



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO. 30 OF 2005**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**ALEX INGALA LUKAKHA.....ACCUSED**

**JUDGMENT**

**ALEX INGALA LUKAKHA**, the accused, is charged with the offence of **murder contrary to section 203 as read with section 204 of the Penal Code**. The particulars of the charge are that on 5<sup>th</sup> November 2004, at Kitengela in Kajiado District of the Rift Valley Province, the accused murdered **DAVID ODHIAMBO ONGA**.

The trial commenced on 22<sup>nd</sup> February 2006, before Ojwang J. The learned Judge heard the case with the assistance of three assessors, as that was the legal requirement then prevailing. However, the trial ran into some difficulties when two assessors failed to attend court. The result was that the trial was put on hold until the said assessors were compelled to attend court.

The trial Judge was then transferred from the Murder Section of the Criminal Division of the High Court. Due to the great volume of work in his new posting, the said trial Judge declined to proceed with the further hearing of the case. His said decision was also largely informed by the fact that he had only heard the evidence of one witness, whereas the prosecution still had about eight (8) witnesses more.

The accused then raised a constitutional issue. He contended that his fundamental rights under **section 72 (3) (b) of the Constitution** had been violated. He further asserted that his constitutional rights under **section 77 (1), (2) (b)** had also been violated. He therefore urged the court to declare the trial proceedings null and void.

On 22<sup>nd</sup> September 2008, Apondi J. dismissed the application of the accused, after he concluded that the same had no merits at all. Thereafter, the trial started afresh, before Apondi J., on 14<sup>th</sup> May 2009.

After receiving the evidence of three (3) prosecution witnesses, Apondi J. was transferred to the Commercial Division of the High Court. It is in those circumstances that the case fell upon my shoulders.

I received the evidence of three (3) more prosecution witnesses. Thereafter, when I put the accused to his defence, he put forward a sworn defence.

I will now analyse the evidence on record, within the context of the relevant and applicable law; and I will derive therefrom my judgment.

**PW 1, TAJEU OLE LENGETE**, worked as a watchmen at Tarino bar, Kitengela, at the material time. On 5<sup>th</sup> November 2004, he

reported on duty at about 6.30p.m.

At about 11.00p.m, **PW 1** was given the keys to room no. 10. The keys were given to him by one of the ladies at the reception to Tarino Bar & Lodging.

At about 11.00p.m., **PW 1** hired out the said room to two men, who were accompanied by two women.

After about 20 minutes, **PW 1** heard noises, and he rushed to Room 10, to check on it. He found a woman at the door. She was naked, save for her panty.

The woman complained that her man did not want to use a condom. **PW 1** told the woman not to disturb other customers. He advised her to resolve her dispute with the man.

Whilst the woman was talking to **PW 1**, the accused was standing next to her. Thereafter, the accused and the woman returned into the room, where they remained for about 20 minutes.

The two women then came out of the room intending to leave the lodging. Before allowing the women to leave, **PW 1** talked to the accused and the deceased, to ascertain that the men had no objection. The men had no objections, and **PW 1** allowed the 2 women to leave the lodging.

At about 7.00a.m., **PW 1** went to his house. But he was recalled to his place of work at about 8.45a.m. On arrival, he found that one of the two men who had spent the night in Room 10, was dead.

At about 9.00a.m, the accused arrived at the Tarino bar and

Lodging, saying that he had come to check on his friend. The manager called the police, and the accused was arrested.

During cross-examination, **PW 1** said that the two men were drunk when they reached the lodging. He also confirmed that the men were carrying some alcohol.

When he was asked about the identity of the man who told him that he had no objection to the 2 women leaving at 1.30a.m, **PW 1** said that it was the deceased.

**PW 2, PC MARTIN GITHINJI**, was a police officer who was attached to the Kitengela Police Post.

On 6<sup>th</sup> November 2004, he was on crime standby at the Police Post, when Inspector Kioko informed him about a sudden death. By that time, Inspector Kioko had already visited the scene of the incident, and he instructed **PW 2** to go and guard it.

**PW 2** went to the scene, where he found PC Kinyua.

Thereafter, police officers from the Scenes-of-Crime Department arrived at the scene, and carried out their investigations. They gave to **PW 2**- the following items, which were recovered from the scene of crime;

- (i) Empty "Pilsner" bottle;
- (ii) Empty "Redds" can;
- (iii) Empty glass; and
- (iv) Empty bottle of whisky.

Meanwhile, **PW 2** had found the body of the deceased lying on a

bed, facing upwards. However, **PW 2** did not see the signs of any struggle inside the room where the body was.

In any event, **PW 2** learnt that the only quarrel that had been there, was between the accused and one of the 2 ladies. Neither of the said ladies was traced by the police after the incident.

Finally, **PW 2** testified that he had recommended that an inquest be conducted on the death of the deceased.

**PW 3, KING'ORI THIGA**, worked as the manager of Tarino Bar & Lodging. He confirmed that **PW 1** called him, from his office, at about midnight, on 5<sup>th</sup> November 2004. The reason for calling him was that some customers were making noise in Room 10.

After talking to the occupants of that room, **PW 3** went home. He returned to his place of work on the next morning, at about 9.00a.m.

A room attendant informed **PW 3** that somebody had refused to wake up. **PW 3** went to Room 10, where the said person was, and he found that the person was dead.

**PW 3** promptly sent for the watchmen, (**PW 1**), who went to the scene immediately.

Shortly thereafter, the accused arrived at the scene, and **PW 1** identified him as one of the two men who had spent the night in Room 10. **PW 3** then called the police, who arrested the accused.

**PW 4, EUNICE WAMUYU NJOGU**, is a Government Chemist, in the Forensic Division. In particular, she worked at the Forensic Toxicology Section.

On 9<sup>th</sup> November 2004, she received three specimens from the body of David Odhiambo Onga, the deceased in this case. The specimens were handed over to **PW 4** by PC Vincent Kinyua of the Isinya Police Station.

The specimens which **PW 4** received were;

- (a) Blood;
- (b) Liver and Kidney; and
- (c) Stomach.

The police asked **PW 4** to examine the specimens, to ascertain whether or not they contained any poison.

After carrying out examinations of the specimens, **PW 4** ascertained that the blood, Kidney and liver had traces of AMODIAQUINE, which is an anti-malarial drug.

**PW 4** also found traces of alcohol in the blood and in the stomach. Similarly, traces of the anti-malarial drug were found in the stomach.

It is significant that **PW 4** found massive quantities of both the drug and alcohol in the specimens. The blood had 2.27 milligrams of the drug, per 100 grams of blood.

The liver had 3.86 milligrams of the drug per 100 grams.

The kidney had 3.41 milligrams of the drug, per 100 grams.

The stomach had 0.91 milligrams of the total contents.

Those quantities were described as being 10 times higher than they should be, for curative purposes.

Meanwhile, the alcohol level was at a concentration of 633 milligrams per 100 millilitres. In her assessment, that reflected the consumption of at least 15.5 bottles of 0.5 bottle of beer, or 34 tots of whisky.

In comparative terms, **PW 4** said that the alcohol boundary which was safe should be less than 350 milligrams per 100 millilitres.

Therefore, it was the considered opinion of **PW 4** that both the AMODIAQUINE and the alcohol levels were fatal. They could have contributed to the death.

The analyst also explained that the presence of alcohol and the medicine in the stomach of the deceased implied that the same had been taken orally. However, **PW 4** was unable to tell whether the deceased took the medicine and alcohol voluntarily or through coercion.

**PW 4** was also unable to tell how soon after taking the medicine and alcohol, the deceased passed on. The reason for that inability was that **PW 4** had no information about whether the medicine or alcohol was taken at one go, or in doses.

**PW 5, CPL GERALD WASIKA**, was a police officer attached to the Scenes-of-Crime Section.

On 6<sup>th</sup> November 2004, at about 1.59p.m., he visited Tarino Lodging at Kitengela Township. He found **PW 2** at the scene **PW 2**. showed him the body of Daudi Odhiambo Onga, which was lying on a bed, in Room 10.

**PW 5** noted that there were blood stains around the mouth of the

deceased. Some bloodstains were on the bed sheet.

And under the other bed, in the same room, **PW 5** saw an open packet of “Kuber”.

He took photographs of the scene, which he produced before this court.

During cross-examination, **PW 5** said that he did not see any foam near the mouth of the deceased. He also said that the broken glass which was under the bed, did not have any blood on it.

**PW 6, DR. MOSES NJUE GACHOKI**, is a forensic consultant, and the Head of the Department of Forensic and Diagnostic Services.

On 9<sup>th</sup> November 2004, at the City Mortuary, Nairobi, **PW 6** carried out an autopsy on the body of the deceased, David Odhiambo Onga.

The body did not have any visible external injuries. However, there was bleeding from the mouth.

**PW 6** noted that the body was of a person who was well built. Blood was oozing from the mouth and nostrils. And there was evidence of bleeding within the eyes.

When **PW 6** opened up the body, he found that although the bones of the neck were intact, the muscles overlying the bones were bruised and bleeding. Other systems were normal.

**PW 6** drew the conclusion that the probable cause of death was strangulation, by application of pressure to the front part of the neck.

**PW 6** then took samples of the deceased’s blood, liver, stomach and kidney. The said samples are the ones which were handed over to

**PW 4** for analysis.

By the time **PW 6** was testifying, he had not yet had the opportunity of seeing the Government Analyst Report which was presented by **PW 4**.

After reading the said report in court, **PW 6** said that the level of medicine and alcohol in the body was significant. In his considered opinion the said level of medicine and alcohol explained how a man was strangled without a struggle. In effect, the deceased had already been subdued by the large quantity of alcohol and the medicine which he had consumed. He was then strangulated when he was already under the influence of the alcohol and the medicine.

Nonetheless, **PW 6** reiterated that the cause of death was the strangulation. He explained that his said conclusion was not influenced by what the police had told him about the circumstances in which the deceased met his death. **PW 6** did remove the skin on the body, and he found bruising on the neck.

The said bruising cannot have been caused by the alcohol or the medicine which the deceased had taken. At most, the said alcohol and medicine could have only caused an irritation of the esophagus.

**PW 7, DR. TITUS NDETI**, examined the accused on 22<sup>nd</sup> November 2004. He found the accused to be a male aged about 36 years. He also found that the accused had no external injuries. The mental status of the accused was found to be good. It is on that basis that the accused was found to be fit to stand trial.

At the conclusion of the testimony of **PW 7**, the prosecution closed its case.

Thereafter, when the accused was put on his defence, he said that the deceased was a friend of his.

On 5<sup>th</sup> November 2004, the accused went to Nomad Bar, in Kitengela Township, at about 6.00p.m. The accused started having beer and whisky.

He was joined by the deceased, at about 6.30p.m. By that hour, the deceased was completely sober.

The deceased and the accused sat at one table, and they drunk alcohol until 11.30p.m. The accused drunk Guinness and Richot, whilst the deceased drunk Pilsner and Richot.

At 11.30p.m. the deceased said that he could not access his house because the premises were locked up at 10.30p.m.

The accused also felt that it may not be safe for him to go to his house. The two of them then decided to spend the night at a lodging.

They walked out of Nomad Bar and went to "Beer Garden", where they met two ladies. The said ladies agreed to join the accused and the deceased, after the latter spoke to them.

The accused bought more drinks. However, before he could finish his beer, the accused felt like vomiting. He therefore urged the deceased to finish-up quickly. The deceased then decided to carry the two bottles of Richot to the lodging.

After searching for rooms in two lodgings, the accused, the

deceased and the two ladies found room at Tarino Bar and Lodging. The accused paid for the room, which had 2 beds. He and one lady were to occupy one bed, whilst the deceased was to occupy the other bed, with the second lady.

However, the ladies insisted that the accused and the deceased had to use condoms. Although the accused testified that he was prepared to forego intimacy, the deceased agreed to go for condoms.

The accused gave to the deceased, the money to pay for the condoms, plus a further sum of KShs.6,500/- which the accused decided to have deposited at the reception, for safety.

According to the accused, the deceased did deposit the said money with the reception. The accused also said that the deceased purchased condoms.

However, by the time the deceased returned to the room, the accused was asleep. He woke up the next morning, and found that the door was wide open, and the two ladies had left.

The accused went straight home. He took a shower and then returned to Tarino Bar & Lodging, to check on the deceased. But before returning to the lodging, the accused checked for the deceased at the deceased's house. In effect, it is the evidence of the accused that he only went back to the lodging, to check on the deceased, after he found out that the deceased was not at his house.

At the lodging, the accused confirmed that his money had been deposited at the reception.

When he reached Room 10, the accused found a bar-maid who was asking whether the deceased was asleep or dead. By then the bed-sheets had been removed from the bed, and the mosquito net had been tied-up above the bed.

Thereafter, the accused was arrested, when it had been verified that his friend was dead.

During cross-examination, the accused stated that when he woke up on 6<sup>th</sup> November 2004, he walked out of the door without first checking to ascertain whether or not the deceased was awake or asleep. He did not check on the deceased because he did not know if something had happened to him.

He rushed to his house because he needed to get ready to go to work. But after getting ready, the accused went first to the deceased's house. His reason for going to check on the deceased was that the two of them had other plans for that day. In particular, the deceased was supposed to help the accused to escort his fiancé; the said lady had spent the night at the accused's house.

Having analysed the evidence tendered, I note that the prosecution has proved that the accused was with the deceased for several hours on the night of 5<sup>th</sup> November 2004. The two were close friends, and they drunk some alcohol together.

They then went to Tarino Bar & Lodging, accompanied by two ladies. The accused was supposed to sleep with one lady whilst the deceased would sleep with the other lady. However, as they could not

find two rooms in the lodgings they visited, the accused and the deceased were content to share one room, which had two beds.

The 2 ladies demanded that the men use condoms.

And, according to the accused, he was so tired that he much preferred to sleep. However, he did send the deceased to go and buy condoms. He also instructed the deceased to deposit KShs.6,500/-, at the reception, where the money would be safe.

Curiously, however, the accused did not suggest to **PW 1** or any of the other prosecution witnesses, that the deceased went to buy condoms or to deposit money at the reception.

To my mind, that is significant because **PW 1** testified clearly, that after he and the manager, (**PW 3**), talked to the occupants of Room 10, the said occupants resolved the issue which had prompted shouting, and returned to the room.

If indeed, the deceased had left the room either alone or with one or more of the ladies, to go and buy condoms, that could have been verified easily, if the accused had put forward questions to the watchman or the manager. But he did not do so. Instead, he waited until he was testifying during his defence, to make an assertion, to that effect. That implies that that line of defence was an afterthought.

I also find it curious that the accused rushed to his house to get ready to go to work, without as much as finding out whether his closest friend, who had slept on the next bed, was asleep or awake.

Granted, he might have been in a hurry to get ready to go to his

place of work; but thereafter, the sense of urgency appears to have dissipated, because the accused returned to the lodging after first checking at the deceased's house.

Then again, the accused testified that he went to check on the deceased because he was to help the accused in escorting the lady to whom the accused was engaged. That means that the first task which the accused was to undertake on the morning of 6<sup>th</sup> November 2004, was to escort his fiancée'. He was to do so in the company of the deceased.

If that be the case, as stated by the accused, it would have made sense for the accused to wake up the deceased as soon as the accused was ready to leave the lodging. He would then have been able to get home, prepare himself for work, escort his fiancée, and then rush to work.

To my mind, the defence does not appear to add up.

However, I am also aware that an accused person has no legal duty to prove his innocence. He is presumed innocent until and unless the prosecution proves him to be guilty.

In this instance, the accused was in one room, together with the deceased and two ladies. The identities of the said ladies remains unknown.

But it is also clear that by the time the said ladies left Room 10, both the accused and the deceased were alive.

Thereafter, the deceased was found to have died due to

strangulation.

By the time **PW 6** conducted the post mortem examination on the body of the deceased and compiled his report, the specimens from the body had not yet been analysed.

When the pathologist testified, he was given a copy of the report prepared by the Government Analyst who had analysed the specimens.

Having given due consideration to the contents of the report, the pathologist reiterated that the cause of death was strangulation due to pressure on the neck of the deceased. However, he also noted that the quantity of the malarial drug and the alcohol, in the body of the deceased was fatal.

The significance of the said level of alcohol was that it could explain why and how it was possible to strangle the deceased without leaving any signs of struggle. In other words, it was easy to strangle the deceased because he had already been subdued by the drug and the alcohol in his body.

Given the fact that the accused was the last person to be left with the deceased when the latter was still alive, it suggests that it is the accused who killed the deceased. Indeed, it is the deceased who said that neither he nor the accused had any objection to the watchman permitting the ladies to leave the lodging.

The pathologist told the court that there was no visible injuries on the external part of the deceased's body. That would explain why the police suspected that there had been poisoning. It would also explain

why the police did not ascertain if finger-prints were left on the neck of the deceased; and if so, whose prints they were.

Whereas, it is the accused who quarreled with the lady who he was to sleep with, the prosecution asserted that the deceased was killed because he caused the ladies to leave, by insisting on not using a condom. **PW 1** made it clear that it was the accused who argued with his lady-partner. And neither the prosecution nor the defence sought to portray a different picture.

In effect, the reason advanced by the prosecution, as a basis for the accused killing his friend, is not supported by the evidence on record.

In any event both the Government Analyst and the pathologist concur, that the quantity of the malarial drug and the alcohol inside the body of the deceased was fatal. The word “fatal” defined by the “Oxford Advanced Learner’s Dictionary” as;

**“causing or ending in death.....”**

That meaning is comparable to that provided by the “Chambers Concise Dictionary”, which defines the word as follows;

**“1. Causing death; deadly. a fatal injury.  
2. bringing ruin; disastrous. 3. decisive; critical.  
4. destined; unavoidable.....”**

To my mind, the drugs and alcohol inside the body of the deceased were in such quantities that the same was going to cause his death. His death was thus destined or unavoidable.

Nonetheless, someone appears to have fast-tracked the demise of

the deceased, by strangling him. Was that person the accused?

Although the accused was in the same room with the deceased, the prosecution has failed to demonstrate any reason why the accused could have wanted to kill the deceased.

Secondly, and in any event, by the time the death of the deceased was ascertained, several persons had had access into the room where the body lay. Therefore, because the pathologist did not pin-point the time of death, so as to enable the prosecution pin-down the incident to the accused; it cannot be ruled-out that someone other than the accused may have strangled the deceased.

The circumstantial evidence adduced does not point exclusively at the accused as the guilty party, to the exclusion of all other persons who had access to the room where the deceased was found dead. In the circumstances, I hold the considered view that it would be unsafe to hold the accused criminally liable for the murder of David Odhiambo Onga. In the event, the charge against the accused is dismissed, and the accused is acquitted pursuant to section 215 of the Criminal Procedure Code.

I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi, this 29<sup>th</sup> day of September, 2010**

.....  
**FRED A. OCHIENG**  
**JUDGE**