

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

Criminal Case No. 28 Of 2014

Between

Republic Prosecutor

And

Samson Onyango Juma ACCUSED

RULING

1. On 5th May 2014, this court was informed that **SAMSON ONYANGO JUMA** (“the accused”) had murdered **JAMES OKEYO OJWANG** (“the deceased”) on the night of 11th April 2014 at West Kadiang’a Sub-location of Nyakach District within Kisumu 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. I completed it after complying with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

2. The case against the accused was based on the testimony of Salome Polo (PW 1) who told the court that at about 8.00pm on 10th April 2014, she had gone to visit the deceased. As the deceased was escorting her back home, they were confronted by two people, Jakabondo and Sigo, who demanded to know where they were coming from. She identified the accused in court as Jakabondo. She testified that the accused hit the deceased with a stick and he fell while Sigo cut him with a panga. She ran away while screaming.

3. At about 11.00pm, a night guard at Nyamarimba Health Center, Jeremiah Onyango Ochola (PW 3) recalled that while he was guarding the facility, a group of approximately 10 people carrying assorted weapons arrived with the deceased who had been injured. He opened the facility for them and they put the deceased in the ward while he went to call the nurse on duty to assist. As he went out, he found another person, whose hand and legs had been tied, lying in a water drain. He called the Assistant Chief of West Kadiang’a Sub-location, Caleb Opiyo Owako (PW 4).

4. PW 4 testified that when PW 3 called him, he had already been informed the deceased had been assaulted by two people; the accused and Tadayo Osigo Ochoo, who was also known as Sigo. He informed his superiors and at about 1.30am on 11th May 2014, he received a call that the deceased had passed away and that the accused was being beaten by a mob. He relayed this information to the police. He again received a call informing him that Sigo had died after being beaten by a mob. He only met the accused and saw the deceased’s body in the police vehicle after they had left Nyamarimba.

5. The investigating officer, Inspector Pius Kyalo Muia (PW 6), recalled that on the morning of 11th April 2014, after being informed of the incident, he proceeded to Nyamarimba Health Center with other police officers. By the time they arrived, the deceased had already passed away. They also found the accused, whose hands and legs were tied, outside the facility. They took him for treatment at the facility and left with him as they took the deceased’s body to Jaramogi Odinga Oginga Teaching and Referral Hospital (JOTRH) where a post mortem was done on the deceased’s body on 23rd April 2014 after it was identified by Samuel Odongo Ondiek (PW 5). The doctor concluded that the cause of death was severe head injury secondary to blunt force trauma following assault.

6. After hearing the prosecution evidence, I am now called upon to decide whether the prosecution had

established a prima facie case to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases 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 of a severe head injury inflicted on him. What is in issue is whether the accused was one of the two people who assaulted him on that night. The prosecution relied on the testimony of one witness; PW 1 who testified that she identified him on that night. As the incident took place at night, the circumstances that call for careful examination of the evidence to exclude the possibility of mistaken identity. 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.

8. In her testimony, PW 1 testified that she identified the accused as Jakabondo. In cross-examination, she admitted that she did not know him and that night was the first time she met him. This fact is confirmed by the testimony of PW 4 who told the court that he did not know the accused as he was not from the village. The prosecution did not lead any evidence to establish that PW 1 knew the accused prior to that night. Turning to the circumstances of the case, all that PW 1 said was that there was moonlight and that she identified the accused. There is no evidence of how bright the moonlight was or how far the accused was from her. In addition, no evidence was called from the person she made the first report and to whom she identified the accused immediately after the incident. The only other evidence is that the accused was brought by a mob to Nyakarimba Dispensary after having been assaulted, tied up and left to die. How and where and why he was caught is really a matter for speculation. In my view, the quality of evidence of identification is weak and insufficient to put the accused on his defence.

9. 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 **SAMSON ONYANGO JUMA**. He is therefore acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 22nd day of May 2017.

D.S. MAJANJA

JUDGE

Mr Nyanga, Advocate for the accused.

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