

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO. 44 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

DAN ONYANGO OPIYO.....1ST ACCUSED

CALEB AYAGA ODUOR.....2ND ACCUSED

FREDRICK OWIRO ORERO.....3RD ACCUSED

R U L I N G

By the close of prosecution case four witnesses had testified. No postmortem report was produced to show the cause of death of the deceased Charles Otieno. Andrew Okumu Ogwang (PW1) was on 29-10-2009 at about 1 a.m woken up by the deceased's wife Joyce Adhiambo Charles (PW2) who had been informed that the deceased and his worker had been attacked and cut. She had been informed by one of the workers Geoffrey Ochieng Ulanga (PW4). PW4 had come to PW2 to report the attack. He had a cut on the forehead and his hands were tied. They woke up neighbours and the assistant chief Joseph Onyango Owiyo (PW3) and went to the scene at the road where they found the deceased cut and dead. Lying next there and injured was his herdsman Arthur Omondi. Police were eventually called to take the deceased's body to the mortuary, and Omondi to hospital for treatment.

PW4's evidence was that the deceased was expecting luggage (clothes, iron sheets and sofa set) to be dropped by a vehicle at this road. He (PW4) and Omondi (both the deceased's workers) joined him to wait for the luggage to be delivered. The vehicle arrived at 8 p.m and offloaded the luggage. They loaded them on a handcart. When going home they were attacked by people who cut and tied them and took the luggage. They left them for dead. PW4 had been tied to the deceased. He managed to untie himself. The deceased had died. Omondi was injured but still alive. He went to wake up PW2. His evidence was that the night had moonlight and he was able to identify two of the assailants. He said they were the 2nd accused Caleb Ayala Oduor and 3rd accused Fredrick Owiro Orero. He did not know how the accused persons (the 1st accused is Dan Onyango Opiyo) got arrested. He recalled, however, that he picked out the 2nd and 3rd accused in an identification parade that the police arranged. He picked the two accused from one parade. That was an irregular parade as each accused was supposed to have his own parade. The prosecution did not call the officer who conducted the parade. That left the prosecution with only dock identification which was of little value (**Kiarie -VS- Republic [1984]KLR 739**).

But more important, the attack was at night. PW4 was but a single identifying witness. His testimony was that he was the first to be attacked and cut. After being cut he lost consciousness. When he woke up he found he had been tied to the deceased (who was dead). His colleague was injured. The attackers had left with the property. The attack was by many armed people. He stated that he identified the two accused by use of moonlight, but when he wrote his police statement he did not describe the attackers or how they were dressed. The police officers who arrested the accused did not testify. It is not known how they managed to arrest the accused. There was no evidence that any of the lost goods were found on them, or at all. In short, the circumstances surrounding the attack were difficult. The court has to warn itself of the danger of convicting the 2nd and 3rd accused on only the evidence by PW4 (**Maitanyi -VS- Republic [1985] KLR 198**). Such a conviction would not be safe, now that there was no other incriminating evidence.

There was no evidence to connect the 1st accused with the attack, or the death of the deceased.

In conclusion, I find that the prosecution has not called sufficient evidence on the charge to enable the calling of the accused to their defence. The charge is consequently dismissed and accused acquitted.

Dated, signed and delivered at Kisumu this 21st day of January, 2014.

**A.O.
JUDGE**

MUCHELULE