



**Republic v Ogweno & 3 others (Criminal Case 20 of 2022)
[2024] KEHC 5095 (KLR) (7 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 20 OF 2022**

KW KIARIE, J

APRIL 7, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

GEORGE OTIENO OGWENO 1ST ACCUSED

TOBIAS ODHIAMBO OMOLLO 2ND ACCUSED

MAURICE OTIENO YADO ALIAS OWINO YADO 3RD ACCUSED

TOM ODHIAMBO AWUOR 4TH ACCUSED

RULING

1. George Otieno Ogweno, Tobias Odhiambo Omollo, Maurice Otieno Yado, alias Owino Yado, and Tom Odhiambo Awuor are charged with murder contrary to section 203, as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the 6th day of May 2020, at Kalwal village, in Ndhiwa Sub County within Homa Bay County, jointly with others not before the court, murdered No. 111971 PC Felix Yegon.
3. The only witness who testified that he identified the first, second, and third accused persons was Philip Bondo Joel (PW1). His evidence was that these people were previously unknown to him. This is the person who sought police assistance so that he could get his wife back from a man who remarried her after she left him.
4. He told the court that after they had found his rival, the officers dressed in civilian informed him that they had an issue with him. But before they reached his home, he realised they were police officers and raised an alarm, saying, "They have come back." Members of the public responded and chased them



while armed with machetes and clubs. This was when he said he could identify the first, the second and the third accused.

5. When circumstances are not favourable for an identification, Lord Widgery CJ in *R. v Turnbull and Others* [1976] 3 All ER 549 issued the following caution:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

...

Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

6. In his evidence, this witness said that he was tense at the time. He did not describe the people he purported to have identified. Since an identification parade is meant to verify the description of the accused given to the police, the subsequent identification parade had no basis.
7. The evidence of Dickson Ogindo Oer (PW2) was that the third accused arrived at the scene after him. He (PW2) found the deceased already dead.
8. The unfortunate attack that led to the death of a police officer ought not to have occurred had the officers strictly kept in their lane. They had no business assisting Philip Bondo Joel (PW1) in reclaiming his former wife from her subsequent husband. It emerged from the evidence of CPL. Geoffrey Lobat (PW3) that he (PW1) had gone to the area earlier and injured a woman who was admitted. This explains why members of the public were angry and shouted that “they” had returned.
9. David Kiara Muthoni (PW7) testified that the items that were presented to the government analyst were stained with the human blood of a single unknown person.
10. The investigations were poorly conducted. No blood samples of the deceased were taken, nor were samples taken from the accused persons. This could have been the best evidence to incriminate or exonerate any accused. This chance was squandered.
11. After considering the evidence on record, the question is whether the prosecution has established a prima facie case against accused persons. In the *Black’s Law Dictionary*, 10th Edition, prima facie case is defined as follows:

Prima facie case. (1805) I. The establishment of a legally required rebuttable presumption.
2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.



12. The Court of Appeal in the case of *Ramanlal Trambaklal Bhatt vs R* [1957] E.A 332 at 334 and 335 defined prima facie case 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.

13. Article 50 (2) (i) of the *Constitution* of Kenya provides:

- (2) Every accused person has the right to a fair trial, which includes the right—
(i) to remain silent, and not to testify during the proceedings;

In the instant case, if the accused persons opt to exercise their constitutional right hereinabove stated, I cannot enter a conviction based on the evidence on record. Therefore, the prosecution has failed to establish a prima facie case against any of them. I accordingly acquit each of the offence of murder under section 306(1) of the *Criminal Procedure Code*. Each accused is set at liberty unless, if otherwise, lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE

