

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 1 OF 2014

BETWEEN

REPUBLIC.....PROSECUTOR

AND

VICTOR OMONDI RABILLO.....ACCUSED

RULING

1. **VICTOR OMONDI RABILLO** (“the accused”) is facing the charge of murder of contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars are that on 26th December 2013 at Ogal Beach, Osiri Sub-location in Kisumu North District, he murdered **SAMUEL ODUOR OBIERO** (“the deceased”).

2. There is no doubt that the deceased was murdered. Dr Nelly Wanjala (PW 3) produced a post mortem report of an autopsy performed by Dr Arodi which indicated that the deceased’s cause of death was severe haemorrhage secondary to penetrating abdominal injury. At this stage I am required, under **section 306** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, to determine whether the prosecution has made out a prima facie case to warrant putting the accused on his defence.

3. The prosecution case is that the accused killed the deceased by stabbing him with a sharp object. Bonface Juma Ogutu (PW 2) who was the key prosecution witness testified that on the night of 25th-26th December 2013, he saw the accused and the deceased together on his way home from a local bar. The deceased was lying on the ground as he was drunk and accused was standing. PW 2 chatted with the accused for a while and then left to go his way. On the following morning, he received news of the deceased’s death and he went to the scene which was outside his employer’s homestead where the deceased lived. The accused also came to the scene and when PW 3 asked him what had happened, he replied that he simply escorted the deceased to gate as he was drunk and left him there and that he was also shocked to hear the news of the deceased death.

4. Paul Odhiambo Otieno (PW 1), the Assistant Chief of Osiri Sub-location, recalled that after he received the news, he called AP Sergeant George Otieno (PW 4), who was the in-charge Ogal Police Post and informed him of the murder. PW 4 went to the scene in company of other police officers and then called the Deputy OCPD at Osiri who came with other officers and collected the body. Later that day after gathering information from the public they arrested the accused. On cross examination, PW 4 stated that he retrieved crude weapons from the accused house which included a sword like weapon which had blood on it and a blood stained t-shirt but these items were not produced as exhibits.

5. The investigating officer, Corporal Richard Langat (PW 5) testified that he received a call from PW 1 who informed him of the murder. He went to the scene with other officers. PW 2 was present at the scene. He inquired from PW 2 about the murder and he stated that he had seen the deceased quarrelling with the accused on the night before.

6. The main issue for consideration is whether the accused before the court is the person who killed the deceased with malice aforethought. No one saw the accused stabbing the deceased hence the case against him was purely circumstantial. PW 2 saw the accused and the deceased together the previous night. Although PW 4 told the court that he was informed by PW 2 and one Caleb Otieno that there was a

disagreement between the accused and deceased, PW 2, who gave direct testimony, testified that there was no disagreement and that he never heard of any disagreement.

7. PW 3 named one Caleb Otieno as the person who called him and who witnessed the quarrel but he was not called to testify. PW 5 also mentioned another person, Benjamin Ragwagu who had been following them and accused them of throwing stones at him. According to him, PW 2 advised him to cool down and go back home so that they could sort out the issue the next day. The said Benjamin Ragwagu was not called to testify and could also be implicated.

8. PW 4 recalled that he recovered a blood stained sharp metallic object and a blood stained t-shirt from the accused's house. When pressed in cross-examination, he told the court that he only mentioned the metallic object in his statement. PW 5 recalled that he was given the metallic object and blood stained t-shirt but he never produced these in evidence.

9. The only evidence that connects the accused and deceased is that the accused was the last person to be seen with the deceased on the night prior to being found dead in the morning. The key witness, PW 2, did not detect any hostility or bad blood between the accused and deceased. The testimony of PW 4 and PW 5 introduced another angle to the story which was not pursued. The fact that other witnesses, who would have shed light on the circumstances, were not called nor essential evidence secured and produced, leaves this court with the opportunity to make an adverse inference against the prosecution case. In a case where the evidence against the accused is circumstantial, the gaps are too wide to be bridged by calling upon the accused to make his defence and fill in those gaps. Although there is grave suspicion against the accused, even he elected to remain silent, the prosecution case would fail.

10. 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 **VICTOR OMONDI RABILLO**. He is therefore acquitted. The sureties are discharged.

DATED and DELIVERED at KISUMU this 25th day of May 2017.

D.S. MAJANJA

JUDGE

Mr Olel, Advocate for the accused.

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