



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**

**HCCRC CASE NO. 19 OF 2015**

**(CORAM: J. A. MAKAU – J.)**

**CHRISPINE OCHIENG OWOKO.....1ST APPELLANT**

**RAPHAEL MUGANDA MASAWA alias RUF.....2ND APPELLANT**

**KELVIN ODHIAMBO OGOHA.....3RD APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING:**

1. **CHRISPINE OCHIENG OWOKO** 1st Accused, **RAPHAEL MUGANDA MASAWA**, “**ALIAS**” **RUF**, the 2nd accused and **KELVIN ODHIAMBO OGOHA**, the 3rd accused are jointly charged with on offence of **murder contrary to section 203 of the Penal Code Cap 63 Laws of Kenya as read with Section 204 of the Penal Code**. The particulars of the offence are that on 28th day of July, 2012 at Siranga Sub-location in Ugenya District within Siaya County, jointly murdered one **GABRIEL OWINO OLOO**.

2. The prosecution called nine (9) witnesses and upon closure of their case the defence submitted that the three accused persons have no case to answer. The prosecution counsel on his part submitted that a **prima facie** case has been established against all the three accused persons and prayed that they be put on their defence.

3. The prosecution case is as per the court proceedings and I need not reproduce the whole of it but will summarize the same. Briefly the prosecution evidence is as follows:- That PW1 was the only eye witness. That on 28th July 2012 at around 11 p.m. PW1 Bernard Ondoo Owino was at Toronge at a disco dancing and he saw one Mr. Owino who was drunk being caned on his back and head with a big stick by Mr. Ochieng, the 1st accused, Mr. Ruf Masawa, the 2nd accused and Kelvin Odhiambo the 3rd accused, forcing PW1 to hide in a bush at the area where the three were beating the deceased. That at the time he witnessed the incident he was in a bush at a distance of about 200 metres from the three accused persons. He testified that the incident took place at 11 p.m., on a dark night but there was moonlight as Mr. Owino was being beaten along the Nzoia Road. PW1 went and informed Mr. Owino's wife. PW2 evidence is that on 29.7.2012 he heard a woman telling Mama Anna his mother-in-law to go and collect Gabriel who was in trench. PW2 went to the scene and found the deceased's body covered by black ants. He was unable to talk to them, they noticed he had swollen forehead, and arranged for his transportation to the hospital. PW3 testified she found the deceased Owino lying on the trench on her way to the church and informed his wife Arina. PW4 an assistant chief of Siranga Sub-location, testified that on 28.7.2013 he was at a party at home of Okumu Andendo and had gone there with Richard Ooko Osiango arriving there

at 9.00 p.m. where they found many people dancing while others were drinking. They were placed at a dark corner so that many people would not see them. That on arrival they found Gabriel Owino Oloo, lying down drunk, and after a while he woke up demanding food from the women and he was given. That after eating he went to arena where music was being played, that at about 10.00 p.m. the deceased walked out of Mr. Okumu's home and at the gate where PW4 he witnessed him being escorted by a boy who was mentally challenged, thus Ondoo Owino, PW1. That after a short while, of about 20 minutes Ondoo Owino returned to where music was going on. He talked to PW4 and Richard Ooko Osiango telling them **"Ogina Koko"** thus the nickname of Gabriel Owino fell into a ditch along Ugunja-Ukwala road and that he left him there. He told many people the same but as many people were drunk no one paid attention to him.

4. PW5, George Paul Owoko testified that on 28.7.2012 he was at a party hosted by one Okumu at his home where there were many guests, that he arrived at the party at 6.00 p.m. and left at 10.30 p.m., that he saw the deceased at the party, thus Gabriel Owino Oloo, that the following day at 10.00 a.m. he received a report that the deceased was found by the roadside dead. PW6 testified that on 28th July 2012 he had visitors from Kagolla clan and his friends, that he had alcohol for his guests which started being served as from 3.00 p.m. That on 29th July, 2012 he got a report that the deceased who was one of his visitors was found unconscious along Uranga/Yenga Road. He later got information he died at the hospital. PW7 testified that on 29th July 2016 while at Nairobi he received a message of death of his father from his wife Ruth Otieno. He made arrangements, came home and proceeded to the hospital to identify the body of his father in company of his brother and mother for postmortem which was done by Dr. Wanjeri. He was issued with postmortem Report which was marked as MFI-P1.

5. PW8 Nathan Mbwabui Kennedy, a clinical officer at Alupe sub-county Hospital, Busia County produced a post mortem report issued on 26th August 2012 by Dr. Wanjau who who is now deceased, in respect of the death of Gabriel Owino Oloo. He produced the postmortem Report as exhibit P1. The cause of death was cardio pulmonary arrest due to very severe head injuries and intracranial haemorrhage's. The body had extensive bruising on the anterior abdominal wall; bruise on the right orbital region, swollen right occipital parental region and bleeding from ears.

6. PW9 No. 69126, CPL Nickson Lukwa, the investigating officer, who had received the file from the initial investigating officer, who was inspector Masinde who was going on transfer testified that upon recording witnesses statements including that of PW1 Bernard Ondoo who mentioned the three accused persons, he decided to open an inquest file and before its conclusion it turned out the three accused persons were charged with murder case and taken to Kisumu High court.

7. I have very carefully considered the prosecution witnesses evidence, the rival oral submissions by the defence counsel and the prosecution counsel. The issue for my consideration is whether the prosecution had adduced sufficient evidence to warrant the three accused persons being put on their defence.

8. **Section 203 of the Penal Code** defines murder as follows:

***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"***

9. **Section 206 of the Penal Code** defines on the other hand **"Malice a forethought"** as follows:

***a) "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-***

***b) an intention to cause the death of to do grievous harm to any person, whether that person, whether that person is the person actually killed or not;***

***c) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or***

*not, or by a wish that it may not be caused.*

*d) An intent to commit a felony;*

*e) an intention by the act or omission facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”*

10. In a murder case it is apparent that the prosecution must prove that the accused person, had intention to cause the death of or to do grievous harm to any person, that he had the knowledge that his acts or commission could cause death or would probably cause death either to the persons intended or to other person or that he had the intention to commit a felony.

11. In the present case the issue for consideration is whether the prosecution's evidence as tendered prove the above ingredients of the offence of murder against all the three accused or any of them to warrant them or any of them being put on his or their defence. In my considered view a case to answer should be made where the prosecution evidence can in absence of evidence from the accused explaining otherwise a conviction will result.

12. In the present case the direct evidence is from PW1 only as other witnesses PW2, PW3, PW4, PW5, PW6, PW7, PW8 and PW9 did not witness the incident nor did they give any evidence connecting any of the three accused persons with the offence they are facing. That none of them was at the scene of murder and none of them placed any of the accused persons at the incident of the crime. That none of them was immediately after PW1 returned from escorting the deceased was informed by PW1 that he witnessed the accused beating and/or assaulting the deceased but he informed PW4 and many others that he had left the deceased having fallen in a ditch. He never told any of them of the attack of the deceased by the accused persons. I therefore find that their evidence did not place any of the accused at the scene of murder. Their evidence is not direct or indirect or circumstantial tendering to prove the ingredients of the offence of murder. Their evidence concerns subsequent events which did not connect any of the accused to the death of the deceased. The medical Report do not rule out any possibility of deceased death having been caused by drunkardness and a fall on hard object or ground. The evidence of PW1, PW4, PW5 and PW6 (the host) is clear that PW6's guests were being fed on alcohol and many people including the deceased, who was known to be a drunkard were drunk. PW4 testified that the deceased was drunk and was lying on the ground due to being in a state of drunkardness. That he was escorted by PW1 due to being drunk, that PW1 returned and told everyone including PW4 that “*Ogina Koko*” meaning the deceased had fallen in a trench. That no one cared to go to check because they knew he was as a drunkard. PW8 during cross-examination by Mr. Onyino Learned defence Counsel, on bruises on the body of the deceased he agreed they could be caused by several falls of a drunkard on stony ground or on falling on concrete floor and a fracture can occur also. The witnesses testified the road was a murrum road with culvert and stones. The clinical officer did not therefore rule out that the deceased injuries were not caused by a fall but by human beings.

13. I will turn to the issue of identification of the accused persons by a single witness PW1. The issue here is whether the accused were recognized by PW1 at the material night? In the case of **Wamuunga V. Republic (1986) KLR 424**, it was stated that where the only evidence against an accused is evidence of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of the recognition were favourable and free from possibility of error before it can safely make it the basis of conviction. Yet again in the case of **Simiyu & Another V. R. (2005) 1 KLR 192** it was stated there is no better mode of identification than by name and when a name is not given, then there is a challenge on quality of identification and a great danger on mistaken identity arises. The case of **R V Alexander Muturi Rutere alias Sanda & Others 2006 e KLR**, states, that if a witness is known to an accused but no name is given to police then giving the name subsequently is either an afterthought or the evidence given is not reliable.

14. In the present case, was there a first report made to police or any other persons where PW1 stated he had recognized the attackers of the deceased? PW4 an assistant chief who PW1 reported to did not mention any incident of the deceased being attacked by anybody leave alone the accused but gave a report

of a fall in a trench. PW1 never gave the names of the alleged attackers. PW9 testified he had to open an inquest file as the evidence was insufficient to connect anyone with the deceased's death. PW1 did not mention any of the accused persons nor did he mention of the deceased being attacked at the earliest opportunity and that failure, I find weakened the evidence of PW1.

15. That according to PW1 the attack took place at night at round 11.00 p.m. in a bush area and from a distance of 200 metres from where he was. The source of light according to PW1 was moonlight whose intensity and position he did disclose. That during cross-examination PW1, a full grownup man with beards told the Court he was 9 years old, however the court noted he was over 18 years old, he also stated that he was in standard 5 and that morning before he came to court he had sought permission from the class teacher to come to court. That he had that morning gone to school for that purpose notwithstanding PW1 and others had spent a night at police station following issuance of warrant of their arrest and was brought to court directly from police that morning. On cross-examination he agreed that he did go to school to seek permission. He stated the day the case was going on was on a Sunday when it was on a Tuesday. He even stated last year thus (2015) was 2005. That on the material time he was intoxicated. He further stated the people in disco matanga were many, five (5), thus the three (3) accused, the other two were himself. He changed to say they were four (4). He changed further and said people were 50. He gave names of Okumu and Kondero as the people who saw occurred assault the deceased. He testified that Ondeyo Andendo who saw accused assault deceased was at his home and told him what he saw which he told the wife of Owino. I carefully observed PW1 as he gave evidence and from his evidence and as described by PW4 I do agree with PW4 that PW1 is mentally challenged, dishonest person and not trustworthy.

16. In the instant case the incident took place at 11.00p.m. in a dark night when PW1 was 200 metres from the people attacking Owino and to which PW1 on cross-examination agreed he could not have clear vision of the people, that his vision was blocked by thicket and that where there were clouds overshadowing the moonlight. I am therefore in view of PW1's evidence satisfied the conditions were not favourable for positive recognition of the assailants, the witness claims to have seen. I am further doubtful whether due to PW1 being mentally challenged he witnessed what he purported he had seen happen on the material night taking into account also he had taken a lot of changaa and due to his drunkardness is possible he never witnessed any incident as he stated but is imagining what might have caused the death of the deceased. I am therefore satisfied that the circumstances of recognition were not favourable and free from possibility of error and more so when PW1 admitted that he was told by someone else what to tell this court. He is not in my view and for reasons I have given a credible witness.

**17. Having said so much, I find the evidence placed before this court is insufficient to warrant any of the accused person being put on his defence. I find that the three accused have no case to answer as no *prima facie* case has been established against any of the accused persons. I accordingly find and hold that the three accused persons namely CHRISPINE OCHIENG OWOKO, the 1st accused, RAPHAEL MUGANDA MASAWA, ALIAS RUF the 2nd accused and KELVIN ODHIAMBO OGOHA, the 3rd accused, are not guilty of the murder and are accordingly acquitted under Section 306 (1) of Criminal Procedure Code and are unless any of the three accused is otherwise lawfully held released forthwith.**

**DATED AT SIAYA THIS 19TH DAY OF MAY 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:**

**Mr. Onyino for the Accused person**

**Mr. Ombati for State**

**Accused 1 – Present**

**Accused 2 – Present**

**Accused 3 - Present**

**Court Clerk: 1. Kevin Odhiambo**

**2. Mohammed Akideh**

**J. A. MAKAU**

**JUDGE**