



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. 36 OF 2015**

**(MURDER)**

**(CORAM: J. A. MAKAU – J)**

**REPUBLIC**

**VERSUS**

**ELIJAH ODHIAMBO OWINO ALIAS “NERA”**

**JUDGMENT**

1. The Accused **ELIJAH ODHIAMBO OWINO** alias “NERA” is charged with an offence of Murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya**. The particulars of the charge are that between the night of 13<sup>th</sup> and 14<sup>th</sup> day of April 2014 at Dienya Sub-Location in Gem District, within Siaya County, jointly with others not before Court murdered one **DOUGLAS OTIENO OWITI**.

2. The Prosecution called eight (8) witnesses. The facts of the Prosecution’s case were that the deceased was in company of PW1, PW2, PW3 and PW4 and others all numbering to seven (7) on 13.4.2014 at 10.00 p.m. when they proceeded to attend a funeral of a cousin to PW1 at Gem Apuoyo. That on arrival at the gate of PW1’s home, they met a group of people standing at the gate, armed with pangas and torches, who told them that the people from Alego should go back to Alego. That the Accused herein, slapped the deceased, with as panga. That as the group from Alego retreated to go back home, the Gem group started following them. The Alego group ran into different directions. PW1, with another and the deceased took same direction. That the Accused caught up with the deceased, grabbed him and started beating him using panga, cut him on the right shoulder, fell down and they continued to beat him. PW1 hid in the thicket. That the Alego group later returned, asked PW1 where Douglas Otieno, the deceased, was. He told them the deceased had been attacked in the bush. That when they reached where Douglas was they found him dead. PW1 left the other members of his group guarding the body of the deceased, as he proceeded to report the matter at the Assistant Chief’s home. The Assistant Chief and Police came to the scene, the following day, collected the deceased’s body. Later PW1 and his group, saw the Accused ploughing with bulls and informed Police, that the Accused was one of members of the gang which had attacked the group from Alego. Police Officers arrested the Accused, as they took the deceased’s body to the mortuary at Siaya. The Deceased’s body was subjected to post mortem examination and the Accused later charged with this offence.

3. PW1, Brian Okoth Ajuala, testified that on 13.4.2014 at 10.00 p.m. he left his home, to attend his cousin’s funeral at Gem, in company of Douglas Otieno (Deceased), Evans Ouma, Kevin Odhiambo (PW2), Akosi David (PW3), Donald Odhiambo and others. That at the gate to PW1 cousin’s home, they found as group of Gem people armed with pangas and torches. That the people told PW1 and his group to go back to Alego. This happened when they were very close to them. That “Nera,” the Accused slapped Douglas

Otieno on his back with a panga. PW1, stated "Nera" was a person known to him prior that incident and he heard his vice. That PW1's group retreated, back as Gem group pursued them as they chased them, away leading to them running into different directions.

4. PW1, Dickens and Douglas, went on the same direction. "Nera" reached Douglas Otieno, grabbed him and with his group started beating him using pangas, cut him on the right shoulder, he fell down and they continued to beat the deceased. PW1 did not know who amongst the group cut the deceased though he was nearby, but after Douglas was grabbed he hid in the nearby bushes a distance of 5 metres away. That upon his group returned, asking for Douglas Otieno, PW1 told them he was in the bushes as he had been attacked by the gang. They proceeded there and found Douglas Otieno already dead with a cut on the right shoulder and bleeding from the abdomen which had been cut. They took the deceased near the road and proceeded to make report at the Assistant Chief's home. The Assistant Chief, one Obonyo and Police from Akala Police Station came to the scene to collect the deceased's body, when PW1 and his group saw "Nera," the Accused, with ploughing bulls, informed police that "Nera" was one of the members of the gang, which had attacked them. He was arrested and taken to Police Station. PW1 recorded his statement later. PW1 stated in his statement he stated that he saw "Nera," Olichu, Jaduong, amongst whom he can only see Nera in the dock.

5. During cross-examination PW1, stated from the gate to the river Opose is about 1 kilometre, where the deceased was attacked. Shown the statement he made to the Police, PW1 admitted, he read the statement and what it contained is the truth. He admitted in his statement to the Police there is no mention of "Nera" slapping Douglas Otieno, with a panga. He admitted there was no attack of the deceased at the gate. He stated at the time of the attack of the deceased he was hiding in the bush as the group could not see him because it was dark and he was hiding in a bush. He further stated he came out of where he was hiding to see whether the gang of the attackers had gone because he could not see from where he was hiding, what was happening. He further stated the attack was in the bush and he could not see the attackers because of the bush. That he could not tell who was attacking Douglas because the attackers were many. He stated from the home of the Accused to the home they were going for funeral is about 300 kilometres. PW1 stated before this incident he had met "Nera" once and that he was not familiar with him. PW1, stated he could not explain the clothes "Nera" was in on the material day but he had a coat which was buttoned. PW1 stated he identified "Nera" from his clothes and voice. PW1, stated he knows Olichu and that he was the person who attacked Douglas Otieno. PW1 further stated in the few minutes he had seen the deceased he had been attacked by Olichu, however, he changed and stated the deceased was attacked by "Nera" urging he got confused by Advocate's question on re-examination. PW1 stated he gave Police the names of People he could see well as "Nera," Olichu and Jaduong who he managed to see with the aid of touch lights shone by people behind them. That when Douglas was attacked PW1, stated as he was hiding, he was not able to see the attackers because it was dark. PW1 admitted in his statement to Police he did not say he saw someone cutting another.

6. PW2, Kevin Odhiambo Ojuang, stated that on 13.4.2014 in company of Brian Okoth (PW1), Cyrian Olouch and David Odhiambo (PW3), left Kowiti for a funeral of his grandfather, arriving there at 11.00 p.m., that at the gate they found people armed with pangas and rungu, who told them that as they were from Alego, they were not allowed to enter the home where funeral was being conducted. That the people at the gate were many. That the people started beating them and they all ran in different directions. PW2 hid in a sugar plantation with Dickens Okoth, that when PW2 and Dickens Okoth came out, a child who had hidden with them told them Douglas had seriously been cut and was lying on the ground. The child took them to where Douglas was, found covered with blood on the head and stomach, they carried him to the road. PW1 and Cyprian went to report at the Chief's home. That Police came before Chief and took the deceased away. PW1 stated at the gate to the deceased home, out of the people he found there, he knew one person thus "Nera" and that he heard his voice. That "Nera" initially used to work in PW2's village but at the time of the incident he was working at his own village.

7. During cross-examination, PW2, testified the people of Gem, whom they met at the gate were many and had many spot lights. PW2 stated he heard the voice of "Nera" at the gate. PW2 shown his statement to Police he admitted he recorded he heard the voice of someone he knew, but on being pressed further he admitted there is nowhere, where he stated he heard the voice of someone he knew. He admitted he did not state what the person said or did.

8. PW3, David Odhiambo Odinga, stated, that on 13<sup>th</sup> April 2014 at 10.00 p.m. he was in company of seven people namely Cyprian Oluoch, Kevin Odhiambo (PW2), Brian Okoth (PW1), Donald Odhiambo, Brian Ouma and Douglas Owino going to a funeral at Gem

Apuoche, a funeral of husband to his Aunt, that on arrival at the gate at 11.00 p.m. they found a group of people from Alego lead by "Nera." That "Nera" told them they were people from Alego and it is good they go back to Alego. That the group was armed with pangas, rungas and torches. "Nera" slapped the deceased with a panga on his back. That "Nera" was using a torch to shine on Alego group, saying these are some of them. That they got scared and ran away, each running his own way. PW3 ran towards Opuoyo river. From where he could hear someone screaming as if he was being beaten saying "Olichu do not kill me." The scream was coming from 60 metres away. He later met John Okoth who had ran to the same direction, with Douglas Owino who told him Douglas he had been cut. John Okoth took them to the direction where he had come from and found the deceased almost dead. They took him to the road. Cyprian and Brian Okoth went to report to the Area Chief, who returned and told them Chief told them he would be coming to the scene in the morning. That in the morning Chief came and while there "Nera" passed by with a plough pulled by bulls going to plough. They told Chief that "Nera" was one of the people. That he was then arrested by members of the public and Police from Akala Police Station arrived, took photographs of the scene, rearrested the Accused, and took the body of the deceased away. PW3 stated the person he identified as "Nera" was well known to him as he used to stay at Alego with his grandfather and that he had known him for 7 years before the incident, urging he has grudge with the Accused before because of alleging his phone had been taken by another group in another funeral and that they returned the phone to him.

9. During cross-examination of PW3, he stated he recorded his statement with Police after the person he identified as "Nera" had been arrested, that by the time he was arrested they had disagreement with him over the phone which had been stolen from PW3's friend. That at the gate none of the members from Alego group had a torch and that there was no source of light to enable them identify anyone. That "Nera" was using torch light to identify members of Alego group and others were not lighting their torches. Shown his statement to the Police PW3, admitted in his statement he did not mention "Nera" using a torch light in identifying anyone. PW3 stated the group from Alego was of more than 15 people. PW3, stated John Okoth is the same person as Brian Okoth (PW1). PW3 agreed the Accused is not also known as Olichu. That at the gate there was bright light, nevertheless it was necessary to use spotlight to identify someone notwithstanding the bright light. On re-examination of PW3 he stated there was electric light at the compound but outside the compound there was no light. That the incident was outside the compound where there was no light. That outside the compound it was dark.

10. PW4, Martin Obonyo Opondo, Assistant Chief of Dienya, testified that on 13<sup>th</sup> April 2014 at around 3.30 a.m., he was awakened by 4 people, who informed him they attended a Disco-Matanga in his area and one of the member of their group was murdered. PW4, told them to go and he would join them the following day. He visited the scene at around 6.00 a.m. where he found very many people, and while investigating the matter one of the people called him pointing at a passerby telling him that was one of them. He then realized that was one of the person who had reported to him that night. PW4 then proceeded to arrest the person pointed at and alleged to be one of the persons who had attacked the group from Alego. After that he was arrested by members of public. PW4 pleaded with people not to beat the person, called the OCS Akala Police Station, who came to the scene, collected the body of the deceased and the suspect for further investigation. PW4 stated the person he re-arrested is "Nera" who is his neighbor and his resident. He identified him at the dock.

11. On cross-examination PW4 stated the four people who came to his place to report of the incident did not give him the name of the suspect.

12. PW5, Dr. Philip Brian Okoth, conducted postmortem examination in respect of the body of Douglas Otieno after identification of the body by James Owiti and Benson Ochieng (PW7) at Siaya County Referral Hospital mortuary at 3.40 p.m. on 14.4.2014. On examination of the body he noted the following:-

***“Mucosal membrane pallor present (conjunctival, buccal [severe pallor]***

***- Cut wound on right shoulder 3 Cm in size***

***- Cut wound on left shoulder 10 cm in size with underlying deltoid muscle cut exposing the shoulder joint.***

***- Scalp wounds present small one on the left frontal. Aspect with larger one on the right temporal aspect 2 cm & CM respectively.***

Based on his examination of the deceased's body he formed the opinion of the cause of death to be due to multisystem organ failure resulting from hyponolemic haemorrhagic shock, following assault, results in fatal injury (*cuts, adequate for exsanguination*)

13. PW6, John Okoth Onguda, testified that on 13.4.2014 at 9.00 pm he was at Akwaya with Dickens Okoth, on their way home when they joined other people from their home area and on joining their people at the gate, they heard "Nera" saying "*people of Alego should go back!*" as they flashed torch lights on their faces, as they were putting their torch lights on and off. That Douglas Otieno, who was at frontline was slapped by "Nera" who was inside the compound with a panga. PW6, heard him calling Olichu, as the group from Alego was being chased. PW6, stated they knew that the person was "Nera" as they flashed torches. That "Nera" struck Douglas Otieno with a panga, as he was ahead of them that the group from Alego ran towards the river. PW6, hid on the way to river, as Douglas continued running, but he was cut by Olichu who was ahead of him. He stated the people who were following them were Olichu, "Nera" and Musee. That Douglas Otieno, was cut 6 metres from where PW6 was. That the attackers had torch lights which enabled him to see what was happening. PW6 looked for his mates who he informed that the attackers had beaten Douglas Otieno. That they took him to the road, thus Brian, Dickens, Akosi and PW6. That some of them, namely Dickens and Brian went to inform the Chief, who came followed by Police Officers, who collected the body of the deceased. PW6, testified he did not know Olichu but "Nera" who used to stay in their home area before, for 1 year, though he did not know where in particular, he was staying. PW6, identifying "Nera" as the Accused person in the dock (*pointing at him*).

14. During cross-examination, PW6, testified that the people at the gate flashed torch lights on PW6's group and identified them as people from Alego. That it was dark night hence torch lights had to be used. That the torch lights were switched off after identifying the group from Alego. That he heard the voice which he identified as "Nera's." That when lights were put off there was no scuffle. That PW6 stated running. He stated "Nera" was wearing gumboots. That he did not see Olichu's dressing as it was dark. PW6 stated no light was flashed at the time as he was behind the other people and that he could not see beyond Dickens, who was taller than him. That after 5 minutes of lights being flashed at them PW6 could not see.

15. PW7, Benson Ochieng Owiti, testified that on 14.4.2014, that he identified the body of Douglas Otieno Owiti, to the Doctor for post mortem examination while in company of his uncle James Owiti Ariedi and Police Officer Sifuna. That postmortem was done and the body released to them for funeral.

16. PW8, No. 53811 Cpl. Michael Sifuna, from Akala Police Station, the investigating officer in this case stated, that on 14.8.2024, his fellow Police Officer Cpl. Boniface Wanjala, received a telephone call from the Chief of Dinya West, informing him of a murder, incident in his area. PW8 in in company of Cpl Wanjala, proceeded to the scene of the incident at Dinya in Gem Division, where they found a dead body lying down under a tree opposite the home of the deceased. The body had a cut on the left side of the head and bruises at the back. That the body was lying on the stomach and at the scene they found a walking stick. PW8 called the Chief and inquired whether there was a suspect, the chief told them he had already arrested a suspect, who he handed over to PW8, whom he requested and asked Cpl. Wanjala to take the suspect to Akala. Police Station. PW8 remained at the scene awaiting for the vehicle to return to take the deceased body to the mortuary. The vehicle returned to the scene and PW8 recorded witnesses statements. PW8 identified the suspect, handed over to him by Assistant Chief as the Accused (*pointing at him*) in the dock and stated he was not a person known to him. That he was transferred before he completed his investigations, and he handed over the file to OCS, Akala Police Station.

17. On cross-examination PW8 testified that when he re-arrested the Accused he had no murder weapon. PW8 stated he recovered walking stick, which he stated belonged to the Accused as he was seen with it. The previous day.

18. The Accused on being put on his defence gave evidence on oath. He stated that on 13.4.2014 he was at home the whole evening and at night he attended a funeral at a neighbouring home at 9.00 p.m. being a funeral of his uncle. Then while at the home of his deceased uncle a fight broke out upon which the Accused and his brother ran away back home and slept. That the following day at around 6.00 a.m. he woke up, proceeded to his uncle's shamba, but while on the way, he was stopped by Assistant Chief Martin Obonyo (PW4), called him to where he was and asked the Accused whether he knew of the death of Douglas and he told the Assistant Chief he did not know of it. He urged the fight broke outside the compound of his deceased uncle. He stated at the funeral he was with his brother Seth Otieno and that they left the deceased's compound through the fence. He stated that he did not

participate in the fight. He denied killing the deceased. On cross-examination he stated his deceased uncle was called Victor Owino. That in the funeral there were 30 people out of which he recognized 2 people, his brother and his Aunt who was seated next to them. That the fight broke at the gate and as people were advancing to where the Accused and his brother were and opted to run home. He stated that he did not know John Okoth (PW6), Brian Okoth (PW1), Kevin Odhiambo Ojwang, (PW2) and David Odhiambo (PW3). He stated that he does not know Olichon nor Douglas Otieno nor one Musee. He stated when the Assistant Chief arrested him he did not tell him where the deceased was killed.

19. DW2, Seth Owino, brother to the Accused testified that on 13<sup>th</sup> April 2014 from evening upto night he was at a funeral at the homestead of his uncle, where he had gone with his friend "Nera" arriving there at 10.00 p.m. That at the funeral he did not recognize anyone. That at 11.30 p.m. he heard noises. That there was electric lighting where the music was being played as they used generator, which was far from where DW2 was seated, in a compound of about ½ an acre. That when noises began DW2 and "Nera" left and went to the home of "Nera" at 12 midnight and slept. That DW2 woke up at 5.00 a.m. and left "Nera" sleeping in the same house. On cross-examination DW2, stated he picked "Nera" at 9.45 p.m. and at the funeral they were seated together and could not see from where they were the gate. That noises were coming from a dark area from the direction of the gate. That it sounded like someone was being beaten. He denied knowing one by the name Olichon or Musee. He denied he was part of the gang at the gate. He stated that he did not have a torch on the material night. DW2 testified they went through the gate and not the fence. He denied knowing Douglas Otieno Owiti.

20. At the close of the defence case, Mr. Ahimbisibwe learned defence counsel, submitted the Prosecution has not proved their case beyond any reasonable doubt and urged the Accused should be acquitted. Whereas M/s. Odumba, learned Prosecution Counsel, urged the Court to find that the Prosecution has established their case beyond any reasonable doubt and urged the Court to find the Accused guilty as charged.

21. The accused is facing a charge of murder, the burden of proving the charge of murder lies with the Prosecution to prove the charge against the accused beyond any reasonable doubt. Under **Section 203 of the Penal Code**, murder is defined as follows: -

***"203. Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder."***

22. The Prosecution in a murder case must prove that the accused had formed the necessary intention to cause death or grievous harm to the deceased. **Section 206 of the Penal Code**, describes circumstances which constitute the same as follows: -

***"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-***

***a) an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or not;***

***b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be cause;***

***c) an intent to commit a felony;***

***d) an intention by the act or omission facilitate the flight or escape from custody of any person***

**who had committed or attempted to commit a felony”.**

23.23. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients: -

**a) death of the deceased and its cause.**

**b) that the accused caused the death through an unlawful act or omission.**

**c) the accused possessed an intention to cause harm/kill or had malice aforethought.**

24. The first issue for consideration in this case is whether the Prosecution proved the death of the deceased and its cause? PW1, PW2, PW3, PW4 and PW6 saw the deceased's body before PW4, the Chief of Dienya, Martin Obonyo Opondo, who had received report of the deceased death from PW1 and his group, and he called the OCS Akala Police Station who send PW8, Cpl. Michael Sifuna from Akala Police Station to collect the deceased's body to Siaya County Referral Hospital Mortuary. PW7 Benson Ochieng Owiti on 14.4.2014 in company of his uncle James Owiti and Cpl Michael Sifuna identified the body of Douglas Otieno, to PW5, Dr. Philip Brian Okoth, for post mortem purposes at Siaya County Referral Hospital Mortuary. A Postmortem examination on the deceased's body was carried out by PW5, Dr. Philip Brian Okoth on 14.4.2014 at around 3.40 p.m. in presence of PW7, his uncle James Owiti and Cpl. Michael Sifuna of Akala Police Station. The evidence of PW5, the Doctor corroborates, the evidence of PW1, PW2, PW3, PW4, PW6, PW7 and PW8 who testified that they saw the body of the deceased herein before it was taken to Siaya County Referral Hospital Mortuary. The defence do not deny the death of the deceased herein. On the cause of death PW1, PW2, PW3 and PW6, testified that the deceased was attacked by a group of people who were preventing people from Alego from entering the home of PW1's cousin, during the funeral period. PW1 and his group informed the Chief of Dienya, PW4 of the attack and death of the deceased herein. They testified the deceased had been cut with a panga by his attackers. PW5, Dr. Philip Brian Okoth, who carried out the Post mortem examination on the deceased's body and produced post mortem report as P Exhibit 1, noted that on the external examination of the deceased's body as follows:-

**“Mucosal membrane pallor present (conjunctival, buccal [severe pallor]**

**- Cut wound on right shoulder 3 Cm in size**

**- Cut wound on left shoulder 10 cm in size with underlying deltoid muscle cut exposing the shoulder joint.**

**- Scalp wounds present small one on the left frontal. Aspect with larger one on the right temporal aspect 2 cm & CM respectively.**

That as a result of his examination, he formed the opinion that the cause of death was:

**“Multisystem organ failure resulting from Hypovolemic Hemorrhagic shock, following assault, resulting in fatal injury [cuts adequate for Exsanguination]”**

From the above I am satisfied that the Prosecution has therefore proved the death of the deceased and the cause of the death of the deceased to the required standard of proof.

25. I now turn to the next issue for consideration, thus who caused the death of the deceased? The Accused in this case denied having caused the death of the deceased and gave a defence of alibi. He called one witness in support of his defence. In the instant case the offence occurred at night at a dark place and the key issue for consideration is identification of the attacker or attackers of the deceased.

26. The defence in the instant case contends that the Prosecution failed to adduce sufficient evidence linking the Accused with the death of the deceased, urging the evidence produced was contradictory and unreliable and as such it fell below the required standard of proof. According to PW1, he left for his cousin's home, in company of the deceased, Douglas Otieno and others who included PW2 and PW3, that at the gate of his cousin's home, they found a group of Gem people armed with pangas and torches who told PW1 and his group to go back to Alego. That "Nera" the Accused slapped Douglas with a panga. That he saw "Nera" and even recognized his voice. That PW1 and his group retreated as they were being chased by Gem group forcing PW1 and his group to run in different directions. According to PW1, Accused reached Douglas Otieno, grabbed him and with his group started beating him using panga, cut him on the right shoulder and continued beating the deceased. PW1 testified he did not know amongst the group who cut the deceased as he was hiding in a bush from a distance of only 5 metres to where the deceased was being assaulted.

27. PW1's evidence did not stand the test of cross-examination as he admitted in his statement to the Police, he did not mention "Nera" Slapping Douglas Otieno with a panga and that he admitted there was no attack of the deceased at the gate and that at the time the deceased was attacked he was hiding in the bush as the attackers could not see him as it was dark nor could he see them nor what was happening due to the darkness. The bushes hindered his view and he could not see the attackers, adding that the attackers were many and he could not see who was attacking the deceased. PW1 could not explain how the Accused was dressed yet he claimed he identified the Accused by his clothes and voice. PW1 contradicted himself when he testified that it was Olichokwa who attacked the deceased. I find PW1's evidence riddled with contradictions and inconsistencies as he claimed he could see with the aid of torch light shone by the people behind him when he stated, that none of the people from Alego had torch light. I find from the evidence of PW1 it was difficult for him to have been able to identify the Accused as one of the people who attacked PW1's group. His evidence cannot be relied upon due to the inconsistencies and contradictions I have pointed out in his evidence.

28. PW2, Kevin Odhiambo Ojwang, who was in company of PW1 and others stated they arrived at the gate of PW1's cousin at 11.00 p.m. whereby they found a group of Gem people armed with pangas and rungu, who told them as they were from Alego they were not welcome. That the people at the gate who were many, started beating PW2 and his group who ran away in different directions. PW2 hid in the sugar plantation, and after a while Dickens Okoth came, and informed him of Douglas's injuries. PW2 stated the Gem people at the gate were many and he heard the voice of "Nera" while at the gate, however PW2 on being shown his statement to the Police he admitted he recorded, he heard the voice of someone he knew. He did not tell the Police, he heard the voice of "Nera" nor did he state what the people said. I therefore find PW2's evidence, contradictory and not credible.

29. PW3, David Odhiambo, stated that at 10.00 pm in company of 7 others they proceeded to a funeral at Gem Apuoch, a funeral of the husband to his Aunt, when on arrival, at the gate, they found a group of people from Gem led by "Nera" who told them they were people from Alego and that it was good they go back to Alego. That the group was armed with pangas, rungu and torches. "Nera" slapped the deceased with a panga on his back as he was using torch to shine on Alego group saying these are some of them. That the Alego group got scared and ran away towards Oposo river from where he could hear someone screaming as he was being beaten saying "Olichokwa do not kill me." He later met John Okoth (PW6) who told him the deceased had been cut. PW3 and John Okoth went out to find the deceased already dead. They called Area Chief to be informed of the incident. PW3 and his group saw "Nera" proceeding to plough, informed Chief and he was arrested. PW3 stated he had an existing grudge with the Accused because of his alleged phone which the Accused claimed had been taken by another boy. PW3 admitted that he recorded his statement with Police after the Accused had been arrested. That the incident took place at night and none of the people from Alego had a torch and that there was no source of light to enable them identify anyone, save "Nera" who had torch to identify members of Alego Group. I have noted the witness admitted in his statement to Police he did not mention nor gave the name of "Nera" as the person using torch light to identify people from Alego. He claimed at the gate there was bright light, nevertheless, it was necessary to use spotlight to identify someone. He contradicted himself by stating there was electricity light in the compound but outside the compound it was dark. He confirmed the incident was outside the gate where there was no light. I find the evidence of PW3 contradicted the evidence of PW1, and PW2 in terms of lighting and the role played by the Accused and what he is said to have said. I therefore find and hold there was no sufficient light to enable anyone to be identified. PW3 failed to state how he was able to identify the Accused. I find his evidence unreliable and cannot rely on the same.

30. PW4, Martin Obonyo Opondo, evidence deals with the report he received from PW1 and another and the arrest of the Accused after Alego group identified him as one of the attackers of the deceased. Nothing was recovered from the Accused connecting him

with this offence or placing him at the scene of crime. I therefore find no link of the Accused with the offence.

31. PW6, John Okoth Onguda's evidence is that on 13<sup>th</sup> April 2014 at 9.00 pm while at the gate to the PW1's deceased cousin, at Gem he heard "Nera" saying people of Alego should go back as they flashed torch lights on their faces. That Douglas Otieno, the deceased who was at the front was slapped and he heard him calling Olichu as they were chasing the group from Alego. That he saw "Nera" hit the deceased with a panga as he was ahead of them but he hid on the way, as the deceased continued running but he was cut by Olichu who was ahead, 6 metres from where PW6 was. That the attackers had torches which enabled him to see what was happening. PW6 stated at the gate people used torch lights as it was dark which were being switched on and off. That he heard voice which he identified as "Nera's". PW6 in his evidence stated as he was at the back and as Dickens was ahead of him he could not see beyond him. That after 5 minutes of being flashed with spotlight PW6 could not see. PW6 did not state the words uttered by "Nera", and in what language and whether he had heard him speak previously. I find as It was a dark night and torch light had been flashed on PW6's face, he could not see. He did not state he saw the Accused cut the deceased but one "Olichu," who is different from the Accused. I find PW6 evidence do not link the Accused with the beating and cutting of the deceased but one Olichu. Indeed PW3 stated he had heard the deceased pleading with "Olichu" not to kill him. He stated "Olichu" is different from "Nera" the Accused. PW3 and PW6 agree the deceased was cut by Olichu and not the Accused herein.

32. In a case based on identification, it is a well settled principle that evidence of visual recognition in criminal cases can cause miscarriage of justice if not carefully tested. In the case of **R Vs. Turnbull and others (1976) 3 ALLER 549**, Lord Widgery C.J, had this to say:

*"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, 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 the accused under observation? At what distance? In what light? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"*

.....

*Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

33. The Prosecution witnesses PW1, PW2, PW3 and PW6 stated they were able to recognize the Accused with the aid of torch lights flashed at them by the group from Gem. In **Maitanyi Vs. Republic (1986) KLR 198 the Court** at page 201 held:

*"The strange fact is that many witnesses do not properly identify another person even in daylight ... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into .... See **Wanjohi & Others -vs- Republic (1989) KLR 415"***

34. PW1, PW2, PW3 and PW6 testified that there was no light outside the deceased compound, though there was electricity inside the compound. That the group from Alego had no torch lights but light was being flashed at them by Gem group. The Prosecution witnesses testified their group had no torch lights nor did they testify on the distance between themselves and the Gem group. None of the Prosecution witnesses testified that he saw the Accused strike or cut the deceased but stated that the deceased was cut by one Olichu, who, has not been arraigned before Court and no explanation was offered why he has not been arrested and charged with this offence. Further PW1, PW2, PW3 and PW6 in their first report to the Police, they did not mention the Accused as the person who had cut the deceased. PW6 recorded his statement after the Accused had been arrested. In **Maitanyi Vs. Republic (Supra) the Court of Appeal** while testing identification evidence expressed itself thus:

***“In his testimony Elias stated that he mentioned the appellant as one of the assailants in his initial report. We also take note that Lawrence gave evidence that when he regained consciousness he told his brother, Elias, that it was the appellant and his father who had attacked him; He also gave the Appellant’s name to the Police.....”***

35. It is interesting to note, in this case, the Accused was well known to PW1, PW2, PW3 and PW6 prior to the incident and this was a case of recognition yet the witnesses in their first statements to Police did not give the Accused name nor mention him as one of the attackers of the deceased. In case of **R Vs. Alexander Mutwiri Rutere alias Sanda & Others 2006 eKLR**, it was stated that if a witness is known to an Accused but no name is given to the Police, then giving the name subsequently is either an afterthought or the evidence given is not reliable. (underlining is mine) In the instant case I note PW1, PW2, PW3 and PW6, who claimed were at the scene did not in their first report mention the name of the Accused to the Police but subsequently at the time of trial. The failure of PW1, PW2, PW3 and PW6 to mention the Accused’s name earlier on weakens the Prosecution’s case and renders it incredible. That the Accused being person well known to them, they should have mentioned him in their witnesses statements to the Police.

36. The Accused gave a defence of alibi and called one witness to support his defence of alibi. I have very carefully considered the Accused’s defence of alibi to the effect that he was not at the scene where the scuffle took place. The Prosecution did not dislodge the Accused’s defence of alibi. I therefore find that the Prosecution failed to prove to the required standard that the accused caused the death of the deceased herein.

37. Whether the Accused had malice aforethought? The Accused stated that when a fight broke out he ran away back home and the following day he learned of the deceased’s death from Chief, PW4. He denied participating in the fight which had broken outside the compound. PW3, testified he heard the deceased asking one Olichio not to kill him. PW3 and PW6 testified that it was Olichio who cut the deceased with a panga. PW5, the Doctor in his evidence enumerated the injuries sustained by the deceased which reveal that the injuries were caused by a sharp object. The postmortem report corroborates the evidence of PW1, PW2, PW3 and PW6 as regards injuries sustained by the deceased. From the evidence on record there is no evidence to the effect that the Accused alone or with others had planned to commit the offence. I have considered the Accused’s defence of alibi, that he did not participate in the fight nor was he at the scene of the fight but after the fight broke up, he went home and slept. I find the Accused’s defence was not controverted. He was not placed at the scene of the fight as conditions were not favourable for recognition of the Accused person. Having considered the evidence as a whole, I find the Accused did not plan nor did he take part in the commission of the offence. For the reasons above, I find the Prosecution failed to prove malice aforethought as against the Accused herein.

**38. For the above-mentioned reasons, I find the Prosecution has failed to prove the charge of murder against the Accused. I accordingly find the accused not guilty of the charge of murder of the deceased Douglas Otieno Owiti. The Accused is Accordingly discharged of the offence of murder and set at liberty forthwith unless otherwise lawfully held.**

**DATED AND SIGNED AT SIAYA THIS 22ND DAY OF JUNE, 2017.**

**J.A. MAKAU  
JUDGE  
DELIVERED IN OPEN COURT**

**IN THE PRESENCE OF:**

**MR. AHIMBISIBWE FOR THE ACCUSED**

**M/S. ODUMBA FOR STATE**

**C.A.  
1. LABAN ODHIAMBO  
2. P.B. OCHIENG  
3. S. OORO  
J.A. MAKAU  
JUDGE**