

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 99 OF 2014

REPUBLICPROSECUTOR

VERSUS

DAVID OKUMUACCUSED

RULING

1. **DAVID OKUMU** was charged with others not before Court with the murder of **ALBERT OMONDI OCHOLA** (hereinafter referred to as '**the deceased**'). The particulars of the information were that the accused person committed the offence on the 20/09/2014 at Kambija Sub-Location, North Kamagambo Location within Migori County within the Republic of Kenya. He denied committing the offence and a trial was ordered.

2. The case was thereafter fixed for hearing on several occasions but for one reason or the other the hearing did not begin mainly due to the absence of prosecution witnesses. As at the close of the prosecution's case a total of four witnesses had testified. They are the Assistant Chief of Kambija Sub-Location one **JOSEPH MICHAEL OKOTH** who testified as **PW1**, a neighbour to the deceased one **CAREN ADHIAMBO SEWE** was **PW2**, **ELIJAH OTIENO OJIJO** who was a cousin to the deceased testified as **PW3** whereas the Investigating Officer **No. 60296 Corp. DALMINIOUS ONYANGO** testified as **PW4**.

3. At around 08:00pm as **PW2** was in her house she heard some screams from the home of the deceased. She rushed there only to learn that the deceased had been attacked and was lying in a trench. She observed the body which had head injuries and noted that it was lifeless. She identified it as the body of the deceased. She later informed **PW1**. It was **PW1** who reported the incident to the police and the body was eventually collected and taken to Homa Bay District Hospital Mortuary where a post mortem was conducted. **PW3** identified the body of the deceased before the autopsy. **PW4** was not the initial investigating officer. He took over the conduct of the case long after investigations had been concluded and the accused person charged before Court. He explained his difficulty in getting the witnesses who had recorded statements with the police as they had relocated elsewhere. The Post Mortem Report was produced by the consent of the parties. That was the evidence adduced by the prosecution witnesses.

4. At this point in time this Court is supposed to weigh the prosecution evidence on record and ascertain whether it establishes a *prima-facie* case (See the case of **Ramanlal Trambaklal Bhatt v. R (1957) E.A. 332**). In doing so this Court must have an eye on the ingredients of the offence of murder. There are three ingredients of the offence of murder which are: -

(a) *Proof of the fact and the cause of death of the deceased;*

(b) *Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence; and*

(c) *Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.*

5. Going by the evidence on record, there is medical evidence in proof of as well as the cause of the death of the deceased in this matter. Indeed, the deceased died out of an injury on his head.

6. As to whether the accused person is the one who inflicted the fatal injury on the deceased's head, this court is in difficulty in finding in the affirmative even on a *prima-facie* basis. That is so because none of the witnesses mentioned the accused person as one of the possible killers of the deceased. Infact it is not known why the accused person was charged in the first instance. Of course, that status may be because of the witnesses who did not testify but that is the position as at now. There is hence no evidence linking the accused person with the death of the deceased.

7. Having found that there is no nexus at all between the death of the deceased and the accused person, it will serve no purpose to even place the accused person on his defence. Pursuant to **Section 306 (1)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, I find that the accused person herein **DAVID OKUMU** is **NOT GUILTY** of the murder of **ALBERT OMONDI OCHOLA** and is hereby acquitted.

8. The Accused person shall forthwith be set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of July 2017.

A. C. MRIMA

JUDGE