



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL CASE NO. 19 OF 2015**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**JACOB ODERO OPIYO.....ACCUSED**

**JUDGMENT**

1. **JACOB ODERO OPIYO** (“the accused”) was presented before this court on an information dated 25<sup>th</sup> June 2015 charging him with three counts of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 12<sup>th</sup> December 2014 at West Katieno Location, Seme Sub-county of Kisumu County, the accused murdered his son, **ABRAHAM OCHIENG ODERO (D1)** and that on 31<sup>st</sup> March 2015 at the same location the accused murdered his parents, **JANE AOKO ODERO (D2)** and **DAN OPIYO ODERO (D3)**. The accused denied the charges against him.

2. To prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

3. The fact and cause of death of each deceased was not in dispute. Dr Kevin Ochieng (PW 8) who produced three post mortem reports on behalf of the doctors who conducted the respective autopsies under the provisions of **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. The autopsy on D1’s body was done by Dr Bosire Moraa on 22<sup>nd</sup> December 2014 at Jaramogi Oginga Odinga Teaching and Referral Hospital (“JOOTRH”). The main finding was that D1 had multiple skull fractures on the head leading to internal bleeding in the brain. She concluded that D1 died as a result of a severe head injury secondary to assault.

4. The autopsy D2’s body was conducted by Dr Lawrence Sikuku on 13<sup>th</sup> April 2014 at JOOTRH. He observed that there was a deep cut on the frontal scalp which led to internal bleeding in the frontal and left parietal area of the head. He concluded that D2 died as a result of intracranial pressure secondary to subdural haematoma following trauma inflicted by a sharp object on the head.

5. Dr Omondi Mboya conducted the autopsy on D3’s body at JOOTRH on 25<sup>th</sup> May 2015. He noted that there was a wound on the left parietal scalp which, upon internal examination, revealed extensive internal bleeding. There was a depressed skull fracture on the frontal region to the right temporal region measuring approximately 24 cm with attendant internal bleeding. Dr Mboya concluded that the cause of death was severe head injury secondary to blunt force trauma.

6. The main issue in this case is whether the accused committed the unlawful act that caused the deceased's death. The evidence emerging at the trial regarding the circumstances surrounding the death of D1 was as follows. On 12<sup>th</sup> December 2014 at around 4.00pm, the accused's brothers, Charles Otieno Opiyo (PW 1) and Naaman Ouma Opiyo (PW 2), were in PW 1's house when they heard their grandmother screaming, "*Jacob what have you done to yourself?*" Their grandmother informed them that the accused had thrown his son, D1 in a bush. She took them to the bush and they found D1 lying on the ground covered with a jacket. When PW 2 uncovered the child, they observed that he had swollen injury on the head. They rushed him to hospital with the help of neighbours but he later on passed away. PW 1 recalled that earlier on the accused had come to his house bare-chested while holding a hammer and asked to be assisted with a shirt. It is shortly thereafter that he and PW 2 heard their grandmother screaming.

7. PC David Tindi (PW 9), who investigated the murder of D1, told the court that on 14<sup>th</sup> December 2014, the accused's wife, Quinter Awour, went to Kombewa Police Station in the company of the Assistant Chief, Kombewa and made a report that the accused had killed their son. PW 9 took her statement and later attended the post mortem of D1.

8. As regards the death of D2 and D3, PW 1 testified on the night of 31<sup>st</sup> March 2015 he was in his house with his two sisters Roselyn Adhiambo (PW 3) and Florence sleeping when he was awoken by noises outside. He opened the door and his sister Irene came in and informed him that the accused had killed their parents. He went into his parents' house and found D2 lying on the floor in a pool of blood. D3 was leaning on the wall but he was very weak. He also found one of the house windows had been broken from the inside. PW 3 testified that earlier that evening at around 7:00pm she had seen the accused walking around their compound and that although there was no bad blood between them, she and her siblings feared him.

9. The deceased's sister, Fena Awino Opiyo (PW 5), a child, gave unsworn testimony. She told the court that on the material evening, it was raining and D2 and D3 were outside collecting rain water while she was in the house with her sister Irene. The accused came into the house armed with a piece of timber. After D2 and D3 were done collecting rain water they went into the house and that is when the accused appeared with a piece of timber then hit D2 first and then D3. PW 5 further testified that when they saw what had transpired she and Irene ran out of the house and locked the door from outside. The accused then broke a window and escaped.

10. Corporal Nelson Kiplagat (PW 7), who investigated the murder of D2 and D3 testified that after receiving information about the incident, he visited the scene and found the body of D2 in the house while D3 had been rushed to JOOTRH for treatment. He interviewed the witnesses and recorded statements which revealed that on 12<sup>th</sup> December 2014, the accused attempted to commit suicide by throwing himself to an oncoming vehicle. He was taken to JOOTR Hospital and after treatment he disappeared and only to reappear at home on the night of 31<sup>st</sup> March 2015 when he murdered D2 and D3.

11. In his sworn testimony, the accused denied any involvement in the murders. He stated that on 12<sup>th</sup> December 2014, he was at home with his family, at around 4:00pm he decided to go to the shamba and finish some work. He went to his brother's house to get an overall. While on his way from his brother's house, his mother called him and told him that she found D1 with injuries on the head. He looked for the child but could not find him. When he returned home, he was informed that D1 had been found and had been taken to hospital. He rushed to Akala try and get money and that is when he was hit by a car and he lost consciousness. He later found himself at his uncle's home in Daraja Mbili but never returned home thereafter. As regards the murder of D2 and D3, the accused denied killing them and insisted that his sisters who testified against him were lying.

12. No one saw the accused kill D1 and as the case against him is grounded on circumstantial evidence, it is important to recall that the principle that has been restated by our courts on many occasions that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt and that it is necessary before drawing

the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Rex v Kipkering Arap Koske & Another [1949] 16 EACA 135** and **Mwangi & Another v Republic [2004] 2 KLR 32**).

13. The only evidence against the accused is that PW 1 and PW 2 who responded to their grandmother's screams. She was not called to give evidence. There was also no evidence placing the accused at the scene of the assault in order to implicate the accused. Further no evidence was called to establish who was with the child at the time he was killed. The prosecution evidence has many gaps that do not foreclose the possibility of anyone else would killing the child. Although there suspicion pointing to the accused, the prosecution evidence is insufficient to support a conviction in respect of the murder of D1.

14. The evidence of PW 3 and PW 5 implicates the accused in the murder of D1 and D2 on the night of 31<sup>st</sup> March 2015. PW 3 had seen the accused in the homestead earlier on that evening when in fact the accused had been away for some time after the death of D1. This was confirmed by PW 1 who, when cross-examined, stated that he had also seen the accused in the homestead at about 7.00pm on that day. PW 5 witnessed the accused hitting D2 with a piece of timber on the head before proceeding to do the same to D3.

15. In evaluating this evidence, I must warn myself of the dangers posed by evidence of identification of person in difficult circumstances. Our courts have held that such evidence should always be approached with great care and circumspection and must be watertight before a court can return a conviction (see **Abdalla Bin Wendo & Another v R [1953] 20 EACA 166**, **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.

16. In my view, the opportunity for mistaken identity was lessened by the fact that PW 5 knew the accused, who was her elder brother, and who she had seen entering the house prior to the incident. She further told the court that there was a solar lamp in the house. Given the time of interaction, the light in the room and PW 1's familiarity with the accused, I am confident that he was positively recognised.

17. In addition, the key testimony implicating the accused was the unsworn testimony of a child hence the reception and assessment thereof is governed by **section 124** of the **Evidence Act** which states, in part, as follows:

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him .....*

18. The said provision has been the subject of judicial comment in several cases (see for example **Kibangeny arap Kolil v R [195]EA 92**). In **Johnson Muiruri v Republic [1983] KLR 445**, the Court of Appeal held that:

*Where, in any proceedings before any Court, a child of tender years is called as a witness, the Court is required to form an opinion, on a voire dire examination, Whether the child understands the nature of an oath in which event unsworn evidence may be received. If the Court is not so satisfied, his unsworn evidence may be received if in the opinion of the Court he is possessed of*

sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convinced on such evidence unless it is corroborated by material evidence in support thereof implicating him. [Emphasis mine]

19. In this case, there is evidence corroborating the testimony of PW 5. Her testimony that D2 was hit on the head is corroborated by the evidence of PW 1 and PW 2 who arrived at the scene later and confirmed the injuries on the deceased head which were also confirmed by the post mortem. PW 5 also testified that the accused broke the window and ran away. This evidence was corroborated by PW 1 who testified that when he came into the house he found D2 dead and D3 leaning on the wall and the window had been broken from the inside. PW 7 also confirmed that the window pane had been pushed from the inside and the frame had fallen outside.

20. I found the testimony of PW 5 straight forward and her demeanour did not suggest that she was lying or misleading the court. Her description of the assault on D2 and D3 and the aftermath leaves no doubt that the accused murdered D2 and D3. The accused's defence on this account was a bare denial and could not stand the overwhelming prosecution evidence that proved that on the material night the accused returned home where he was seen by PW 1 and PW 3 early in the evening. Since his parents did not expect him to harm them, they welcomed him whereupon he assaulted them leaving them for dead. He escaped through the window and was only arrested in Kisian on 1<sup>st</sup> April 2015 by APC Charles Odeny (PW 6) where he had gone to stay with his uncle. The totality of the evidence is that it is only the accused who could have assaulted D2 and D3.

21. The viciousness of the assault and the consequent injuries inflicted on each of the deceased leaves no doubt that the accused intended to cause grievous harm if not kill them. These facts taken together with his act of escaping through the window and disappearance from the village points to the fact that his actions were clothed with malice aforethought within the meaning of **section 206(a)** of the *Penal Code*.

22. I therefore find **JACOB ODERO OPIYO** guilty of the murder of **JANE AOKO ODERO (D2)** and **DAN OPIYO ODERO (D3)** and convict him accordingly on each count. I acquit the accused on the murder of **ABRAHAM OCHIENG ODERO (D1)**.

**DATED and DELIVERED at KISUMU this 25<sup>th</sup> day of July 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyanga, Advocate for the accused.

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