



**REPUBLIC OF KENYA**

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

**HCCRC NO. 57 OF 2014**

**PROSECUTOR ..... REPUBLIC**

**VERSUS**

**PETER OTIENO AGOKO ..... ACCUSED**

**RULING**

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on 31st August 2014 going to 1st September 2014 at unknown time at a place called Rang'ala in Ugunja District within Siaya County jointly with others not before Court he unlawfully and wilfully murdered **Joshua Owino Otieno**. He was arraigned before this Court on 10th September 2014 and when the information was read to him on 23rd September 2014 he pleaded not guilty and a trial ensued. Throughout the trial he was represented by Mr. R. Otieno Advocate. The Prosecution called three witnesses but that of Nicholas Okoth Otieno (PW3) was most relevant. I say this because Aggrey Omondi Onyango's (PW1) and John Omondi Orambo's (PW2) testimonies were only to the effect that they had been with the deceased during the day on 31st August 2014. The three were in a bar called Check-point. They drunk until 6.30PM or thereabouts when the deceased left with John Omondi Orambo (PW2). John Omondi Orambo (PW2) later dropped the deceased at Kakoth Center. The next these two witnesses heard of the deceased was that he was dead and they did not know what killed him.

Nicholas Okoth Otieno (PW3) the star witness told this Court that he is a motor cycle rider ("boda boda") and that at about 7.30PM while he was taking a client to a place called Lagala he met Peter Agoko (the accused) and one Simon at the Kakoth stage.

Apparently he continued on his way and as he was transporting another customer at 9PM he yet again saw the accused standing at the Kakoth stage. He stated that he was able to identify the accused by the light of his motor cycle. The next morning he heard someone was dead and went to the scene to see for himself only to find the body of the deceased lying about ten meters from where he had seen Otieno (accused) standing. He identified the dead man as they were village mates. He described the deceased's clothing as a dark green shirt. He further testified that the night before, when he saw the accused at Kakoth, there was a man lying down on the ground and he was wearing a green shirt. That green shirt was now besides the body. When he told the accused who was also at the scene that he had seen him at Kakoth stage the previous night and inquired who else he had been with the accused left. Another person at the scene also remarked that the accused must have known about it. Nicholas (PW3) informed the police what he had seen that night but when they went to the accused's house they did not find him. They nevertheless conducted a search. The police also allegedly went to Simon's house and recovered a blood stained shirt. At around 6PM he was summoned by a group of villagers who asked him to repeat what he had seen and when he said he had seen the accused standing and another man lying down the crowd tried to lynch the accused but he was rescued by a police officer from Semenya. He told the Court that the accused was a tout at Kakoth and that there was no grudge between them.

The three witnesses testified on 18th February 2015 and from that time no other witnesses were availed except one who came one year later on 9th February 2016 and 7th April 2016 when case was adjourned because the Advocate for the accused had not been notified. The list of witnesses availed to this Court shows that only four witnesses remained, two of who were police officers. It could not therefore be correct that the Prosecution found it difficult to bring witnesses from Ugunja when the accuse has been languishing in remand for close to three years. Be that as it may the duty of this Court at this stage, is to determine whether a prima facie case has been made out against the accused person sufficiently to warrant him to be put on his defence.

Considering that a prima facie case is one where a reasonable tribunal properly directing its mind would convict were the accused to remain silent when put on his defence I find that none has been established in this case. As I stated earlier Nicholas Okoth Otieno (PW3) is the star witness in this case. Since he does not allege to have seen the accused in the act of killing the deceased his evidence is only circumstantial. It is also evidence of a single witness. In **Maitanyi V. Republic [1986] KLR 198** the Court held:-

***“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.***

***2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.***

***3. The Court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the Court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.....”***

As for circumstantial evidence it was held in **Kariuki Karanja V. Republic [1986] KLR 190:-**

***“2. In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”***

A closer scrutiny of the evidence of Nicholas (PW3) demonstrates that he is an unreliable witness. To begin with it was his evidence that it was at night – the first time he saw the accused and that other person he called Simon was at 7.30PM. He alleged to have seen them at Kakoth stage as he drove by to take a client to a place called Lagala. He did not state whether there was any light at that time and how he identified those two. He did not tell this Court whether there was light at the stage and if so the source of the light. This omission and the fact that he did not say he stopped so as to confirm these were really the accused and Simon renders his evidence shaky. If indeed they were the ones he saw that would not be unusual as he himself told this Court that the accused was a tout. Secondly he admitted that when he saw the accused at the same place at 9PM it was dark and stated that without lighting one could not see anything. One wonders then how he could have seen all that he alleges to have seen while just driving by. Although he alleges to have seen the accused by the light of the motor cycle he did not state what direction the light beamed. For instance was the light beamed towards the direction the accused was standing because if it was not he could not see the accused. It is also instructive that when he first talked to the police about this matter he did not mention that a man lying down was wearing a green t-shirt. Nether did he mention it in his statement. Further since he does not say that he stopped at the scene even momentarily how did he see that a man was lying down? At what point or moment did he see the accused trying to touch the man. Moreover the man he had seen lying on the ground may have been someone else altogether. He after all did not move closer to see who it was. It could even have been Simon whom he had seen with the accused a few hours earlier. Who knows. The issue of the dark green t-shirt clearly came as an afterthought and its sole purpose was to link the man the accused allegedly saw lying down to

the deceased in this case and so is the allegation that the accused moved from the scene when he told him he had been sighted at the scene that night. His evidence is inconsistent and unreliable and does not point to the guilt of the accused person. In addition no evidence was adduced to prove the cause of death. This Court will therefore never know what caused the death of the deceased let alone whether the same was as a result of an unlawful act of someone and this with malice aforethought. Clearly the case against the accused would not succeed if he was to remain silent when put on his defence. Accordingly I find he has no case to answer and acquit him under Section 306(1) of the Criminal Procedure Code. He should be released forthwith unless otherwise lawfully held.

**Signed, dated and delivered in Kisumu this 9th day of February 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Miss Chelengat for the state

Mr. Indimuli for the Accused (Holding Brief for Mr. Otieno R)

The accused person

C/A: Serah Sidera