



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**Criminal Case 2 of 2002**

**REPUBLIC.....PROSECUTOR**

**VS**

**BONFACE OWINO OLOO.....ACCUSED**

**J U D G M E N T**

Boniface Owino Oloo is on information of the Attorney General on behalf of the Republic of Kenya dated 2nd May 2002 charged with the offence of Murder Contrary to Section 203 of the Penal Code Chapter 63 Laws of Kenya as read together with Section 204 of the same code. The particulars of the offence are that on the 13th day of January 2001, at Bumala village, Bumala sub-location in Busia District within the Western Province with others not before court murdered Sylvester Opondo Kwena. The prosecution's case in brief is that on the night of the 13th day of January 2001, the accused was seen near the scene of crime behaving in a strange manner. He was seen wearing a white shirt standing besides a footpath leading to the house of one Fredrick Odongo Sikengo (P.W 1) a neighbour to the deceased. The shirt was later on recovered under the accused's bed having blood stains which blood was of the same blood group with that of the deceased. In a nutshell the prosecution is of the view that the circumstances in this case proved beyond reasonable doubt that the accused alone and nobody else committed the offence of murder against Sylvester Opondo Kwena.

The prosecution called four witnesses in support of their case. The accused gave an unsworn statement in his defence without calling any independent witnesses though he had indicated that he was to summon witnesses to buttress his defence. I will begin by considering the evidence tendered by the prosecution in support of their case. Caroline Auma Opondo (P.W. 3) who was the wife of Sylvester Opondo Kwena, deceased, said that the deceased arrived home at about 6.00 p.m. on the 13th day of January 2001 and shortly left the home without telling her where he was going. She said that at about 8.00 p.m. she heard screams of her husband outside her house. She rushed out and heard the deceased calling his father shortly before he fell down unconscious. She rushed to where the deceased lain unconscious with his intestines protruding from the stomach. She screamed and her screams attracted the attention of Fredrick Odongo Sikengo (P.W 1) and Joseph Kwena (P.W.2) who rushed to scene almost immediately. P.W 1, said he left the scene after he realized that the deceased had passed out. On his way back to his house he found the accused who was well known to him standing besides the footpath leading to his house. He attempted to greet him and possibly make inquiries as to why he was keeping aloof while the deceased who was the accused relative was lying dead. PW 1 said the accused refused to greet him nor talk to him. This witness said he managed to see and recognise the accused with the assistance of a torch which he used while going back to his house. He said the accused wore white shirt.

On his part Joseph Kwena (PW 2) said he saw Boniface Owino Oloo (accused) who is his nephew with Sylvester Opondo Kwena (deceased) on 13th January 2001 at 6.00 p.m. This witness said he saw the accused come to the scene of crime after other people had visited the area. P.W. 3 also confirmed that the accused appeared in the scene after she screamed for help. Police constable Charles Odhiambo (P.W 4), the investigating officer was the prosecution's star witness in this case. He said he received a report from his superior inspector Lihapi, about the incident at 11.00 p.m. on the night of 13th January 2001 while he was at the crime office, Busia Police Station. P.W 4 and Inspector Lihapi visited the scene and took the deceased's body to Busia District Hospital Mortuary for preservation and post-mortem. On the 14th day of January 2001, P.W 4 received a report implicating the accused. He arrested the accused at Bumala Market and proceeded to the accused's house where he conducted a search upon which a white shirt stained with blood was recovered under the accused's bed. This witness produced in evidence the shirt which he recovered at the accused's house. P.W4 took blood samples from the shirt that of the

accused and the deceased and forwarded the same to the government Chemist via the exhibit memo form dated 19th January 2001 which was produced as an exhibit in evidence. A report from J.K. Munguti, the government analyst dated 20th April 2001 was received and produced in evidence as an exhibit by P.W 4.

The report showed that the blood stains found on the shirt recovered from the deceased's house was of group A similar to the blood group of the deceased. The accused's blood was of group O. The Government analyst formed the opinion that the blood stains could have come from the deceased after injury. P.W 4 told this court that the accused had told him that the shirt got blood stained when he was bitten by his dog. Pursuant to the provisions of Section 77 (1) of the Evidence Act Cap 80 Laws of Kenya P.W 4 was allowed to produce the postmortem report dated 17th January 2001 which came to his possession by virtue of being the investigating officer. The report was duly signed by Doctor Ogutu, a medical Officer attached to Busia District Hospital. The doctor formed the opinion that the deceased died due to pulmonary arrest due to severe internal haemorrhage due to a ruptured liver resulting from a stab wound.

The accused for his part vehemently denied the offence. He gave an unsworn statement without calling any witnesses. He raised the defence of alibi claiming that on the 13th day of January 2001 he was with his parents at Sighulu village hence, he claimed he had no opportunity to meet the deceased. He however admitted having visited the scene in response to the distress calls from the homestead of the deceased. He claimed his shirt got contact with the deceased's blood while he was assisting the police to load the deceased's body on to the police motor vehicle. He further alleged that he was framed up by the police when he refused to record a statement as per the request of the A.P's Sergeant. At the end of the evidence, counsel for the accused made detailed submissions in support of his client's position. Mr. Ashioya advocate for the accused submitted that the prosecution did not establish that the accused had malice afore thought. He further claimed that there was no evidence to show that the accused actually stabbed the deceased. The learned advocate argued that though the blood group found in the shirt recovered at the deceased's house matched that of the deceased, there was no evidence that the same was acquired at the time of committing the offence. He further submitted that the blood stains could have been obtained at the time of loading the deceased's body on the police landrover.

At the conclusion of submissions, I summed up the evidence to the assessors and directed them on the applicable legal principles. That summing up is on record and I will not repeat it. The assessors were then asked for their opinions. They were unanimous that the accused person was guilty as charged. They formed the opinion that the accused was at the scene of crime wearing a white shirt. They believed the evidence of P.W1, Fredrick Odongo Sikenga that the accused was at the scene of crime. They also formed the opinion that the deceased got contact with the deceased's blood while committing the offence. They also disbelieved the defence put forward by the accused that his shirt got stained with blood while loading the deceased body on a police motor vehicle.

Having considered the evidence, the submissions, and the assessors' opinions, I have come to the following conclusions over the matter: The evidence indisputably discloses that Sylvester Opondo Kwena was on 13th January 2001 stabbed and consequently died as a result of a stab wound. I agree with the assessors that the person who stabbed the deceased actually intended to fatally injure the deceased. The object used to stab the deceased from the post-mortem report shows that it ruptured the deceased's liver. In my view the evidence tendered by the prosecution shows that the assailant intended to cause grievous harm to the deceased. I hold that the assailant obviously acted with malice aforethought in view of the injuries inflicted upon the deceased. The action was therefore unlawful. Having concluded that issue, I wish to now consider the following matters. First, the accused has disputed that he was at the scene of crime hence he had no opportunity to stab the deceased. The prosecution tendered the evidence of Fredrick Odongo Sikengo (PW 1) and Joseph Kwena (P.W 2) to show that the accused had the opportunity to commit the crime. P.W 2, Joseph Kwena gave evidence to the effect that he saw the accused with the deceased at 6.00 p.m. on 13th January 2001. This witness also saw him come late to the scene after other people had come. P.W 1, Fredrick Odongo Sikenga said he saw the accused near the scene when he flashed his torch while going back from the scene to his house. The evidence of these two crucial witnesses were not shaken on intense cross-examination mounted by Mr. Ashioya for the accused. I observed the demeanor of each of these witnesses and I found them to be straight forward

witnesses. I believed their testimonies. I again agree with the assessors that the accused was at the scene of crime and obviously had the opportunity to meet the deceased. I do not believe his assertion that he was with his parents at Sighulu village. The evidence tendered by the prosecution over this issue is more credible and believable when considered vis a vis the evidence of the recovery of the blood stained shirt.

It is the submission of the accused that his shirt got soaked in blood while loading the deceased's body on the police land Rover. The evidence of Charles Odhiambo (P.W 4) shows that the blood stained shirt was recovered either under the mattress of the accused or just under the bed. P.W 4 said the accused told him that he got contact with his own blood when a dog bit him. The evidence of the P.W 4 was consistent with the statement he recorded. It is not denied that the blood stained shirt was recovered underneath the accused's bed. If indeed the shirt got stained with blood of the deceased while the accused was loading the deceased's body on to the police motor vehicle then why was the accused hiding the shirt under his bed? The only inference I can make is that he was concealing material evidence which may incriminate him with the incident. In the circumstances I disbelieve his evidence. I am convinced that in the circumstances of this case that the accused had his shirt stained with blood from the deceased while stabbing him. In this regard I agree with the opinion of the assessors that the blood found in the accused's shirt was the blood shed by the deceased. The chain of events in this case points to the conclusion that it is only the accused who murdered the deceased and nobody else. The prosecution has therefore proved beyond reasonable doubt that the accused was involved in the murder of the deceased.

The upshot therefore is that I find Boniface Owino Oloo guilty of murder as charged. I sentence him to suffer death in the manner authorized by law

I direct the assessors who have served in this trial to be discharged and shall not be summoned to serve again as assessors for a period of 12 months from the date of this Judgment. This directive is made pursuant to the provisions of section 271 of the Criminal Procedure Code.

**DATED AND DELIVERED THIS 7th DAY OF July 2005**

**J.K. SERGON**

**JUDGE**