

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 49 OF 2011

BETWEEN

REPUBLICPROSECUTOR

AND

MOSES OTIENO OCHIENG 1ST ACCUSED

JANE ADHIAMBO OCHIENG..... 2ND ACCUSED

RULING

1. **MOSES OTIENO OCHIENG** and **JANE ADHIAMBO OCHIENG** are the son and wife respectively of the deceased **GONZAGA OCHIENG**. They are accused of murdering him on 31st July 2011 at Rangala Sub-location of Ugunja District within Siaya County. They pleaded not guilty. The 2nd accused passed away during the proceedings.

2. The prosecution called only 3 witnesses before closing its case. Charles Ouma Oloo (PW 1) testified that on 31st July 2011, the deceased's brother, Omolo, came to see him at about 2.00pm and informed him that the deceased's house was quiet. He suspected that there was something wrong as the home was normally lively. They decided to proceed there and found the deceased's grandchildren. They entered the deceased's house and found him lying on his bed. PW 1 observed that he had bruises on the head with blood oozing. They left to inform one of the village elders who informed the Assistant Chief. Police officers arrived and collected the body. He told the court that he attended the post-mortem that was conducted at Siaya District Hospital.

3. One of the officers who arrived at the scene was the investigating officer, Sergeant Julius Kilonzo (PW 3). He recalled that he was on patrol within Rangala Sub-location with other officers when he was called by the Commanding Officer of Ugunja Police Station and instructed to proceed to the scene. When they arrived at the deceased's home, they found villagers already there. They took the deceased's body to Siaya District Hospital Mortuary. PW 3 recalled that there were no visible injuries on the body apart from scratches on the neck. PW 3 testified that he arrested the 2nd accused on 4th August 2011 when she returned to the deceased's homestead after being away for some time. The 1st accused was arrested on 7th August 2011 by members of the public.

4. Dr Evans Ogoti (PW 2) produced the Post-mortem form on behalf of Dr Rapando who had conducted the post mortem on the deceased's body. His key observation was that the deceased had a bruise at the back of the right shoulder and his neck was moving freely. Internal examination of the head revealed a blood clot behind the head above the ear and a fractured spinal column. He opined that the cause of death was respiratory depression due to a cervical spine fracture and possible spinal cord transection. In simple terms, the deceased appeared to have been strangled.

5. After the close of the prosecution case, I am required to decide whether there is sufficient evidence to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases among them among them ***Ramanlal Trambaklal Bhatt v R [1957]EA 332, Wibiro alias Musa v R***

[1960]EA 184 and *Anthony Njue Njeru v Republic* NRB CA Crim. App. No. 77 of 2006 [2006]eKLR). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

6. The prosecution is weak tea. There is no evidence placing the accused at the scene of the incident on the day of the alleged murder. As the case is grounded on circumstantial evidence, no evidence of motive was led to implicate the accused. The accused cannot be called upon to answer such a case. Even if the accused elected to remain silent, the prosecution case would fail.

7. Under **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of Laws of Kenya)*, I am required to enter a verdict of not guilty which I hereby do against **MOSES OTIENO OCHIENG**. He is therefore acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 17th day of January 2017.

D.S. MAJANJA

JUDGE

Mr Adiso, Advocate for the accused.

Mr Sirtuy, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.