



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL CASE NO. 45 OF 2013**

**BETWEEN**

**PROSECUTOR ..... REPUBLIC**

**AND**

**NICHOLAS OWITI .....1<sup>ST</sup> ACCUSED**

**ELISHA OUSA .....2<sup>ND</sup> ACCUSED**

**DENNIS OMONDI .....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons, **NICHOLAS OWITI (DW 1)**, **ELISHA OUSA (DW 2)** and **DENNIS OMONDI (DW 3)** were presented before this court on an information dated 24<sup>th</sup> September 2013 charging them with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. Particulars of the offence were that on 6<sup>th</sup> May 2012 at Luanda K’Otieno Beach in Naya Sub-location, Rarienda District within Siaya County, jointly with others not before the Court, they murdered **FRANCIS OJOWI OUDU** (“deceased”).

2. After denying the charge, the trial commenced before Chemitei J., before I completed it. The prosecution marshalled 8 witnesses to support its case while the accused gave sworn testimony and called at total of 3 witnesses. The prosecution case was the accused were part of the gang that attacked and assaulted the deceased on suspicion that he was fishing using poison.

3. The fact and cause of death was not in dispute. The post-mortem form prepared by Dr M. Gore was produced by Dr Eve Oile (PW 3). Dr Gore conducted the post mortem on 8<sup>th</sup> May 2017 at Jaramogi Odinga Oginga Teaching and Referral Hospital (“JOOTRH”) after the deceased’s body was identified by Maurice Omoro Oudu (PW 6). Dr Gore’s observed that the deceased had bruises on both hands, right side of the abdomen and below the neck and cut on the right eye. The deceased also had a deep cut wounds on the head. Dr. Gore concluded that the cause of death was multiple injuries due to assault.

4. The circumstances of the incident were narrated by the deceased’s wife, Emily Akinyi (PW 1), who testified that on the fateful night at around 10:00pm she was asleep with her husband, when someone called him from outside. After sometime, she heard some noises which she ignored thinking that people watching soccer nearby. When she heard people shouting “mwizi mwizi”, she went outside and found that it was the deceased being assaulted by a group of people.

5. PW 1 testified that she saw five people including the accused assaulting the deceased. She knew the

accused and was able to identify each of them as there was a security light outside. PW 1 recalled that DW 1 was holding the deceased while DW 2 held a panga and DW 3 was assaulting him with a stick. PW 1 told the court that as she watched, another person, who she identified as *Dan*, pour petrol on the deceased while DW 1 lit a match stick and set him ablaze as he tried to run to the nearby police post. PW 1 decided to go and report the incident at police post while the accused continued to assault the deceased and threaten anyone who intervened.

6. A resident of Luanda K'Otieno, Barrack Otieno Otera (PW 2), was awoken by noises outside. When he went outside, he found a crowd of people assaulting the deceased. The deceased was shouting the names of the people who were assaulting him and among them were the names of DW 1 and DW 2. He moved closer to the scene and with the help of the security lighting at a shop he was able to see DW 1, DW 2 and DW 3. PW 2 testified that the deceased, DW 1, DW 2 and DW 3 were well known to him as they were fisherman at the local beach.

7. Brian Ouma Okoth (PW 4) lived in the same block as the deceased. As he was sleeping, he was awoken by bang on his door. Before he could get out of bed, he was accosted by a group of people who began assaulting him. They took his clothes, mobile phone and money. Suddenly a police officer came to his rescue and he got him out of the house. While outside he was able to see DW 2 among other assailants as there was strong moonlight outside. The police officer took him to the police post and later assisted him to go the hospital.

8. Corporal Jeremy Minoti (PW 5), who was stationed at Luanda K'Otieno Police Post at the time, recalled that about 1:00am he was woken up by a lady who informed her that a person had been attacked by a mob on suspicion of fishing using poison. He rushed to the scene and found PW 4 being assaulted in his house by three people. At the scene, he was able to identify DW 2, who he knew as a local fisherman, among the people assaulting PW 4. DW 2 had a panga and the other two people had rungu. He helped PW 4 to the police post, locked him in and went back to rescue the deceased. On reaching the scene he found the deceased lying on the ground surrounded by stones. He noted that the deceased had cuts and other injuries and that an attempt had been made to burn him. Since the deceased was still alive, PW 5 made arrangements to have him and PW 4 taken to JOOTRH but the deceased died on the way to hospital.

9. The investigating officer, PC Johana Langandu (PW 7), testified that at the time of the incident he was stationed at Aram Police Station. On the morning of 6<sup>th</sup> May 2012 at around 6:00am he was informed of the incident at Luanda K'Otieno and proceeded there on instructions from his Commanding Officer. He found the deceased, who was still alive, PW 4 and PW 5 at the Police Post. He took statements of the witnesses and arranged to have the deceased and PW 4 taken to hospital. Following investigation, he together with other officers arrested 6 suspects but with the weight of the evidence he decided to charge the three accused with murder.

10. After the close of the prosecution case, the accused were placed on their defence. DW 1 denied killing the deceased and stated that on the night of the alleged murder he was at a church conference. He testified that he remained at the church until 12:30am when he left with Zedekiah Onyango Ngode (DW 5) and another friend he hosting him for the night. He slept in his house the whole night and left for work in the morning. He stated that he did not know of the deceased murder until he was arrested.

11. DW 2 also denied involvement in the offence. He testified that on the material night, he was asleep in his house in Naya. At around 9:00pm, his neighbour George Odhiambo (DW 4) came to his house and requested him to go and assist in digging his brother's grave. He stayed at DW 4's home until 4:00am when he went back to his house. DW 4 testified that DW 2 was with him and at no one time did he leave.

12. In his sworn testimony, DW 3 denied killing the deceased. He told the court that on that night he was with his wife Grace Auma Omondi (DW 6) in his house and he did not leave until morning. DW 6 testified that she was with DW 3 the whole night.

13. The key issue in this case is whether the accused caused the death of the deceased by their unlawful

acts. The incident took place at about midnight which calls for a careful examination of the evidence to ensure that the circumstances were favourable for positive identification so as to avoid miscarriage of justice by mistaken identity. The Court of Appeal in ***Odhiambo v Republic* [2002] 1 KLR 241, 247** set out the guiding principles for consideration of such evidence as follows:

*The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which the Court may reasonably conclude that identification is accurate and free from the possibility of an error. see *Abdala Bin Wendo and Another v. Republic* [1953] 20 EACA 166; *Roria v. Republic* [1967] E.A. 583.*

14. 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 ***Maitanyi v Republic* [1986] KLR 198** and ***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.

15. From the evidence, it is clear that the witnesses knew the accused as this was a beach community where people were living close to each other. The resolution of the case against the accused turns on the circumstances of identification particularly the source of the light. Regarding the source of light, PW 1 recalled that there was a security light outside when she saw the accused assaulting the deceased. When asked about the light in cross-examination, she stated that there was a security light but agreed that in her initial statement that she recorded that the light was moonlight. PW 2 recalled that he was able to identify the accused because of security light from the shop and the moonlight. PW 4 talked about strong moonlight. PW 5 told the court that there was electric light outside and that he had a spotlight which he shone in the PW 4’s house. I am more inclined to believe PW 5 who states that there was electric light outside which is corroborated by PW 2. Although PW 1 and PW 4 were clear that there was sufficient light, their appreciation of the source of light may have been clouded by the fact that they were active participants and victims of the incident. What is clear though, is that the witnesses testified that there was sufficient light which provided circumstances for positive identification. I therefore conclude that indeed there was sufficient light provided by electric security lights at the shops at Luanda K’Otieno.

16. As a result of the clear lighting and the fact that the witnesses knew the accused, PW 1 was categorical that DW 1 was holding the deceased while DW 2 was using a panga and DW 3 was using a stick to assault him. When *Dan* poured gasoline on him, it was DW 1 who lit the match and set him ablaze. PW 2, who also knew the accused, was also able to identify DW 1 and DW 2 as they assaulted the accused. PW 5 was also able to identify DW 2 as he assaulted PW 4 with a panga in his house.

17. Counsel for the accused pointed out that there were two incidents on that night. The first was where the deceased was being assaulted and the second where PW 4 was assaulted and that it was implausible that DW 2 would be involved in both incidents. I have considered the evidence and according to PW 1 she saw DW 2 assaulting her husband whereupon she went to report to the police. In the meantime, the PW 5 was woken informed of the incident, passed by when he went to rescue PW 5 where he found DW 2. In my view, there is no inconsistency in the evidence as it is possible that DW 2 was involved in assaulting the deceased first before he went to assault PW 4.

18. The fact that the accused were identified and named immediately after the incident is confirmed by

the testimony of PW 7. In cross-examination, he stated that the incident was reported as mob justice and the DW 1 and DW 2 accused were amongst the people arrested on 6<sup>th</sup> May 2012 and on 9<sup>th</sup> May 2012, the DW 1 and DW 2 accused amongst other suspects were taken to the court as Bondo. DW 3 was arrested on by PC Henry Munene (PW 8) on 22<sup>nd</sup> May 2012 after he attended Aram Police Station following summons to attend the police station as a suspect in the deceased's murder.

19. The accused persons have raised the defence of alibi. It is their case that when the incident took place they were in different places. The burden of proving a case against an accused person beyond reasonable doubt always rests with the prosecution and never shifts to the accused even in cases of an alibi defence (see *Kiarie v Republic* [1984] KLR 739). In *Uganda v Sebyala & Others* [1969] EA 204, the court stated thus:

*The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.*

20. I have tested the alibi defence raised by the accused and I reject it in light of the strong eye witness evidence of the prosecution witnesses. The killing happened at a place where there was sufficient light and the accused persons were identified by several persons who had known them before the incident. Except DW 3, DW 1 and DW 2 were arrested immediately after the incident while DW 2 was also seen at the scene assaulting PW 4. There was no suggestion in the evidence that the witnesses would have been motivated by any grudge or ill-will or that they chose to select random innocent people to accuse of murder. DW 1 and DW 2 were arrested immediately after the incident while DW 3 was arrested later.

21. The evidence of PW 1 is that the accused persons in concert with others assaulted the accused person. They beat him and later set him on fire and although it was not proved who inflicted the fatal blow, the prosecution established that the accused and other acted in concert to cause the death of the deceased. In the case of *Njogu v Republic* [2007] 2 KLR 123, it was held that:

*Under section 21 of the Penal Code (Cap 63), when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

22. There is adequate evidence which establishes beyond doubt the existence of a common intention to inflict injuries whose cumulative intent and effect was to cause death or grievous harm. I therefore find and hold that the accused acted in concert with malice aforethought to kill the deceased.

23. I therefore find **NICHOLAS OWITI, ELISHA OUSA** and **DENNIS OMONDI** guilty of the murder of **FRANCIS OJOWI OUDU**.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of November 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Ochuka, Advocate for the accused.

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