



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL CASE NO. 15 OF 2014**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**FREDRICK OTIENO.....1<sup>ST</sup> ACCUSED**

**WYCLIFFE OKOTH CHAN.....2<sup>ND</sup> ACCUSED**

**SIMON OJWANG.....3<sup>RD</sup> ACCUSED**

**RULING**

1. On 18<sup>th</sup> February 2014, this court was informed that **FREDRICK OTIENO, WYCLIFFE OKOTH CHAN** and **SIMON OJWANG** had murdered **WESLEY KIPRONO KOROS** (“the deceased”) on the night of 11<sup>th</sup> February 2014 at Holo Village, 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. Holo village in Nyakach situated near the border of Kisumu and Kericho Counties. In the past there have been incident of clashes between the local from both sides of the border. The area Chief, Michael Sati Okech (PW 3) told the court that night of 11<sup>th</sup> February 2014, the home of Otieno Gori Tambo was raided by Kipsigis youth from the other side of the border. Luo youth decided to retaliate and they started burning houses. PW 3 saw a big crowd moving toward Songa market and after a while, a police vehicle with hazard lights passed them. He later learnt that a watchman at the market had been injured and was being taken to hospital.

3. Chief Inspector Richard Mathenge (PW 5) is one of the police officers who went to the scene of the incident after he had been notified at about 11.30pm. He too was told that a crowd of about 200 people had gathered at the market and attacked a watchman who had since been taken to the hospital. As he was at the scene, he realized that houses were burning in the vicinity. He and the local administration tried to calm the situation and it is only on 14<sup>th</sup> February 2014 that the accused were arrested after being named by Stanley Odhiambo Ombigo (PW 1) who was guarding the premises with the deceased.

4. The key prosecution witness was PW 1 and in his evidence he recalled that on that night at about 8.30pm, he was guarding a shop with the deceased when he heard noisy crowd approaching the shop. He told the court that there was a security light in the compound. As the crowd approached, they climbed on to the roof of an incomplete house. The crowd surged into the compound. He narrated what happened as

follows:

*Wesley tried to run away. They put him on the wall and ordered [him] to sit. I recognised Fred Ogalo who is here in court and Wycliffe both here in court. Others are not here.*

*He refused to sit down but was hit. I tried stopping them but Fred told me to keep quiet. I called my boss. Meanwhile they were assaulting him. There were others assaulting him including the accused herein.*

5. PW 1 further testified that he called his employer who then called the police. The police arrived sooner and took the deceased to hospital where he deceased passed away. The postmortem was done by Dr Ken Soy on 17<sup>th</sup> February 2014 at Kericho District Hospital Mortuary. He observed that the deceased had multiple wounds on the head, multiple bruises on the ribs and on the upper limbs consistent with defensive wounds. He opined that the cause of death was cardio-pulmonary arrest secondary to intracranial haemorrhage resulting from sharp trauma to the head consistent with assault. The cause of death is consistent with the evidence of the witnesses that the deceased was assaulted multiple times by the mob.

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 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. The fact that the deceased died as of a severe head injury inflicted on him is not in dispute. What is in issue is whether the accused were the people who assaulted him on that night. The prosecution relied on the testimony of a single witness and since the incident took place at night, the court is called to examine the evidence carefully 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**). The approach to evaluating this evidence was set out in the case of **R v Turnbull & Others [1976] 3 ALL ER 549** where the Court stated expressed the view that:

*... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? .... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.*

8. 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.

9. In his testimony, PW 1 did not give the conditions of lighting that enabled him to identify the accused from a group of about 200 people who had attacked them. The prosecution did not lead any evidence to

establish how PW 1 knew the accused prior to that night or lead any further evidence that would enable me assess the quality of evidence of identification. In my view, the quality of evidence of identification is weak and insufficient to put the accused on their defence.

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 **FREDRICK OTIENO, WYCLIFFE OKOTH CHAN** and **SIMON OJWANG**. They are therefore acquitted and set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 30<sup>th</sup> day of October 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Onsongo, Advocate for the accused.

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