



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 19 OF 2014

BETWEEN

REPUBLIC PROSECUTOR

AND

JACKTONE OTIENO OLIDHI ALIAS TONNY 1ST ACCUSED

ELISHA OTIENO JOHN2ND ACCUSED

RULING

1. On 9th July 2014, this court was informed that the accused, **JACKTONE OTIENO OLIDHI alias TONNY (A1)** and **ELISHA OTIENO JOHN (A2)**, murdered **RICHARD NIXON WATEMBO** (“the deceased”) on 17th April 2014 at Shauri Yako Estate in Homa Bay District within Homa Bay County, contrary to **Section 203** as read with **Section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The accused pleaded not guilty and the prosecution marshalled 8 witnesses before it closed its case. At this stage I am required to decide whether there is a *prima facie* case to put the accused on their defence. The test for a *prima facie* case was propounded in *Ramanlal Trambaklal Bhatt v R [1957]EA 332* and 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.
3. The deceased’s wife, Selina Auma Otieno (PW 1), recalled that on 17th April 2014, the deceased left home at Shauri Yako Estate at about 10.00 am. At about 2.00pm, she received a phone call from Opiyo informing her that the deceased had been beaten by A1, A2 and Wycliff. As she was leaving, she met a friend of the deceased, Bob, who also told her that the deceased had been beaten by A1 and A2 near Kotieno Bar. Before she could leave, the deceased’s mother, Benta Anyango Kamungo (PW 2), called her and informed her that she had taken the deceased to Homa Bay District Hospital after he had been beaten. PW 1 proceeded to the Hospital where she found PW 2 nursing serious injuries all over the body.
4. PW 2 testified that on the same day, a man by the name Kaburi visited her at her food kiosk and informed her that the deceased had been beaten and was lying along the road in Shauri Yako Estate. She quickly set off to where the deceased was. She found him surrounded by a group of people. She organised to take him by taxi to the Hospital. She noted that his clothes were bloody and his body was generally swollen. PW 2 was advised to transfer the deceased to Jaramogi

Odinga Oginga Referral Hospital, Kisumu, for further treatment due to the nature of the injuries sustained. The deceased succumbed to his injuries on 20th April 2014 at Jaramogi Odinga Oginga Referral Hospital.

5. A post mortem on the deceased's body was conducted by Dr Dickson Mchana (PW 7) on 24th April 2014. He found that the deceased had defensive injuries on both forearms. He also had injuries on the head as evidenced by multiple blood clots below the skull. The skull was fractured at the base on both sides and there was bleeding below the brain. As a result, PW 7 certified that the cause of death was a severe head injury caused by blunt force trauma following assault. PW 7 opined that the head injuries were caused by multiple blows and that the defensive injuries were as a result of the deceased trying to defend himself.
6. After the deceased passed away, the investigation turned to who had caused his death. The investigating officer, Inspector Thomas Odenyo (PW 8), recalled that on 27th April 2014, PW 1 came to report that the deceased had been assaulted and had died as a result of the beating. PW 1 mentioned that the deceased had been assaulted by A1, A2 and Wycliff. PW 8 began looking for witnesses by visiting Kotieno Bar where the deceased was allegedly assaulted. He went to the scene of the incident and was told that the deceased was assaulted outside Kotieno Bar and the beating continued to Soko Mjinga, which is a distance from Kotieno Bar, along the main Homa Bay road. He was informed that the beating took place between midday and 2.00pm when the deceased was left for dead.
7. PW 8 further testified that although some witnesses came forward to inform him of what had happened, none of them was willing to record statements or to testify. He traced Opiyo who had called PW 1 to inform her that the deceased had been beaten but he was unwilling to record a statement and he disappeared. Wycliff, who had been mentioned by PW 1, presented himself to the police station and stated that he had tried to stop A1 and A2 from beating the deceased. Although he recorded a statement, he could not be traced to come and testify. Only Geoffrey Omondi Odero (PW 4), the proprietor of Kotieno Bar testified. PW 4 recalled that on the morning of 17th April 2014 at about 10.00am, he saw A1 with other customers at the bar but he went to sleep soon thereafter since he was not feeling well. He later woke up at 2.00am, only to be informed that some people had been fighting. He confirmed that he did not see A1 later that day.
8. It emerged from the testimony that PW 1 had previously been cohabiting with A1 as his wife. PW 1 testified that when A1's wife came back to stay with him, she left him and went to cohabit with the deceased in February 2014 after he had just returned from the United States of America. By the time she left A1, she was already carrying his child. PW 1 further recalled that A1 had visited her on three occasions prior to the incident. He assaulted her on the first visit, threatened to kill her and the deceased on the second occasion then threatened to kill her the third time. PW 8 confirmed that PW 1 did not report these incidents to the police.
9. From the evidence I have outlined, it is clear that the deceased died as a result of assault by several people on 17th April 2014. There is no direct evidence suggesting that the accused were at the scene where the deceased was assaulted or that they participated in the assault which led to his death. In the absence of direct or circumstantial evidence linking the accused to the attack of the deceased, what various witnesses told PW 1, PW 2 and PW 8 remains hearsay. The totality of the prosecution case is that there is no evidence connecting the accused to the murder of the deceased. Although there is a motive for A1 killing the deceased, such motive alone is insufficient to sustain a charge of murder absent credible and admissible evidence. What remains is grave suspicion implicating the accused but no more.
10. In these circumstances, I am required to enter a verdict of not guilty against **JACKTONE OTIENO OLIDHI alias TONNY (A1)** and **ELISHA OTIENO JOHN (A2)** under **Section 306(1)** of the **Criminal Procedure Code (Chapter 75 of Laws of Kenya)** which I hereby do. The accused are acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 27th day of May 2016

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the accused.

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