



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CRIMINAL CASE NO. 57 OF 2011**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**HENRY OTIENO WAMBOGO.....ACCUSED**

**RULING**

1. ON 3<sup>rd</sup> October 2011, this court was informed that the accused **HENRY OTIENO WAMBOGO** (“the accused”) had murdered **WASHINGTON ABONYO AKOTH** (“the deceased”) on the night of 8<sup>th</sup> and 9<sup>th</sup> October 2010 in Ramula Sub-location of Siaya County contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. He pleaded not guilty and the trial began before Chemitei J., and I completed it after complying with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution case was as follows.

2. Caroline Awino Samo (PW 2) used to sell chang’aa at her home. She recalled that on the evening of 8<sup>th</sup> October 2010 at about 7.30pm, the accused and the deceased arrived at her home and took a glass of chang’aa together. At about the same time Josephat Oballa Nyatumba (PW 3) joined them and at around 8.30pm the three of them left together. PW 3 testified that he went on his way while the accused and deceased went the other way together. Vivisha Adhiambo Samo (PW 6), PW 2’s daughter confirmed that the accused, deceased and others were at the home drinking chang’aa and they all left together.

3. The Assistant Chief of Gombe Sub-Location, William Okingo Owiti (PW 7), recalled that on the night of 8<sup>th</sup> October 2010, one Shem Okoth Adera, came to report to him that he was with the deceased, accused and one Thomas Ochiel when the accused grabbed a panga and chased him and Thomas away. He told the court that since the matter did not take place in his jurisdiction, he told Shem to go and report the matter at Ramula the next morning.

4. PW 2 woke up the next morning and when she went out, she found the deceased lying dead with a stab wound on his side and a panga nearby. The deceased’s mother, Rose Aguta Okoth (PW 4), was called and she came to view the body. She recalled that she saw a lot of blood in PW 2’s house. The deceased’s brother, Barrack Ouma Okoth (PW 5) also arrived at the scene and found the deceased’s body. In a little while, the police came and took the deceased’s body to the mortuary.

5. The post-mortem on the deceased’s body was done by Dr. Bob Owino on 11<sup>th</sup> October 2010 at Yala Sub-District Hospital Mortuary after the body was identified by PW 4 and PW 5. The report was produced by Dr Kennedy Rapenda (PW 1) under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. The significant observation by the doctor was that there was laceration, about 5 cm in length, on the spleen. He concluded that the deceased died from a lacerated spleen due to assault.

6. The prosecution closed its case after it could not locate the other witnesses it had lined up. I am now required to decide whether there is sufficient evidence to put the accused on his 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.

7. There is no doubt that the deceased died as a result of a stab wound that resulted in the laceration of his spleen. As to who could have inflicted the injury, the evidence is that that the accused was drinking chang'aa with the deceased on the night of 8<sup>th</sup> October 2010 and he left with the deceased. What happened between that time and the morning when he was found dead is a matter of speculation. There is evidence that on that night he was with other people who have not given evidence. This leaves the possibility that the deceased could have been murdered by anyone of those people. The failure to call other witnesses who were with the accused and deceased on that night leaves the court to give the accused the benefit of doubt. The accused cannot be called to answer to such evidence and even if he chose to remain silent, he would be acquitted.

8. Under **section 306(1)** of the ***Criminal Procedure Code (Chapter 75 of Laws of Kenya)***, I am required to enter a verdict of not guilty which I hereby do against **HENRY OTIENO WAMBOGO**. He is therefore acquitted and set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of March 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Odeny, Advocate for the accused.

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