



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL CASE NO. 28 'B' OF 2011**

**REPUBLIC**

**VERSUS**

**P.C. GEORGE OKELLO.....1<sup>ST</sup> ACCUSED**

**P.C. WILSON FONDO.....2<sup>ND</sup> ACCUSED**

**RULING**

The accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that the accused on the 28<sup>th</sup> day of June 2004 at Mtwapa police station in Kilifi District, Coast Province, murdered NANCY VICKY AKINYI.

The prosecution called nine witnesses in support of its case. PW1 DAVID OTEDO ONGIYO is the father of the deceased. He got information about his daughter's death on 2<sup>nd</sup> July, 2004 while at his home at Muhoroni. He travelled to Mombasa on 4<sup>th</sup> July 2004. He went to Mtwapa police station and met the OCS, Inspector Jonathan Wafula (PW5) who briefed him about the death. He then went to Coast General mortuary and saw the deceased's body. The deceased was bleeding from the mouth and nose and the right side of the neck had swelling. There were bruises on the neck.

It is his evidence that a postmortem was done and the doctor told him that the deceased died of strangulation. A suspect who was a bouncer of a bar where the deceased had gone earlier before being taken to the Mtwapa police station was charged in court. He talked to the bouncer and concluded that he was not the killer of his daughter. The suspect was acquitted by the court in Mombasa. He followed up the matter with the attorney General and at one time it was raised in parliament. The accused was later charged with the offence. According to him, the bouncer, Eric Onyango, was just a scape goat and he refused to testify in that case. During his inquiry, he learnt that there was a scuffle between the bouncer and the deceased before the deceased was taken to the police station. The bouncer was a big and muscular man while the deceased was tall and slim.

PW2 DR. K.M. MANDALIA conducted the post mortem at the Coast General hospital. On 5<sup>th</sup> July 2004. The body had bruises on the neck, chest and left shoulder. Bruises on the left arm, forearm close to the elbow and swelling near the eyes. Internally, the left and right lungs were congested and swollen. The liver was also congested. There was bleeding on the surface of the brain. He formed the opinion that the cause of death was due to increased intraperial swelling due to bleeding on the brain and pressure on the neck. It is his evidence that pressure on the neck can cause swelling of the lungs. The bleeding on the brain was due to trauma.

PW3 Commissioner of police JAMES IKUMBI NGULUY was a superintendent of police in 2004 based at the police headquarters but in charge of the Coast Province. He got information that the deceased had died in the hands of the police. Activists took the deceased's body to the Coast Provincial headquarters. Together with a colleague, Mr. Langat, proceeded to Mtwapa police station. They did investigations and noted from the police records of 28<sup>th</sup> July, 2004 that the deceased had made a report at 7.00 am against Erick Onyango. The report was that Eric Onyango had snatched her bag which had her mobile phone. She wanted police assistance. The OCS told them that Eric Onyango had also indicated that the deceased had maliciously damaged his shirt. This report was not recorded on the occurrence book. The police record showed that the accused took the deceased to the station at 8.40 am having been instructed by the station commander.

PW3's further evidence is that the police records showed that the deceased was placed in the cells. The in charge of the cells indicated that the deceased was not physically normal. She appeared sickly when being placed in the cells. His further investigations took him to the bar where the scuffle between the deceased and Eric Onyango took place. They talked to one Teresia, a bar maid who informed them that the deceased went to the bar, took a beer and didn't want to pay. Teresia reported to Eric Onyango. Teresia demonstrated to them how Eric Onyango held the deceased on her shoulders while hitting her on the stomach and the legs. The deceased wanted her handbag back. Another employee at the bar by the name DAVID KAHINDI concurred with what Teresia had stated. Erick Onyango hit the deceased with his legs on the stomach. PW3 caused Erick Onyango to be charged with murder. He was later acquitted by the court.

PW4 P.C. REGINA LANGAT was stationed at the Mtwapa police station. On 28<sup>th</sup> June, 2004 she was working at the report office. At around 8.40 am the two accused went to the report office with the deceased and booked her as a prisoner. She searched the deceased. The accused told her that she was being charged with malicious damage to property. PW4 tried to talk to the deceased but she was not talking. She indicated in the cell records that the deceased was not well. This was cell entry number 15/28/6/2004. She also indicated that the deceased was drunk and sickly.

It is PW4's evidence that the deceased was seated most of the time. Her eyes were red. At midday she was given food but did not eat. She was the only female prisoner in the cells. At 1.30 pm PW4 checked on the deceased. She could not talk. PW4 informed Inspector Wafula (PW5) who was in charge. Inspector Wafula organized for the deceased to be taken to Coast General hospital. The accused did not re-enter the cells after the deceased was placed in. The accused told her that they had been told her that they had been told that the deceased was violent where they had arrested her. PW4 did not see Erick Onyango.

PW5, Assistant Superintendent of police JONATHAN WAFULA was the officer in charge of Mtwapa police station in 2004. He was on duty at the station on 28<sup>th</sup> June, 2004 when Erick Onyango, a bouncer at Palm Bar in Mtwapa, went to report that a lady was creating disturbance and damaging property. He instructed the accused to accompany Eric Onyango and visit the scene which was about 100 metres away from the police station. The accused went back with both Eric and the deceased. Eric and the deceased were still quarrelling. The deceased was to be charged with malicious damage to property as Eric's shirt had been torn. The accused took a few minutes from the time they went to the scene and returned. PW5 talked to the deceased who appeared to be drunk. She was talking in Luo and was claiming that Eric had assaulted her. Erick was also a Luo.

It is PW5's testimony that at about 2.30 pm, PW4 informed him that the deceased had fainted in the cells. He went to the cells and instructed Sergeant Njiru and Corporal Langat to take the deceased to hospital. She was declared dead on arrival. He witnessed the postmortem on 5<sup>th</sup> July 2004 done by PW2. Eric Onyango was later charged with murder. PW5 testified in that case. Eric was acquitted. On 28<sup>th</sup> June 2004, he saw Erick's torn shirt. The deceased did not complain that the accused had assaulted her. It was alleged that the deceased had failed to pay for alcohol she had taken and Erick had detained her phone. It is his further evidence that in his own investigations, the accused did not commit any offence. He was one of the investigating officers in the Erick Onyango murder case.

PW6, P.C. DANIEL NGULET was based at the Mtwapa police station. On 5<sup>th</sup> July, 2004 together with PW5 attended the postmortem conducted by PW2. PW7 Corporal JOSEPH LANGAT was based at the Mtwapa CID office. On 28<sup>th</sup> June 2004 together with PW5 and PW4, Regina Langat went to the female cells at about 2.50 pm. They tried to wake up the deceased but she could not. PW5 instructed them to take her to hospital. He did not go to the hospital as he was attending other duties. PW8 Corporal AMANI ANGUTO was also based at the Mtwapa police station in 2004. K On 28<sup>th</sup> June 2004 he went to the cells with Sergeant Njiru and saw the deceased lying on the floor unconscious. They took her to Coast General hospital but was pronounced dead on arrival.

PW9 Superintendent COLLINS WEKESA NGAVO was posted to Kilifi as the DCIO in November 2010. In 2011 he was instructed to take over the file and carry out investigations on the matter. During his investigations, he found out that the deceased Vicky Nancy Akinyi, went to Palm bar within Mtwapa on 28<sup>th</sup> June 2004 at 7.00 pm. As she leaving the bar she was stopped by Eric Onyango, a bouncer at the bar for having not settled a Kshs.114/= bill. Eric snatched her mobile phone. In anger Akinyi tore Eric's short. Eric went to report at Mtwapa police station. PW5, by then a Chief Inspector, was in charge of Mtwapa police station. He instructed the accused to go to Palm Bar. Eric Onyango pointed to the two accused the deceased. The two accused picked the deceased who was walking properly to Mtwapa police station.

According to PW9, the two accused took the deceased to the crime branch office which is at the rear of the police station. PW5 walked to the crime branch office and talked to the deceased. PW5 instructed that the deceased be charged with malicious damage for Eric Onyango's shirt. The OCS returned to his office. The deceased remained with the two officers. PW4, Regina Langat, was at the report office. She received the deceased from the accused. The deceased appeared excessively weak or over fatigued. According to Regina, the 2<sup>nd</sup> accused lamented that **"this woman has given us hectic time"**. This statement disturbed PW4 as she saw the deceased's condition deteriorating. The deceased had ably walked to the police station on her own. She was assisted by PW4 and put in the cells. The deceased was later taken to hospital but was pronounced dead.

PW9's further evidence is that he talked to Eric Onyango who sounded to be honest. He was heavily built. The deceased was taken to hospital at 10.00 pm about two hours after having one to the Mtwapa police station. PW9 interrogated one worker called Kathini Mutua at Palm bar but she declined to give her statement. She told him that Eric did not assault the deceased. PW9 also interviewed David Kahindi Katana. The two workers told him that David had only snatched the phone and Nancy tore his shirt. PW4, Regina told him that while at the station, she went to the crime office and found out that the accused had tied a lessa over the deceased's head. PW4 did not want that to go on record. It is PW9's evidence that Eric Onyango was charged of murder but those were acts calculated to defeat justice.

According to PW9, there was no commotion at Palm bar after the deceased had tore Eric Onyango's shirt. The bouncer never held Nancy. It is his further evidence that the deceased was taken to hospital at 10.00 pm and not at the time indicated by other officers. According to PW4, the deceased looked sickly and drank.

Counsel for the accused persons submit that the accused have got no case to answer. Mr. Mondri, counsel for the 1<sup>st</sup> accused submit that the accused who are police officers were instructed to arrest the deceased. They did not know the deceased. The accused merely received the instructions from PW5 to arrest the deceased which they did. PW5 was told by the deceased that she had been assaulted by Eric Onyango. Counsel contends that the timings given by PW9 contradicts that of other witnesses.

Mr. Monda further submit that the post mortem report show that the deceased had bruises on the neck. Force was applied on the neck. No one saw the accused assaulting the deceased. The deceased was placed in the cells and the accused never went back to the cells.

Mr. Kiamba, counsel for the 2<sup>nd</sup> accused submit that according to the investigating officer, PW9, three people saw the scuffle between the deceased and Eric Onyango. Those witnesses were not called to

testify. PW4's evidence is that the accused took the deceased to the report office. She appeared sickly. PW5 talked to the deceased. It is not denied that there was a fracas between the deceased and Eric Onyango. The accused did not have any opportunity to attack the deceased while in the cells.

Miss Mathangani, prosecution counsel, contends that there was indeed a fracas between the deceased and Erick Onyango. Both went to the police to report their respective cases. The accused later went to the bar and arrested the deceased. According to Miss Mathangani, the accused had the opportunity to inflict injuries on the deceased. They are the only ones who could have injured the deceased. The evidence is quite sufficient to place the accused on their defence.

The main issue to be determined by the court is whether prosecution has established a prima facie case against the accused persons so that they are put on their respective defences. In the case of **RAMANLAL TRAMBAKLAL BHATT V R [1957] E.A. 332**, the court stated as follows:

**“...It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”**

In essence therefore, this court should consider whether the evidence on record is sufficient to convict the accused persons if no explanation in form of defence evidence is offered by the accused. Under article 50 (i) of the Constitution, the accused can elect to remain silent and not testify in the event that they are put on their defence. The question then would be whether the evidence is sufficient to convict the accused should they elect to remain silent.

The undisputed facts are that on 28<sup>th</sup> of June, 2004, the deceased, NANCY VICKY AKINYI went to Palm Bar at Mtwapa. She took beer and incurred a bill of Kshs.114/=. She did not pay the bill. The bar attendant, one Teresia who didn't testify then reported the deceased to the bar bouncer Eric Onyango. The evidence of PW1, the deceased's father, PW3, PW5 and PW9 does confirm that there was a scuffle between the deceased and Eric Onyango. It is also not disputed that Eric Onyango snatched the deceased's handbag which had her mobile phone. That triggered the deceased to struggle with Eric Onyango and in the process the latter's shirt was torn.

It is also not in dispute that PW5 sent the two accused to Palm bar and arrest the deceased. It is also evidence that Palm bar is not far from Mtwapa police station and the accused took a short time and returned to the police station with the deceased. The evidence further establish that the deceased walked to the police station on her own.

There is evidence that the scuffle between Eric Onyango and the deceased was intense. However, according to PW9, he was told by Kathini Mutua and David Kahindi Katana that Eric Onyango did not assault the deceased. There is the evidence of PW3, James Ikumbi, whom I take to be an independent witness. According to him, he talked to the workers of Palm bar. Teresia, who had served the deceased, demonstrated to him how Eric Onyango held the deceased on her shoulders while hitting her with his legs on her stomach. PW3 further testified that David Kahindi also confirmed that Eric Onyango too hit the deceased with his legs on her stomach.

It is the evidence of PW5, Jonathan Wafula that when the deceased went to the Mtwapa police station, she was complaining that Eric Onyango had assaulted her. PW9 confirms that even after seeing Eric Onyango in 2011 during his investigation, Eric Onyango was still a heavily built tall man. The incident occurred on 28<sup>th</sup> June, 2004 while PW9 conducted his investigations in 2011 having reported at the Kilifi Criminal Investigation office in 2010.

It is therefore clear to me that Eric Onyango did assault the deceased. Being a heavily built person, his shirt could not have been torn if there was no intensive pulling from the deceased. I do agree with the evidence of PW3 that Eric Onyango held the deceased by shoulders and hit her on the stomach. This line of evidence is corroborated by the evidence of PW2, Dr. Mandalia, who observed external bruises on the deceased's neck, chest and left shoulder. The deceased also had bruises on her left arm. Her lungs were

congested. This could have been caused by the kicks on the stomach as per PW3's evidence. According to PW2, pressure on the neck can also cause bleeding in the brain and swelling of the lungs. The external injuries were inflicted by Erick Onyango. Witnesses saw the fracas. Even if the deceased walked on her own to Mtwapa police station, which is about 100 metres away from police stations per the evidence of PW5, the effects of the kicks on the stomach were still slowly affecting her. During cross-examination of PW3 by Mr. Wasuna, the witness stated that Eric Onyango held the deceased on the neck. During re-examination, PW3 testified that David Katana and Teresia told him that the accused didn't assault the deceased.

It is the evidence of PW9 which caused the accused to be charged with the offence. According to PW9, the accused assaulted the deceased while at the Crime office. His evidence is that had Eric Onyango assaulted the deceased, she could have died at Palm bar or she could not have walked to the police station as Eric Onyango is a muscular man. What I can deduce from PW9 is that he was out to find fault on his colleagues. The witness gives his own timings on the sequence of events. According to him, the deceased went to Palm bar at 7.00 pm. She was put in the cells before 10.00 pm. It is his further evidence that the police officers at the station could have manipulated the records on the occurrence book (O.B). The O.B was produced. The record is quite clear and contain reports of other cases. On the material day, 28<sup>th</sup> June, 2004, the deceased reported her complaint at 7.00 am. The complainant was that at around 6.30 hours while at Palm Resort, a male person known to her, physically approached her and snatched her handbag which had her phone and Kshs.2,500/=. The next entry after the deceased's report was made at 7.20 hours. It indicates that the canteen contactor was serving breakfast to five (5) prisoners who were being held in police custody. The O.B also show that police officers, Inspector Wafula, (PW5), Sergeant Njiru and Corporal Langat (PW7) went to the female cells at 14.50 hours. The deceased was taken to hospital at 14.55 hours. there is a report at 8.40 hours when the accused booked the deceased who was to be charged with malicious damage to property in relation of Eric Onyango's shirt work Kshs.350/=.

The record shows that the deceased was placed in the cells while normal. There is an entry at 18.45 hours which indicate that sergeant Njiru and others were returning from Coast General Hospital where they had taken the deceased. The deceased had been declared dead on arrival.

It is established by the police record that was produced by the prosecution that the incident at Palm Bar occurred in the morning. The deceased seemed to have reported the snatching of her handbag at 7.00 am. PW3 saw her report. She then went back to Palm Bar. It is possible that she tried to take back her handbag from Eric Onyango and the scuffle ensued. This time round Eric's shirt was torn and he went to report to PW5. PW5 sent the accused to Palm bar which is not far from the police station. PW3 estimates the distance as ½ a kilometer while PW3 stated that it is 100 metres away. The accused brought the deceased to the station at 8.40 am and she was placed in the cells. The time difference is that the deceased made her report at 7.00 am. One hour, forty minutes later. She was placed in the cells. In between, Eric Onyango had gone to the Mtwapa police station and made his report. The accused went for the deceased and took him to the station. The question then would be what time did the accused had the opportunity to assault the deceased in the Crime office as per the evidence of PW9.

The statement of PW4, P.C. Regina Langat was produced. It does indicate on 28<sup>th</sup> June, 2004 she reported on duty at 6.30 am. At around 8.40 am the accused took the deceased who appeared drunk and also unwell. The statement indicate that the deceased never complained of anything. It also gives sequence of events as per the O.B. This is contrary to the evidence of PW9 on the timings as well as on the contention that PW4 informed him that she had other information which she did not want to be recorded. A witness is led on his/her evidence and not what he/she ought to have recorded. The contention by PW9 that PW4 informed him that the deceased had given the accused hectic time is nothing but hearsay. PW4 testified in court herself and did not raise those issues.

Given the evidence on record, I do find that the accused did not kill the deceased. The deceased succumbed to the injuries she suffered during her scuffle with Eric Onyango. PW9 conducted his investigations in 2011 which was almost seven (7) years after the incident. PW3 and PW5 conducted their investigations soon after the incident. They were able to talk to the workers at Palm Bar. PW9's

evidence is unreliable and cannot be the reason to place the accused on their defence. The prosecution evidence does not establish a prima facie case against the accused to warrant placing them on their defence. I cannot convict the accused based on the prosecution evidence. PW3 and PW5 who are senior police officers testified that the two accused did not assault the deceased.

The upshot is that the prosecution has failed to establish a prima facie case against the accused persons. I do find that the accused are not guilty of the offence of murder as charged and are hereby acquitted under Section 306 (1) of the Criminal Procedure Act, Cap 75 Laws of Kenya. The accused shall be set at liberty unless otherwise lawfully held.

**Dated and delivered in Malindi this 29<sup>th</sup> day of June, 2016.**

**S.J. CHITEMBWE**

**JUDGE**