He accompanied them to the Post where he was interrogated about a red vehicle parked next to his house. He recalled that his wife had told him that the deceased had brought it there on 16<sup>th</sup> February 2014. He called his wife and told her to inform the deceased that the police were looking for him. After the interrogation, the police officers escorted him back. Later that evening the deceased, who had been at Masogo came to see him. They both went outside to talk. The deceased requested him for some money and as he went back into the house, he heard a gunshot. He returned outside and found some commotion towards Masogo. After a while, the Inspector and two officers came to his house with the deceased whom his wife identified. The police officers left with the deceased and he only learnt later that the deceased had passed away.

3. The deceased’s wife, Susan Anita Abwao (PW 1), confirmed that on 18<sup>th</sup> February 2014, the deceased had gone to Masogo for a meeting earlier in the day and when she called him at 11.30pm, he had been arrested and was at Songhor Police Station. She visited him and found he was in great pain. She observed that he had blood stains on the cap he was wearing and had pain on both sides of his ribs. The deceased

told her that he had been assaulted by police officers but he could not name them. On the next day she visited him and took him some food which he could not eat. She also arranged for a herbalist to see him but his condition did not improve. The deceased's son, Jared Odero Abwao (PW 2), also visited him at Songhor Police Station. He observed that the deceased was in pain and was complaining of pain in lower abdomen. The deceased told him that he had been assaulted by police officers.

4. On 18<sup>th</sup> February 2014, Corporal Kennedy Otieno (PW 4) and PC Driver Charles Rotich (PW 5) of Chemelil Police Post were instructed to pick some suspects at Masogo AP Post. They proceeded there and collected two suspects at about 11.00pm. PW 4 recalled that one of the suspects, the deceased, did not look well. They both took the suspects to Chemelil Police Post.

5. The Commanding Officer of Chemelil Police Station, Chief Inspector Richard Okodoi (PW 9), testified that on 19<sup>th</sup> February 2014 at about 2.30am, he was called by Sgt Munyalo and informed that the two suspects had been brought from Masogo AP Post and that one of them was not feeling well. He went to the report office and found the two suspects. He was instructed by the Officer Commanding Police Division (OCPD) to take the suspects to Songhor Police Station where the matter was being investigated. He issued instructions that the suspect should be taken to Chemelil Factory Health Clinic before being taken to Songhor.

6. At about 2.45am, PW 9 instructed PC George Andale (PW 6) to take the suspects to Songhor Police Station. He found the suspects waiting at the report office and noted that one of them was not feeling well. The deceased told him that he was feeling pain in the chest and stomach. He was assisted into get into the vehicle. PW 6 took him to the Chemelil Factory Health Clinic before proceeding to Songhor.

7. Chief Inspector Nicholas Pera (PW 13) confirmed that according to the Occurrence Book, the two suspects were brought to Songhor Police Station at about 4.30am. PC Isaiah Kipkemoi Cheruiyot (PW 10) and PC Nataoukai Namunyah (PW 8) both testified they took over the report office at about 7.00am. They found the two suspects were already in custody. PW 8 told the court they were called into the cells where they found the deceased complaining of pain and was sweating profusely. They informed the Deputy Commanding Officer. Since the suspect could not stand, he was moved out of the cell. When food was brought lunchtime, he could not eat. PW 13 instructed the Deputy Commanding Officer to take the deceased to hospital. The deceased was taken to hospital and returned. According to PW 13, the suspects could not be taken to court due to insecurity in the area.

8. On 20<sup>th</sup> February 2014, the deceased's condition had not improved. PC Kiptoo Chepkwony (PW 12) recalled that when he reported on duty at 3.00pm, he found the deceased complaining of a stomach ache. He reported to PW 13 who instructed him to take the deceased to Chemelil but when he took him there, the doctor directed them to Maraba Sub-District Hospital. He took the deceased there and left him vomiting. He returned to the station and did not see the deceased again. PW 13 testified that he had been granted leave by the court to hold the deceased for 5 days in order to facilitate his treatment. The deceased was taken to Nandi Hills Hospital but was referred to Kapsabet Hospital where he was admitted for treatment. PW 13 told the court that the deceased had requested for herbal medicine and but did not tell him the cause of his pain.

9. Owino Aol (PW 3), a human rights activist from Muhoroni area, recalled that he had been informed that the deceased had been arrested at Masogo and was in police custody at Songhor Police Station. He visited the deceased who was having abdominal pains. The deceased narrated to him how he was assaulted at Masogo by two Administration Police Officers whom he knew by appearance but not by name. The deceased further told him that he had gone to tow his vehicle when he heard a gunshot. As he lay down, he was kicked by the officers in his stomach. One officer kicked him on his back and lower abdomen and another hit him with a rifle butt.

10. PW 3 met the deceased at Kapsabet Law Courts on 21<sup>st</sup> February 2014. The deceased was still in pain and could not speak properly. PW 3 spoke to the court on his behalf and stated that the deceased had been assaulted and needed medical attention. The court directed that the deceased be taken for treatment.

PW 3 last saw the deceased at Kapsabet Hospital on 26<sup>th</sup> February 2014. The deceased could not speak as he had just undergone an operation. PW 3 was later informed that the deceased had passed away.

11. The post mortem on the deceased's body was done by Dr Dixon Mchana Mwaludindi (PW 7) on 6<sup>th</sup> March 2014 at Kapsabet General Hospital Mortuary after the deceased's body was identified by PW 2. He confirmed that the deceased had died after undergoing treatment as there was evidence of medical intervention. He observed fractures on the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> ribs with bleeding into the left chest measuring about 100ml. There were repaired tears on the small intestine measuring 3cm long. A significant portion of the intestine was beginning to die of gangrene. The spleen had a blood clot. Dr Mchana concluded the deceased died from severe infection of the blood due to perforated small intestine following blunt trauma. In cross-examination, he told the court that forceful blunt trauma was enough to make the intestines burst.

12. **Section 203** of the *Penal Code* defines murder in the following terms, "*Any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.*" Thus the central ingredients of the offence of murder are malice aforethought and an unlawful act or omission on the part of the accused causing death of the deceased.

13. Although counsel for the accused submitted that the prosecution failed to prove the cause of death, the prosecution evidence points to the fact that the deceased was assaulted. After his arrest and before his death, the deceased spoke to his wife (PW 1), his son (PW 2) and PW 3 and told them that he had been assaulted by AP officers at Masogo. These statements by the deceased fall within the definition of a dying declaration under the provisions of **section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* and are admissible as to prove the cause of death (see *Choge v Republic [1985] KLR 1* and *Pius Jasunga s/o Akumu v R [1954] 21 EACA 331*). The fact that the deceased assaulted was confirmed by the medical testimony of PW 7. The deceased's statement when taken together with those who observed the deceased in abdominal pain, is consistent with the finding by PW 7 that the deceased died as a result of abdominal trauma. The fact that the deceased had broken ribs also confirms that he was assaulted.

14. There was a suggestion that the deceased was unwell before he was arrested. I reject this suggestion. It is true that the deceased was being treated when he was at Songhor Police Station but this was only after he fell sick after arrest. PW 1, PW 2 and PW 10 who had known the deceased before his death attested that he was in good health. I therefore find and hold that the deceased died and died as a result of blunt force trauma to his abdomen which led to tearing of the intestines which caused severe infection leading to his death.

15. The key issue in this case is whether the accused assaulted the deceased. The evidence points to the fact that the deceased was assaulted by Administration Police officers at Masogo before he was arrested. The testimony by police officers from Chemelil Police Post and Songhor Police Station is clear that the deceased was already suffering from the injuries he had sustained at Masogo. The question then is which police officers assaulted him. PW 10 testified that the deceased was brought to his home by two officers and an inspector. PW 10's wife identified the deceased before he was taken to Masogo AP Post. PW 10 did not name, point out or identify the two officers who came to his home with the deceased.

16. The prosecution closed its case before calling the other suspect, Fredrick Ouma Sombe, who had been arrested with the deceased. According to the investigator, George Otieno Ayuwo (PW 15) he would confirm the identity of the administrative police officers who arrested them and assaulted the deceased. Despite issuing summons for him to attend court and even warrants for his arrest, he was not brought to court. Since the warrant of arrest was issued in September 2017, the prosecution could not explain the whereabouts of the witness nor give an explanation why the warrant of arrest had not been effected. It is Fredrick Ouma Sombe, who attended an identification parade conducted by Inspector Isaiah Bisengi (PW 14) on 9<sup>th</sup> December 2015, where he identified the 2<sup>nd</sup> accused and according to PW 15, he knew the 1<sup>st</sup> accused. However, in the absence of the witness, this evidence is worthless.

17. It is clear and I find that the deceased was assaulted by two Administration Police officers at Masogo. This is established by the deceased declarations to PW 1, PW 2, PW 3 and PW 10 and corroborated by the evidence of PW 7. Even though the prosecution failed to establish the identity of the officers through

the evidence of Fredrick Ouma Sombe, there remains a huge lacuna in the prosecution case which leads me to conclude that the investigations were inadequate or that this case was intended to drive the court to acquit the accused.

18. The totality of the evidence leaves no doubt that the incident took place at Masogo. It excludes the possibility that the deceased was assaulted at either Chemelil Police Post or Songhor Police Station. The investigators had the opportunity to probe the Inspector in charge of Masogo AP Post who had summoned PW 10. The officer would have produced the Occurrence Book and Duty Rosta which would have identified the officers detailed to go and arrest the deceased at Masogo. The identity of the officers who came with the deceased to the PW 10's home would have been put to PW 10 and his wife at an identity parade. What is more shocking about this case is that the prosecution even failed to establish that the accused were administration police officers at Masogo Police Post at the time the incident took place and that they had been detailed to arrest the deceased and that they were at the *locus in quo*.

19. As I had stated earlier, I am required to decide whether the prosecution has marshalled sufficient evidence or established a *prima facie* case to put the accused on their defence. What amounts to a *prima facie* case has been set out in several cases among them among them ***Ramanlal Trambaklal Bhatt v R [1957]EA 332***, ***Wibiro alias Musa v R [1960]EA 184*** and ***Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR***). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

20. There remains a huge gap in the evidence particularly regarding the identity of the accused as the persons who assaulted the deceased and therefore caused his death. Even if the accused elected to remain silent, a conviction cannot be sustained. In these circumstances, I cannot call upon the accused to make his defence even though the suspicion against them is great.

21. I now enter a verdict of not guilty under **section 306(1)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** against the accused, **IBRAHIM LETING** and **KIBET LELGO**. They are accordingly acquitted.

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

**D.S. MAJANJA**

**JUDGE**

Mr Sagas, Advocate for the 1<sup>st</sup> accused.

Mr Onsongo, Advocate for the 2<sup>nd</sup> accused.

Mr Muia, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.