



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 29 OF 2013
(FORMERLY KISII HCCRC NO. 61 OF 2009)

BETWEEN

REPUBLIC PROSECUTOR

AND

CALEB OTIENO NYONGESA alias ATITI ACCUSED

JUDGMENT

1. On 29th September 2009, this Court was informed that **CALEB OTIENO NYONGESA alias ATITI** (“the accused”) had murdered **JOB OMONDI** (“the deceased”) on 9th September 2009 at Homa Bay Township contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The accused pleaded not guilty to the charge and a trial ensued. The trial was initially conducted by Maina J., and completed upon compliance with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution called four witnesses to prove that the deceased was lured from his house and hacked to death by the accused and another person who has not be apprehended to date.
2. In order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;
 - a. Proof of the fact and the cause of death of the deceased.
 - b. That the cause of the deceased’s death was a result of the direct consequence of the accused’s unlawful act or omission.
 - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the *Penal Code*.
3. The first two ingredients of the offence were readily proved by the prosecution. The deceased’s body was identified by his mother, PW 3, Helen Akinyi Otieno, who testified that on 9th September 2009 after she was informed that he son had been killed, she proceeded with her sister to Homa Bay Hospital Mortuary where she identified the body as that of her son. She observed that the body was swollen with multiple cuts which included a cut on the left arm and forehead. She also identified that deceased’s body on 15th September 2009 before the post-mortem was performed by Dr Awori.
4. PW 2, Dr Francis Ochieng, the medical superintendent at Homa Bay District Hospital, produced

the post-mortem form prepared by Dr Awori with whom he worked. Dr Awori had left the public service and gone into private practice in Nairobi. The report was produced under **section 77** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. According to the report, the doctor observed an injury on the left forehead and another below the right eye. He noted a deep cut wound on the right upper limb approximately 7cm wide and 3cm at its deepest part and the muscle in the area was lacerated and the tendons cut. The mucosal surfaces of the eyelids, mouth and nose appeared pale. On the basis of his observations, the doctor concluded that the deceased died of cardiorespiratory failure as a result of excessive bleeding which was caused by the deep cut on major vessels of right upper limbs.

5. I therefore find and hold that the deceased died and he died as a result of multiple injuries inflicted on his body and in particular a cut on the left forehead and a deep cut wound on the right upper limb which resulted excessive bleeding.
6. The main question for resolution in this case is who inflicted the injuries that that caused the death. Two witnesses testified to this fact. PW 1, Joyce Achieng Otieno, testified that she resided behind Texas Inn Bar at Garage Road in Homa Bay Town with her cousin Evelyn, sister Scholastica and her three children. She recalled that on 9th September 2009 at about 11.00 pm her cousin alerted her that she heard the voice of Moses Otieno also known as Musa. Musa was her husband but they had separated and he was living with another woman by the name Beril.
7. PW 1 testified that Musa came into her house, took a panga and went outside. He bolted the door on the outside but she managed to get her daughter to go through the window and open door. She heard Musa calling the neighbours and telling them that someone was stealing from them. In response to his alarm, people came out from their houses and nearby bars to see what was happening. She further testified that she saw Musa was beat the man she heard being called Job with the panga. She also heard Musa speak to someone she did not know on the phone asking, “*uko wapi*”. She also heard him say, “*Kuja haraka.*” Thereafter the bar watchman came with a panga and cut the deceased with the panga on the hand and leg. She identified the accused as the watchman she saw on that day and whom she knew as Atiti and whom she had known for about 2 years. She testified that the police later came and rescued the deceased and took him to hospital while he was still alive.
8. PW 4, Corporal Joseph Munguti, the investigating officer was at the material time stationed at Homa Bay Police Station. On 9th September 2009 at about 2.00 am, as the night duty officer, he received a call from the report office that Musa, had reported that on attack someone had taken place at Texas Bar. He proceeded to the scene where he found the deceased bleeding from the right upper arm and the head. He also saw blood at PW 1’s door but the deceased had moved from there to a place near the toilet which was about 30 metres away. As the deceased was semi-conscious, he decided to take him to Homa Bay District Hospital where he left him and returned to the scene via the Police Station. Although he had left Musa at the Police Station, when he came back he was not there. When he arrived at Texas Bar he did not find Musa, Beril and the accused. He found PW 1 who told him she was the first wife of Musa and that it was Musa, Beril and the accused who had attacked the injured person.
9. PW 4 testified that the accused was a watchman at Texas Bar while PW 1 and Musa resided behind the bar. While at the scene he observed that the area behind the bar was bright as there were security lights lighting the rear part and another light at the neighbouring Joyce Bar and a nearby workshop. In his view the place was very well and he could see far.
10. After preliminary investigations, PW 4 went back to the Police Station. He was informed that the deceased had succumbed to the injuries. At about 8.00 am, he went back to Texas Bar where PW 1 identified the accused who was seated there. She informed him that he was the person who had cut the deceased on the upper arm. He arrested him and took him to the police station. He thereafter requisitioned a post mortem for the deceased and a mental examination for the accused.

11. PW 4 further testified that Musa and Beril are still at large and had not been arrested by the time the case was heard. He also recorded statements from two eye witnesses; a watchman from a nearby supermarket, Patroba Oganya Odera and Everlyne Atieno Opundo who could not be traced thereafter. After investigations, he concluded that the killing of the deceased was pre-planned as Musa suspected the deceased was having an extra-marital affair with PW1 and that Beril lured the deceased from his house to the place he was killed and the accused, who had prior knowledge, came to finish off the deceased.
12. The accused, when called to his defence, elected to give sworn testimony. He denied that he was known Caleb Otieno Nyongesa alias Atiti. He stated that, according to his national identity card, his name Caleb Otieno Sabiano. He recalled that on 9th September 2009, he was working at Texas Inn Bar where he was a disc jockey and on that day nothing strange happened. He denied knowing the deceased. He also denied that he heard that anyone had been killed. He closed work on that day without any information. The accused stated that he was arrested on 11th September 2009 while at work at about 10.00 pm and brought to Homa Bay Police Station.
13. This is a case where the accused has been implicated in the murder of the deceased by a single witness. The testimony of PW 1 is that she saw the accused cut the deceased after he had been called by Musa to, “*finish the job.*” It has been said time and again that the court ought to warn itself of the danger of relying on the evidence of such a witness and should scrutinise the evidence carefully before proceeding to convict the accused. This principle has been reiterated by the Court of Appeal in several cases following the Court of Appeal for Eastern Africa decision in ***Abdalla Bin Wendo & Another v Republic [1953] 20 EACA 166***, the Court stated as follows;

Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions following a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

14. Likewise in ***Wamunga v Republic [1989] KLR 424 at 426***, the Court of Appeal reiterated that:

[I]t is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

15. PW 1 testified that she knew the accused for about 2 years as he used to work at Texas Bar. The accused admitted that he worked at the Bar but he contended that he was a disc jockey and not a watchman. I find therefore that PW 1 knew the accused and that this was a case of recognition rather than identification. In ***Anjononi & Others v Republic [1980] KLR 59, 60*** the Court of Appeal stated as follows concerning recognition:-

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; 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.

16. The accused's case, as posited by his counsel's submission, is that this was a case of mistaken identity as he is not known as Caleb Otieno Nyongesa alias Atiti but by the name appearing on his

national identity card, Caleb Otieno Sabiano. PW 1 testified that she knew him as Atiti and he was arrested by PW 4 on the day after the incident after being identified by PW 1.

17. What is important is that the accused is the person whom PW 1 saw and who was positively identified by her as the person who committed the act that led to the death of the deceased. The attack on the deceased was at night but both PW 1 and PW 4 testified that there was sufficient light emanating from the security lights and the incident took place behind the bar where PW 1 lived. PW 4, who went to the premises early that morning, testified that that the place was well lit as the bar had security lights at the rear part of the bar and also light emanating from the nearby bar and workshop. Moreover, PW 1 was at the scene of the incident for a sufficiently long time to witness the event which was next to her house. The circumstances of the attack and the fact that the accused was a person known to PW 1, negates any notion of mistaken identity.
18. PW 4 testified that there were other witnesses from whom he took witness statement so soon after the incident; Patroba Oganga Odera and Everlyne Atieno Pindo whom he testified that he could not trace because they had changed their places of residence. Although the prosecution has discretion to call the witnesses it desires, failure to call material witnesses may entitle the court to make an adverse inference against the prosecution. In this case, I see no reason why I should make a negative inference as there is no basis upon which I can conclude that the two witnesses would have given exculpatory testimony had they been called to testify.
19. Then there is the fact that the other two participants; Moses Otieno and his paramour Beril are still at large. PW 1 testified that it was Moses who initiated the attack on the deceased whereupon he called the accused to finish the job. He then went and reported the matter to the police station probably to distract the police from investigating him. There is no evidence that he implicated the accused when he went report the incident. The fact that him and his paramour disappeared probably indicated that they were involved in the murder. This leaves the issue of the accused.
20. Mr Osoro, learned counsel for the accused, pointed out that the fact that the accused was at the Bar the next morning is inconsistent with the guilt of a person who had been involved in the murder of someone. The accused, on his part, denied that he heard anything on the material night and that he was arrested on 11th September 2009. On the issue of arrest, the PW 1 and PW 4 both testified that the accused was arrested on the day after the incident, on 8th September 2009, seated at the bar. This is inconsistent with the statement of the accused that he was arrested on 11th September 2009. The only explanation as why the accused would be present at the bar is that he did not expect PW 1 to report him. PW 1 testified that after the incident, the accused came back and asked her what she would say if she was asked about the incident and she responded that she would say that she would not say anything. It is also highly unlikely that the accused would not have heard about the incident until the day he was arrested since it happened right behind the bar and many people came when the alarm was raised by Musa.
21. I have carefully scrutinised the testimony of PW 1 and warned myself of the danger of relying solely on her testimony. I do not find any reason why she would implicate the accused in the murder of the deceased. There is no evidence of a grudge and she would have nothing to gain from implicating him. She has separated from her husband Musa and did not in any way shield him from involvement in the murder by implicating the accused. In her testimony, she implicated the three persons as having acted in concert. I find her testimony credible.
22. On the basis of the evidence I have outlined, I find that it is the accused who struck the blow that killed the deceased. The blow that struck the deceased as it did with great force demonstrates malice aforethought. The blow could only have been intended to cause the death of or do grievous harm to the deceased. There is no evidence that the accused was provoked or acted in self-defence. I therefore find that the prosecution proved malice aforethought within the meaning of **section 206(a) of the Penal Code**.
23. I therefore find the accused **CALEB OTIENO NYONGESA** also known as **CALEB OTIENO**

SABIANO alias **Atiti** guilty of the murder of **JOB OMONDI** and I convict him accordingly.

DATED and DELIVERED at HOMA BAY this 16th day of February 2015.

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Moriasi Osoro and Company Advocates for the accused.

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