



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 16 OF 2015**

**(MURDER)**

**(CORAM: R. E. ABURILI – J.)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CALEB ODHIAMBO ODERA.....1<sup>ST</sup> ACCUSED**

**WILLIAM SUJI ODERA.....2<sup>ND</sup> ACCUSED**

**LEONARD WAMUKHUBA ADIEDO.....3<sup>RD</sup> ACCUSED**

**PATRICK OCHIENG OKETCH.....4<sup>TH</sup> ACCUSED**

**FESTUS RANYONDO OKETCH.....5<sup>TH</sup> ACCUSED**

**RULING ON CASE TO ANSWER**

1. The Accused persons in this case are **Caleb Odhiambo Odera, William Suji Odera, Leonard Wamukhuba Adiedo, Patrick Ochieng Okech** and **Festus Ranyondo Okech**. They are charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63 Laws of Kenya**.

2. The particulars of the Information filed in Court on 23.4.2014 and dated the same day at Kisumu High Court by the Senior Prosecution Counsel Mr. G. A. Mongare are that **Caleb Odhiambo Odera, William Suji Odera, Patrick Ochieng Oketch and Festus Ranyondo Okech**, on the 20<sup>th</sup> day of April, 2014, at Bar-Shauri Sub-Location, in Gem District, within Siaya County, jointly murdered **Samuel Owili**.

3. Plea of not guilty was entered in respect of all the 5 Accused persons on 11.6.2014 and a hearing date set.

4. On 22.2.2017 the hearing commenced before Hon. J.A. Makau – J, after the Kisumu High Court transferred the matter to this Court for trial as the incident subject of the charge took place within the jurisdiction of this Court in Siaya County.

5. The Prosecution called **PW1 David Ochieng Akuom** who testified on oath in Kiswahili language and told the Court that on 20.4.2014 at around 7.45 p.m, he was at his brother's house listening to a radio, and that while he was alone in the house his wife was in the kitchen, he heard a knock on the window and he reduced the volume of the radio. His wife told him that there were noises outside. He realized that the noise was emanating from his mother's homestead. He went out and stood on a path as it was dark at night. He heard people shouting "**Ua ua, unafikiri hii mtaa hakuna wanaume, leo utaona**" translated to mean "**Kill, kill, you think in this area there are no men, today you are going to face it.**" PW1 crossed the first shamba and stopped for about 3 minutes, moved into the second shamba, and before reaching the third shamba, he saw a torchlight.

6. Onto his left where the road joins to his mother's homestead, he heard the voice of Caleb Odhiambo saying. "**Ochieng is a child of the homestead, leave him alone.**" He left and moved to a path where he heard the person who had the torchlight say "**It is me.**" He recognized that it was the voice of **George Oyoma** and he was walking along the path to the PW1's mother's homestead. The person went near the PW1 and PW1 switched on a torch and then the following people came to where he was:

**1) Caleb Odhiambo Odera.**

**2) Patrick Ochieng Oketch.**

**3) Justus Ranyondo.**

**4) "DD" Odinga.**

7. PW1 told them not to kill anyone within the homestead. PW1 called Caleb Odhiambo and told him, and the same PW1 heard someone groaning from nearby. About 4 metres away, Suji came with a

8. stick measuring about 2 meters praising himself and the four people named above went to where the deceased was.

9. PW1 and George stepped aside and George shouted the name of Caleb Odhiambo telling them not to kill anyone in that area. George asked PW1 whether PW1 had a phone and he asked PW1 to call the area Assistant Chief which he did as the five Accused persons proceeded to assault the deceased. He stated that he was able to see what was happening as the five Accused persons beat the deceased using sticks all over his body as the deceased lay on the ground. PW1 stated that he saw them clearly using his torchlight directed at them. The beating took about 15 – 20 minutes while his torch was on for 2 – 3 minutes. The Assistant Chief Hausten Ouma Owira promised to come and he informed PW1 that he had informed the Police at Yala. He further testified that "DD" Odinga went to where PW1 was calling them dogs and asking PW1 and George to leave that place as they continued assaulting the deceased who was groaning and then the groaning stopped is when they ceased beating him.

10. Further testimony from PW1 was that "DD" Odinga and Patrick Ochieng followed the two, PW1 and George who both left in different directions and at that point the assailants returned to the path leading to PW1's mother's homestead. PW1 heard them say "Mother to Odongo, we will be back for you." They were referring to the PW1's mother.

11. According to PW1, the Assistant Chief came after 30 minutes with two young men and they went to where the deceased lay then he called Police from Yala Police Station. PW1 returned to his brother's house as the Assistant Chief also left.

12. He further stated that the Police came at about 8.30 p.m. and George called PW1 at 10.45 p.m. to proceed to the scene of murder. They found a Police Vehicle with Caleb Odhiambo and Samuel Suji in the said vehicle, with George and the Assistant Chief who asked PW1 whether he could recognize the people who were at the scene and PW1 gave the name of Caleb Odhiambo and Suji. He also gave the names of Patrick Ochieng Oketch, Justus Ranyondo and "DD" Odinga. They all left for the home of "DD" Odinga in the company of the Assistant Chief, George and Police Officers, leaving Caleb and Suji behind in the company of Police Officers.

13. They went to the house of "DD" Odinga and found him asleep in his house, knocked the door and his wife asked as to who was knocking. She opened the door and they found "DD" Odinga asleep on the bed with a small child. They used torchlight and saw his clothes soaked in blood, a T-shirt and a long trouser which he still wore while in bed. They arrested "DD Odinga" and that at that point he asked for forgiveness. They proceeded to the House of Patrick Ochieng Oketch and Justus Ranyondo who are brothers and arrested them. They went to the accused persons' mother's house and found Timberland shoes brown in colour stained with blood on top. The shoes were taken by the Assistant Chief and the Police.

14. They returned to the scene of crime and found a dead body of John Owili, upon which the the Police collected the body. PW1 identified the clothings recovered from DD Odinga which were stained with blood and were marked MFI P1 and a T-shirt written "Rhino" at the front and at the back it was written "Manufacturing Projection," with Blood stains marked as MFI P2. PW1 also identified as MFI 3 a pair of brown shoes recovered from the house of the mother of Patrick Ochieng and Justus Ranyondo (brothers). The shoes were found to be blood stained.

15. He also identified Accused No. 1 as Caleb Odhiambo Odera whom he had talked to that night and that the said Caleb was a person well known to PW1 for over 15 years as they are neighbours and that they used to be friends meeting at job-seeking joints.

16. PW1 also identified the 3<sup>rd</sup> Accused as "DD" Odinga, a neighbour from Shauri "A" and stated that he, PW1 comes from Shauri "B" and added that their homes are divided by a road. He stated that they used to meet at casual jobs though the two were not very close. He knew the 3<sup>rd</sup> Accused person's parents and that his mother is called Gaudencia Adiedo.

17. PW1 also identified the 2<sup>nd</sup> Accused in the Dock as "Suji" Odera. He further identified the 4<sup>th</sup> Accused person Patrick Ochieng Oketch whom he claimed comes from Shauri B and that he had known him for a long time.

18. PW1 further identified the 5<sup>th</sup> Accused Justus Ranyondo, Patrick Ochieng's brother, by touching him. He denied having any grudge with any of the Accused persons. He stated that the deceased had "inherited" his mother between 2004 – 2013 but that he came from Huware, in Western region and that the deceased's home was about 3 ½ km away from where he was to be found dead . PW1 denied that his mother was related to any of the Accused persons and stated that she died in 2016 aged 52 years. He maintained that he and the 5 Accused persons were present at the place where the deceased was beaten.

19. On being cross-examined by Mr. Ahimbisiwe, PW1 stated that the deceased was being beaten within the compound of his (PW1's) mother's homestead. He stated that his young sister was in his mother's house, and that his torch was off when he went to the scene. He maintained that the person who was bragging was Suji and that he could see Suji using the torchlight of George which was on.

20. Further, he responded that the Accused rushed to where PW1 was before returning to beat up the deceased. He stated that he was in good terms with the deceased who had inherited his mother and maintained that he left the Accused beating up the deceased and that George was still at the scene when the Police and Assistant Chief came. He stated that he carried the clothes of Accused persons which were recovered from them. He maintained that the Accused persons, were his neighbours.

21. On being re-examined by Mr. Ombati Prosecution Counsel, PW1 stated that at the time of the incident, there were no people inside his mother's house. Further that he was able to identify the person groaning as the deceased as he spotted him after lighting his torch and seeing him as the Accused were beating the deceased.
22. PW2 Rev. George Odhiambo Oyomba gave evidence on oath and stated that he was a pastor with AMC based in Gem. He preaches at Bar Shauri, Gem and that he had been a pastor for 30 years. He recalled that on 20.4.2014 at about 7.00 p.m. he had come from prayers on his way home and on arrival, he heard noises from his neighbour's home with someone screaming as if he was being beaten up. After sometime, his wife went to inquire from his (PW2) why PW2 was quiet yet Bishop was being beaten up. PW2 did not respond. Instead, he started walking towards Bishop's home and when he arrived, he found that the noise was not emanating from Bishop's home. He stopped at the road for about 5 minutes and realized that the noise was coming from Adongo's mother's home. He listened and identified the voice of the person who was making noise, groaning and asking his assailants why they were beating him. He heard one person say in Dholuo. "Beat this person, beat this person." He recognized that voice to be one of Kembara. He called the said Kembara who went to where PW2 was and PW2 asked him why they were beating the person who was screaming and Kembara responded that the person screaming had been beaten by Adongo's (PW1) 'father.' The said Kembara showed PW2 the injured area on the right side of abdomen. After some dialogue, PW2 told Kembara to go home. PW2 stated that from where he stood, he could not see the person who was being beaten. He could not see the 4 other people apart from Kembara but that he saw people leave the scene and that there was no light where he was. Later Ochieng came with a spot light and mobile phone light. At that time, the group was walking away. He asked Ochieng about the person being beaten but that Ochieng said he did not hear any noise. PW2 asked Ochieng to call Assistant Chief Augustine Owino. The latter responded that he was on his way. PW2 parted with Ochieng and each went their own way. He then learnt as he was leaving that it was the husband to Adongo's mother who was being beaten outside her homestead.
23. That after PW2 had arrived at his home is when the Assistant-Chief called him and told him that the person had already died. He went to the scene and found Police Officers, Assistant Chief and a youth winger Kembara was arrested.
24. However, PW2 later admitted to telling lies to Court after the Prosecution was allowed to cross-examine him as he had turned hostile, telling the Court different versions from what he had recorded in his signed statement with the Police.
25. On application under Section 152 (1) of the CPC, PW2 was committed to prison for 2 days but he was released under unclear circumstances and despite orders to the OCS Yala Police Station to explain those circumstances, the same were never made available to Court. Instead, it was alleged that PW1 was released after serving sentence as there was no order for him to be brought before the Court after he had served the 2 days sentence. The warrant of arrest against PW2 remains in force to date.
26. PW3 Augustine Ouma Owino gave evidence on oath and stated that he was Assistant Chief of Shauri Sub-Location. He recalled that on 20.4.2014 at 9.00 a.m. or thereabouts he was on the road preparing to go to a meeting at Yala town when one Caleb Odhiambo, the 1<sup>st</sup> Accused went to PW3 and reported that he was assaulted the previous day by John Owili. PW3 advised him to go to hospital since his hand had been injured with a bruise, and advised him to report to Yala Police Station and to see PW3 after his meeting. PW3 returned home at 7.00 p.m. but never received any report of the 1<sup>st</sup> Accused making any report. At around 8.00 p.m. PW3 received several phone calls one from David Ochieng Okwam, PW1, and PW2 Rev. George Oyomba informing him that the 1<sup>st</sup> Accused Caleb Odhiambo in the company of other Youths had gone to and were attacking John Owili, and that their efforts to stop the assailants had failed as the attackers also threatened to beat them. PW3 called the area Chief Johannes Anam and the OCS Yala Police Station and informed them of the happenings. PW3 was directed to wait for the chief to proceed together to the scene. In the meantime, PW1 and PW2 continued calling PW3 and because the Police were delaying, he got 2 youths from the area who accompanied him to the scene. On arrival they found the deceased John Owili already dead at the homestead of the woman he had inherited, whose name was Salima Juma Ochido. He then called the Police and relayed the information. The body of the deceased was outside the house in the compound lying on its back with blood stains from the face and blood stained clothes. There was no one in the homestead at that time and Police arrived at about 10.00 p.m. PW3 called PW1 and PW2 to come to the scene which they did and he gave them names of the 5 Accused persons upon which PW3 and the Police went to the suspect's homes and arrested the 1<sup>st</sup> Accused from his house and recovered blood stained shirt, arrested William Suji who is brother to 1<sup>st</sup> Accused in a different compound inside his house wearing a yellow blood stained shirt. They also recovered black shoes with blood stains next to his bed. They then proceeded to the home of Leonard Omukhuba Adiedo, knocked on the door and his wife opened the door. He was found asleep. When he was asked to wear the clothes he had worn during daytime, he took blue jeans which were blood stained, and a black shirt.
27. He was arrested. They then proceeded to the home of Festus Odhiambo, knocked, he refused to open and the door was pushed and it opened. He was found asleep wearing a long black trouser which was blood stained. They went to his brother's house. He was asked to dress the way he was dressed during daytime which he did. He was found with blood stained shoes (brown Timberland). His white shirt too had blood stains. They returned to the scene of crime, collected the deceased's body and took it to Yala sub-county Mortuary and escorted the five suspects to Yala Police Station. He later recorded his statement on 21.4.2014.
28. PW3 identified the recovered items MFI. P3, 4, 1, 5, 6 and 7. He also identified all the 5 suspects as people he knew for a long time and stated that he had no grudge with them or their families.
29. In cross-examination by Mr. Ahimbisiwe Advocate, PW3 maintained what he had stated in examination in chief.
30. On being re-examined, he stated that Accused persons are known criminals, with the 1<sup>st</sup> Accused person being a jail bird and so was the 2<sup>nd</sup> Accused while the 3<sup>rd</sup> Accused was a suspect and so was the 4<sup>th</sup> and 5<sup>th</sup> Accused.
31. The Prosecution closed its case after directions were taken to the effect that the matter proceeds from where Hon. J.A. Makau – J. had reached, but there being no other witnesses available to testify, the Prosecution also informed the Court that their key witness had since died. The Prosecution despite efforts to get the remaining witnesses to testify were unable to procure their attendance and so they closed their case on 17.9.2018 and left it to Court.

32. In submission to whether the Accused persons have a case to answer, Mrs. Opondo counsel for all the accused persons submitted that the incident took place at night hence PW1 could not have seen who did what as there was no light illuminating the area. Further, that PW2 was a hostile witness while PW3 only assisted in arresting the suspects. It was further submitted that no medical evidence was adduced to show the cause of the deceased's death hence the evidence in totality as adduced by the 3 Prosecution witnesses fell short of establishing a *prima facie* case to warrant the Accused persons being placed on their defence. Mrs. Opondo urged the Court to acquit the Accused persons under Section 210 of the Criminal Procedure Code.

33. On the part of the prosecution, it was submitted that the prosecution had established a *prima facie* case against the accused persons and that on the evidence adduced, the court should find that the accused persons have a case to answer.

**Determination:**

34. I have carefully considered the evidence adduced by the 3 Prosecution witnesses and the submission as to no case to answer by the defence counsel Mrs Opondo Ochanji. PW1 testified that he was attracted to the scene by noise and saw the 5 Accused persons assault the deceased in his mother's homestead. He knew the Accused persons by name, recognized their voices and that he lit a torch at them and saw them use sticks to beat the deceased until he stopped groaning and later confirmed him dead. There is no mention of where the deceased's inherited wife who later died in 2016 was at the material time of the night since there is evidence that she lived with the deceased in the same house. PW1 also stated that his younger sister was in their mother's house. Nothing more is said of her. There is no indication as to whether the deceased's inherited wife and her daughter were present when the beatings were taking place or not and whether they recorded any statement with the Police on the incident. No single witness has testified on the motive of the alleged murder, not even an investigating or arresting officer.

35. PW2 who was said to have been with PW1 and who witnessed the beating of the deceased John Owili was declared a hostile witness and he vanished before completing his testimony after he was committed to prison for admitting to lying to the Court. A warrant of arrest for him remains in force. PW3 the Area Assistant Chief who was called by PW1 and PW2, and who called the Police only found the deceased already dead and with information from PW1 and PW2 he led the Police to the houses of all and each of the 5 Accused persons and arrested them.

36. The 5 Accused persons are each alleged to have been found with blood stained clothes and or shoes which were recovered and marked for identification by PW1 and PW3 as MFI P 1 - 7 but these items were never produced in Court as exhibits and no forensic evidence was adduced to demonstrate that the blood stains allegedly found on the respective clothings of the Accused persons matched that of the deceased.

37. In addition, there is an allegation that one John Owili died as a result of beatings. There is no medical evidence in the form of a postmortem/autopsy report to show the cause of death and/or whether the cause of death is consistent with the alleged beatings that he allegedly received from the 5 Accused persons and the motive for the beatings.

38. This Court has no reason to believe that the 5 Accused persons could have been framed for the murder of the deceased John Owiti. However, the Court must observe the law that commands that the burden of proof in criminal proceedings lies on the Prosecution throughout the trial and that burden does not shift to the Accused person except in exceptional cases like where the accused person raises the defence of alibi.

39. Furthermore, it is incumbent upon the Prosecution to demonstrate that at this stage, there is a *prima facie* case established against the Accused persons to warrant this Court placing them on their defence.

40. Whereas the Prosecution need not prove at this stage the guilt of the Accused persons beyond reasonable doubt, but the evidence must be strong enough to warrant a defence to counter that evidence.

41. In this case, albeit the deceased John Owili lost his life, the cause of his death is not known to this Court. Only an autopsy can reveal the cause of death and link the alleged beatings to the injuries that way have been sustained by the deceased leading to his demise.

42. The Prosecution claim that an eye witness died. They did not attempt to have the statement of persons who cannot be called as witnesses produced in evidence by the investigating officer. The investigating officer too never came forward to testify and produce an autopsy report and the exhibits that could link the 5 Accused persons to the commission of the offence.

43. Strong suspicion alone cannot be sufficient to link the Accused persons to the offence of murder.

44. For the above reasons, I find and hold that the prosecution has not established a *prima facie* case against the 5 accused persons to warrant this court place them on their defence.

45. All the five accused persons are accordingly acquitted of the offence of murder under section 210 of the Criminal Procedure Code, Chapter 75 Laws of Kenya. They are all set free unless otherwise lawfully held.

46. Orders accordingly.

**Dated, signed and Delivered in open court at Siaya this 16<sup>th</sup> Day of October, 2018**

**R.E.ABURILI**

**JUDGE**