



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 33 OF 2015

(CORAM: J.A. MAKAU – J.)

REPUBLIC..... PROSECUTION

VS

ERICK OCHIENG OUNDO.....1ST ACCUSED

ALOYS OMONDI MAVINCE.....2ND ACCUSED

JUDGMENT

1. The accused **ERICK OCHIENG OUNDO** and **ALOYS OMONDI MAVINCE** are charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya**. The particulars of the charge are that on the 16th and 17th day of May 2015 at Kaugagi Udenda sub-location, Siaya Sub-County within Siaya County murdered one **ALICE ADHIAMBO AGARE**.

2. The Prosecution called nine (9) witnesses. PW1, No. 244907 Inspector Joseph Juma Muchele, OCS Uranga division, then told court on 17/5/2015 Snr. Sgt Nickson Atiega informed him he had received a distress call of a girl who had been murdered, her throat slit and that she was naked from the waist downwards. PW1, in company of Snr. Sgt Nickson Atiega and APC Nahason Mago then proceeded to the scene of the crime at around 7.10am, arriving there at 7.30am, whereby they found the body lying on ground facing upwards on a road. The neck had a deep cut, throat slit, her inner wear removed completely, however, placed on her left foot and her blue jacket beside her left hand and her long trouser blue in colour placed on her right side. PW1 using his mobile phone took some photos and informed OCS Siaya Police Station and Sub-county Administration Police Commander of the incident. That later CID came and took photos of the scene. They picked the body and took it to Siaya Referral Hospital mortuary. On 18/5/2015 at 7.00am, PW1 got information leading to who was with the deceased on the night of 16th/17th May 2015. PW1 instructed his officers to arrest the suspects. That they arrested Erick Ochieng alias Bouth, the 1st accused, who informed PW1, at the material night he was with Mavince, the 2nd accused. PW1 had him arrested. PW1 told court from the T-junction to where the dead body lay was about 50 metres and from junction to Mavince's house was about 100-200 metres. PW1 stated by then they had not received evidence on culprits. That the deceased was a girlfriend of the 1st accused. That following investigation, the police arrested eight (8) suspects who they handed over to CID, but he stated that they now have only two out of the eight suspects before the court, a matter that he was unable to explain.

3. During cross-examination, PW1 stated he recorded his statements before Cpl Mangoli and that he was not the Investigating Officer in this matter, however, he arrested 8 suspects. He stated that he did arrest Rael, daughter of the Assistant Chief because she had communicated during that night with Mavince and

that he arrested the 2nd accused because he was in company of the 1st accused at the material night.

4. PW2, Juliana Agare, mother to the deceased herein, testified that on 16/5/2015 at 7.00pm on arrival at her home she found her daughter who prepared their supper which they ate. That after eating, the deceased dressed up and told PW2 that she was attending a disco at Mahero. She dressed up in a long trouser and a jacket, blue in colour. That on 17/5/2015 at 6.00am, PW2 received a telephone call asking her whether her daughter Adhiambo had returned and she told the caller she had not. She later learned her daughter's body had been taken to Siaya Referral Hospital mortuary. PW2 testified that she does not know the two accused persons nor who caused the death of her daughter save that she knows her daughter was murdered.

5. PW3, Julius Otieno Odhiambo, cousin to the deceased testified that on 16/5/2015 at around 7.00pm he met the deceased at the gate carrying a polythene paper which she told PW3 it contained sweet potatoes. That on morning of 17/5/2015, he heard mother to Adhiambo, the deceased, crying and on going to enquire he got the information that Adhiambo had been murdered along the way. Later, PW3 went to the site of the murder where he found the body of the deceased slit at the neck lying on the road. The deceased's body was naked save the top part but all her clothes had been put beside her body. He noted the blue jacket and long jean trouser blue in colour; that the panty pink in colour had been removed and put on her legs. The clothes he noted were about 2 metres from the deceased body. PW3 waited for Chief and police to come to the scene and later accompanied them to Siaya Referral Hospital Mortuary where the deceased's body was received. PW3 told court he did not know any of the accused persons and he had not seen any of them before. During cross examination, PW3 stated that he saw the deceased last on 16/5/2015 and she was alone.

6. PW4, Elijah Owuor Omondi, a *boda boda* rider told court on 22/5/2015 at around 3.00pm, in company of Eunice Ogeno, he identified the body of the deceased Alice Adhiambo Agare to the doctor for the postmortem purposes. He stated they were informed the deceased had been raped and her body slit.

7. PW5, Dr. Philip Brian Okoth, testified that on 22/5/2015 he conducted a postmortem on the body of Alice Adhiambo under the escort of Cpl Mangoli (PW1) after it was identified by Elijah Owuor (PW4) and Eunice Otieno. PW5 noted the body had a deep cut wound on the left side of the neck with severed carotid artery and jugular vein underlying the area. That there was severe pallor present in the conjunctival membranes and buccal cavity mucosa. There was fracture of C4 vertebrae. That as a result of the examination, the doctor formed an opinion that the cause of death was due to haemorrhagic shock due to exsanguination from major vessels severed on the neck (cut wound). The doctor stated that other systems of the deceased were normal and that nothing abnormal was observed on her private parts. PW5 produced the postmortem reports as exhibit 1. On cross-examination, PW5 stated the injuries on the body of the deceased were only on the neck and that there were no defensive marks and that there was no sexual assault though the body was naked.

8. PW6, Rachael Akinyi Otieno, told court that on 16/5/2015 at around 10.00pm, Mavince the 2nd accused, called her over his phone asking her whether there was a disco in her area and she told him there was none. That she then went to sleep as she was at her parent's home. PW6 stated the 2nd accused is her relative and a friend. That on 17/5/2015 in the morning a lady who was working then at PW6's school informed her of the death of the deceased herein stating she had been murdered. That later while PW6 was at her sister's farm, Erick the 1st accused saw PW6 while he was riding a motorcycle and stopped as the two were schooling in the same school. PW6 proceeded to where the 1st accused had stopped, she noted his face had a bruise and a swelling. PW6 enquired from him what had happened, then the 1st accused told PW6 that on 16/5/2015, they were going to a disco in company of Mavince and the deceased following the sound of disco and on arrival at Silver Supermarket, they found the sound was still proceeding ahead, then they decided to return back home. That on the way back at Legio Maria Church between Nyandorera and Uranga, three people came in a motorbike and had masks on their faces. That the accused persons and the deceased Adhiambo decided to run away. That Mavince and the deceased decided to take cover at Mahero School on the right of the road facing Uranga direction but Erick ran to the left side. PW6 stated the 1st accused told her from where he was hiding, he could hear the

people saying: -

“Had we got hold of them we would have killed them”.

That the 1st accused continued hiding till the people left. That he later went and met Mavince and Adhiambo on the road. The accused told PW6 those people who had come wanted the deceased to be their girlfriend but she had refused. That on arrival near the house of Judy other people came out, one of whom aimed at him, missed and a panga dropped to the ground while the other person told his mate to leave Erick alive but another one hit him with rungu on the face, he then decided to take off leaving the deceased with thugs. PW6 stated the deceased did not mention whether at that moment Mavince was with them or not. PW6 stated the 1st accused told her he ran and went to sleep. PW6 stated the first accused told him the following day his brother told him that Alice was murdered and he and his brother proceeded to the scene and confirmed that was so. That one Winnie Owino, a classmate of PW6 around 4.30pm found PW6 and the 1st accused and told the 1st accused “*pole*” because she knew Adhiambo was Erick's girlfriend. They then parted their ways. On arrival at home, PW6 told her mother what Erick, the 1st accused had told her and her father, who is an Assistant Chief of Nyandorera 'A'. On 18/5/2015, PW6 was called by a class teacher and told to go to the school's Principal's office, where on arrival she found two APs, Erick the 1st accused and Winnie, who took them to AP's offices at Urunga at D.O's offices; then to Siaya Police Station and put into police cells. The following day they all recorded their respective statements. PW6 identified the accused persons (by pointing them) in the dock and by their names, as she had known them for a long time. PW6 stated she had no grudge with any of the accused persons.

9. During cross-examination of PW6 by Mr. Ochieng, Learned Advocate, for the accused persons, she testified that on 18/5/2015 seven of them were arrested and they included (1) Erick Oundo, 1st accused, (2) Mavince, the 2nd accused, (3) Winne Owino, (4) Mercy, (5) George Haeda, (6) Joshua Ombayo, (7) Francis and PW6. That out of the arrested persons, the 1st and the 2nd accused were the only people charged. PW6 stated that they were not told they were under arrest and why they were arrested. PW6 stated that she did not hear of any one having been arrested for having picked soil from the deceased grave. PW6 stated that when she was recording her statement she was told that she was going to be a witness in this case.

10. PW7, Mercy Achieng Ochola, told court that on 16/5/2015 at around 7.00pm she was on her way home from the school and on arrival home, Alice Adhiambo came to her home and found her parents, she asked PW7 to give her a long trouser as she wanted to attend a disco at Mahero and that she was also having a safari to Mombasa the following day, and that after using it she would leave it with her mother. PW7 gave the deceased a pair of jean trouser blue in colour. She stated that there were no *disco matangas* in the area. PW7 asked the deceased to go to a nearby disco at Ulanda but she told PW7 she was going to attend the one at Mahero. The deceased then carried the PW7's trouser in a polythene paper. PW7 also gave the deceased sweat potatoes before she left at around 7.45pm. The following day at around 6.30am, PW7's mother was called by a lady who told her somebody who they did not know had been killed nearby. PW7's mother proceeded to check on the deceased home. PW7 went later at around 8.00am to the scene and she discovered it was Alice Adhiambo Agare. PW7 noted she had a cut at her neck, that the long trouser and panty had been removed save for her blouse. She stated she found the deceased dead as per MFI-P2; PW7 identified MFI-P3 as her trouser which she had given the deceased. PW7 stated she knew the two accused persons before the incident and stated that she knows where they came from thus Ndiwuo. She stated from her home to where the deceased was murdered is about 2 kilometres and the deceased home was about 300 metres from where the deceased was murdered.

11. During cross-examination of PW7, she testified that she was arrested on 18/5/2015 at 10.00am with five others; and she was held at Police Station for three days. She stated on the day she gave the trouser to Alice Adhiambo, she did not see any of the accused persons.

12. PW8, No. 86640 PC Douglas Wamalwa of CID scene of crime department, Siaya County testified that 17/5/2015 while in company of Cpl Maurice Mangoli of CID Siaya, visited an alleged scene of murder at Ndhiwa village of Kaugagi Udenda sub-location, southwest Alego of Siaya County. The

alleged murdered person was known by the name Alice Adhiambo Agare. PW8 took four photographs at the scene; -

(a) photograph no. 1, giving general view of the pieces of clothes lying beside a pool of blood, (MFI-P2(b),

(b) photograph no. 2, showing general close up view of the body, MFI-P2(c),

(c) photograph no. 3, showing the general close up side view of the body, MFI-P2(d),

(d) photograph no. 4, showing general close up view of the deep cut on the neck of the deceased, MFI-P2(a).

PW8 stated being an officer gazetted by the Director of Public Prosecution vide Gazette Notice No. 217 of 28/12/2012, produced the four photographs and certificate and the photographic exhibits dated 15/5/2015 as exhibits MFI-P2(a), MFI-P2(b), MFI-P2(c), MFI-P2(d) produced as exhibits P2(a), 2(b), 2(c) and 2(d) respectively and certificate as exhibit 4. During cross-examination, PW8 stated he went to the scene of crime on 15/7/2015 but he did not know when the offence occurred but stated he went to the scene the next day after the incident occurred.

13. PW9 No. 48210, Cpl Maurice Mangoli, the Investigating Officer in this matter told court that on 17/5/2015 at around 8.00am he received a call from DCIO, Mr. Simeon Mwangela telling him to proceed to a scene of murder at Uranga area where the deceased had been murdered. PW9 in company of PC Wamalwa of the Scene of Crime, PC driver Kimeto proceeded to the scene of crime where they found the deceased lying dead on the road and having been stripped naked, her long trouser on left side of her body and the jacket at the right side. The inner panty removed and put on her left foot. PW9 observed the body had a deep cut on the left side of the neck, lying on her back. The scene of the crime was photographed and the body. PW9 drew a rough sketch plan. PW9 then interrogated the people around the scene who were very many. The body of the deceased was later taken to Siaya County Referral Hospital Mortuary. That on 19/5/2015, PW9 received a call from Uranga D.O's office informing him of arrest of eight (8) suspects and proceeded to collect them. PW9 also received from police officers two pieces of a long trouser which had been cut into two pieces. The suspects were interrogated at the DCIO's Office and out of the 8 suspects, PW9 found the two were the prime suspects. The two were thoroughly interrogated and it was found that on 16/5/2015 in the evening hours the accused had communicated with the deceased, texting her asking her to attend a prayer meeting. The 1st accused had borrowed the mobile phone of the 2nd accused and text the deceased. That the deceased text back telling the accused she was on the way going to the place where the two accused were, the accused met the deceased and the three walked upto 2.00am. That at their time of departing, the deceased insisted on going alone. That after the departure time, the deceased walked for about 50 metres before she was murdered. That from the point of departure, at T-junction area, the 2nd accused told PW9 they went home and slept as both used to sleep in one room. That on arrival at home they tried to call the deceased but there was no response. PW9 stated that he became suspicious that they knew what had happened. PW9 stated at the scene they found clothes which belonged to the deceased as she was naked. PW9 visited the home of the accused and from the home he recovered the upper piece of the trouser from their room where the two were sleeping. As the upper part of the trouser was found at the accused home matched the lower part of the same trouser recovered by the AP Olima and AP Uranga (MFI, P6). PW9 stated he compared the two pieces of the trouser and he found that they were from the same trouser. The colour and the age matched. PW9 stated the 1st accused stated when they met the thugs, the thugs cut the long trousers using a sharp panga however, on looking at the trouser it was a mere tear and not a cut with a panga. PW9 stated however, the accused did not tell him how the trouser was cut. PW9 stated the 1st and the 2nd accused took them to that place where that incident took place and found it was a deep quarry from which if he was thrown into the ditch would not have survived, which was before that T-junction and at that time all the three were together. That on 22/5/2015, the accused were taken to the hospital for mental assessment. That postmortem was also conducted on the same day and the body handed over to the deceased's relatives for burial. PW9 identified the jacket of the deceased which he recovered as MFI-

P7; jeans as MFI-P3; panty as MFI-P8; and produced the trousers as P.exhibit 3; pair of the trouser, MFI-P5 as exhibit 5, jacket MFI-P7 as P.exhibit 7; panty MFI-P8 as P.exhibit 8; the sketch plan, four sketch plan marked MFI-P9 produced as P.exhibit 9.

14. During cross-examination, PW9 testified that he arrested the two accused persons on 17/5/2015. PW9 stated he sought more time from court to detain the two accused pending further investigation. PW9 stated that no one witnessed the deceased being killed. PW9 stated he did not produce Safaricom data on the information he stated from the phone adding he failed to get the information on the pin number of the deceased phone adding he got the information from the accused. He stated that he did not get a mobile phone from the accused. PW9 stated that he did know who was the last person who was with the deceased before her death. He added no murder weapon was found. On re-examination, PW9 averred that last person seen with the deceased were the accused persons and that the deceased body was carried before it was photographed.

15. PW1, No. 244907 Inspector Joseph Juma Muchele was recalled and testified that he was among the first officers to visit the scene of crime and that he recovered two pieces of long trouser, khaki trouser beige in colour along Uranga-Nyandorera road at a place famously known as Legion. The piece of trouser was beside the road. PW1 stated after interrogating the accused persons, they told him some four men in motorbike attacked them at around that area whereby the 1st accused was pursued by the attackers, beaten, hit with a club and cut his trouser using a panga as they held it and cut it. PW1 stated they proceeded to accused home to check whether that was true. That at the Legion area, they found the piece of the trouser and as they were not sure they proceeded to the 2nd accused home. PW1 stated upon comparing MFI-P3 a piece of the trouser with MFI-5 he found them to be the same. He produced the said piece as P.exhibit 6. On cross-examination, PW1 stated that APC Jared Munongwe is the one who recovered the two pieces of the trouser and that PW9 was not with them when they recovered the two pieces of P.exhibit 6. PW1 stated that he did not visit the home of the accused person.

16. The accused on being put on their defence opted to give sworn statement and opted to call no witnesses. The 1st accused gave evidence as DW1. He denied the offence and stated the deceased was his girlfriend and he could not have killed her. DW1 told the court that he is a student at Dir. Kallison Secondary School in Form III and recalls on 16/5/2015 he was at his home with Mavince, the 2nd accused at Uranga from 9pm-10.00pm when Rachael (PW6) called them through a mobile phone of Mavince telling him there was a disco at their home at Mahero and asked them if they could go. DWI said he would go with Mavince and she asked DW1 what about his girlfriend Alice Odhiambo, the deceased. DW1 confirmed he would go with his girlfriend. DW1 called Alice Adhiambo and at around 10.00pm they picked her on the way. DW1, the 2nd accused and Alice Adhiambo proceeded to where Rachael (PW6) had told them there was a disco and even to Rachael's place and found none. DW1, the 2nd accused and deceased decided to return to their home at Uranga using the main Uranga-Nyandorera road, thus between 11.30 pm-12.00pm and on reaching at Legion area, a motorbike which was following them passed them and stopped ahead of them. They apprehended danger, and the 2nd accused and the deceased ran towards the right side of the road as DW1 ran to the left side as the people who were with the motorbike were armed with rungu. That they were three in number; and were wearing marvins and boots. That the people did not speak to them but as the 1st accused was running away, he fell into a ditch which was 50 metres from the road. DW1 was injured on the head. The people pursuing him caught up with him, shone torch light on him and told him to come out of the ditch. He came out and was robbed of his torch and money. He was beaten by the attackers using the rungu after which they told him to go away as they left in their motorbike towards Uranga market. That he sat beside the road as he had no strength to walk. That after 20 minutes he heard Mavince, the 2nd accused, calling him and he also heard the voice of the deceased. The two came to where DW1 was and the three took the route towards their house. On reaching at the T-junction, Alice Adhiambo stopped and DW1 asked her to accompany them to his place but she declined saying she was having a trip to Mombasa and asked DW1 to go and sleep as she promised to see him the following day before she left for Mombasa. DW1 stated the deceased was his girlfriend for 1year and that he had sex with her many times before. He then hugged her and told her to have safe journey home and all that time the 2nd accused was there with them. DW1 stated that when

the deceased and the 2nd accused came where he was sitting after the attack he told them what had happened to him as they told him where they had hid themselves. That after they parted, the 2nd accused went to sleep at DW1's home where they used to stay together. That they arrived home at 1.00am. DW1 stated after he washed, he picked the phone of the 2nd accused and text Alice Adhiambo asking her whether she had arrived safely. The message indicated it was sent but he did not get a reply.

17. The following day at around 7.00am, DW1's cousin Erick Ochieng came to his place and enquired from him whether Alice Adhiambo was still his girlfriend and asked him when he was with her last. On answering that he was with her yesterday, his cousin shook his head and told him she had been murdered. DW1 did not believe him, he got shocked and returned to his house. Later, he sat on the verandah from where he heard people talking about the deceased's death. He proceeded to the scene at around 10.00am with his nephews, where he found many people and police officers. He saw the body of the deceased then returned home. DW1 then informed his mother what had happened to him. That his mother recorded statement with police. On 18/5/2015, he was arrested from the school, taken to AP's Camp at Urunga where he found other suspects, all of whom were taken to Siaya Police Station where they were detained for 1 week. The phone of Mavince, the 2nd accused, he stated was taken by CID and DW1 informed them of the text message he had sent to the deceased. DW1 concluded by stating, he never killed his girlfriend and that he can't kill, adding from where they parted, at the T-junction to the place the deceased was murdered was about 60 metres and after parting with the deceased he did not hear of any screams.

18. During cross-examination, DW1 told court that he received a call from Rachael (PW6). That they picked Alice Adhiambo on the way as they had agreed to go to Mahero. That they went to Mahero and found that there was no disco. DW1 stated the attackers had covered their faces and the route they used back home was different from the initial route to Mahero. DW1 stated, that night they were attacked once by three people on a motorbike. DW1 stated he could not recall PW6 saying he had told her they had been attacked twice, admitting that he told PW6 what happened at the material night. DW1 stated he does not recall taking PW1 to the scene where he fell in a ditch but he took CID officers. DW1 stated the lower part of the P.exhibit 5 thus exhibit 6 was collected from where he fell. He stated that was the trouser he had worn on the material date. He stated that his leg was not injured at the time of cutting of the trouser. He stated he did not tell the court in his evidence in chief about the cutting the trouser as he did not see its importance. DW1 stated they parted with Alice at around 1.30pm and that he found it risky to let her go home alone and forced her to go to his place but she told them she was not scared as she was used to going to her place at night alone. DW1 stated though they were two men they did not see the need to follow the deceased in her covering the next ½ kilometre alone. DW1 stated though he was injured he did not go to the hospital for treatment but decided to bear the pain. DW1 stated he delayed in going to the scene of murder for 3 hours because he did not believe the deceased had been murdered. On re-examination, DW1 stated he delayed to go to the scene of murder as he did not believe it. DW1 stated exhibit P5 and 6 was his and that part of it was recovered at the scene of his attack and the other at his house by CID and that he is the one who led CID to the scene where lower piece of his trouser was recovered.

19. DW2, Mavince Omondi Aloys, the 2nd accused denied the offence and told this court that on 16/5/2015 at 9.00pm, he left his home for the home of the 1st accused, Erick Ochieng and met him at 9.30pm in the room as they used to sleep the two of them next to his home as their homes were close and they are neighbours. DW1 borrowed DW2's phone to call someone. He then told DW2 that his schoolmate talked of a disco in their place called Mahero. DW1 then asked DW2 to escort him to go and pick his girlfriend Alice Adhiambo, the deceased herein. That they left and met her near her home, the three then proceeded to Mahero and on arrival they did not find any disco. They then decided to return home, that was around 10pm-11pm but that time they opted to follow the main road. That at Legion a motorbike passed them twice and DW1 said he knew the motorbike and called the name Earnest who responded and they left and then passed them again. That another motorbike passed them and stopped. It had three people who came out forcing the 2nd accused and the deceased to run off the road on the right side of the road and proceeded to hide in a house under construction. That 20 minutes after the motorbike left, DW2 and the deceased went to look for Erick Ochieng, the 1st accused and found him sitting beside the road crying and he told them the people who had the motorbike had injured him and they noted his

head was swollen. DW1 explained to them what had happened and the three of them left for home. That at the T-junction Alice Adhiambo stopped and told them she wanted to go home. DW1 told her it was late and invited her to his place but she declined telling them, she does not fear anything and as she had a trip to Mombasa, she wanted to go and prepare herself, she then hugged Erick Ochieng, the 1st accused and they wished her safe journey home. DW2 stated he had known the deceased as a girlfriend of the 1st accused for 1 year. DW2 and DW1 went to their place and just before they slept, Erick washed, borrowed DW2's phone and printed a message as DW2 watched, that was around 1.30am. That the following day, DW2 woke up early at around 6.30am and proceeded home and went to cultivate at the shamba from where left at around 10.00am. That as he was working in the shamba, he would hear villagers talking of someone who had been murdered. That he went to Uranga at Erick Ochieng's place at 10.00am from where Erick Ochieng told him that his cousin had told him Alice Adhiambo had been murdered. DW2 picked his phone from Erick Ochieng and discovered the message he had sent to Alice Adhiambo had not been replied to. DW2 did not go to the scene of murder as the body of the deceased had already been picked. On 18/5/2015, DW2 was arrested by APs from Uranga, taken to AP's camp and later to Siaya Police Station where he found other 8 suspects. He was held at the police station for 4 days. DW2 stated from the T-junction to where the deceased body was lying was about 60 metres. He stated his phone was taken by CID and was never returned to him. DW2 stated he opened the phone for police and gave them his PIN number 1996. DW2 told the court he did not kill Alice Adhiambo. He stated among the arrested suspects was one Francis Ododo who was a former boyfriend of Alice Adhiambo. He stated on the material night he did not see who murdered the deceased.

20. During cross-examination, DW2 stated on the night of 16/5/2015 upto 17/5/2015 morning he was with Erick Ochieng, the 1st accused. He stated that they picked Alice Adhiambo along the road. He stated he did not hear the 1st accused talk of the motorbikes following them nor calling one Earnest. DW2 stated he used a torch light to see injuries sustained by Erick Ochieng when he returned to where he was sitted. DW2 stated when they parted ways, they thought the deceased would reach home safely saying there were many homes along the road. He stated the deceased was murdered near a certain home along the road. DW2 stated he did not hear the deceased screaming for help after they parted. DW2 stated on hearing the death of Alice Adhiambo, he went to wash first not because he did not see any urgency. He denied that he had planned with Erick to kill the deceased.

21. At the close of the defence case, Mr. Ochieng, Learned Defence Counsel, submitted that the Prosecution did not prove their case beyond reasonable doubt as required by law whereas Mr. E. Ombati, Learned State Counsel, submitted that the Prosecution had proved their case beyond reasonable doubt and urged the court to find the accused guilty of murder of Alice Adhiambo and convict them accordingly. I have very carefully considered the evidence adduced before me, which I have deliberately reproduced at great length, I have considered the evidence, the submissions by both counsel and authorities relied upon in support of rival stand taken by each side and shall proceed to consider the respective issues raised thereto.

22. The two accused persons face a charge of murder contrary to **Section 203 of the Penal Code**. **Section 203 of the Penal Code** defines murder as follows: -

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

23. In succeeding in proving the charge of murder the prosecution has to prove facts which establish malice aforethought; which is a very important ingredient for an offence of murder. **Section 206 of the Penal Code** sets down the facts which constitute malice aforethought as follows; -

“206. Malice aforethought shall be deemed to be established by Malice aforethought. Evidence proving any one or more of the following circumstances:-

a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) an intent to commit a felony;

d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

24. To prove a charge of murder, the prosecution has a duty to establish the following ingredients: -

a) Death of the deceased and its cause.

b) That the accused caused the death through an unlawful act or omission.

c) That the accused possessed an intention to cause harm/kill or possessed malice aforethought.

25. Whether the prosecution proved the death of the deceased and the cause of her death? PW1, No. 244907 Inspector Joseph Juma Muchele, PW2 mother to the deceased, PW3 cousin to the deceased, PW7 Mary Achieng Achola, PW8 No. 86640 PC Douglas Wamalwa and PW9 No. 48210 Cpl Maurice Mangoli went to the scene of murder and found the deceased body lying on the road dead. PW8 took photographs of the deceased body P.exhibits P2(a), (b), (c) and (d) and produced certificate as exhibits 4. PW9 in company of other police officers and PW3, cousin to the deceased, took deceased's body to Siaya County Referral Hospital Mortuary. PW4, Elijah Owuor Omondi on 22/5/2015 in company of Eunice Otieno accompanied by PW9 identified the body of the deceased to Dr. Philip Brian Okoth who conducted postmortem on the body of the deceased and produced postmortem report as P.exhibit 1. The doctor's evidence is that the body was identified to him by Elijah Owuor, PW4 and Eunice Otieno. The doctor's evidence corroborated the evidence of PW1, PW2, PW3, PW4, PW7, PW8 and PW9 on the death of the deceased; who saw the deceased body being taken to Siaya Referral Hospital Mortuary. The death of the deceased at any rate is not in dispute. PW5 who completed the postmortem report exhibit P1 stated the cause of death of the deceased was due to haemorrhagic shock due to exsanguination from major vessels severed on the neck (cut wound) which is consistent with the injuries sustained by the deceased as disclosed by PW1, PW2, PW3, PW6, PW7, PW8 and PW9. I therefore find and hold that the Prosecution proved the death of the deceased and its cause.

26. Who caused the deceased's death? Accused No. 1 and Accused No. 2 totally denied having committed the offence. The two accused stated they parted with the deceased at T-junction and wished her safe journey home. That they went home as the deceased proceeded to her home and they did not hear any screams for help after parting with the deceased, only the following day to receive the sad news of the murder of the deceased about 60metres from the T-junction where they parted with her. PW9, the Investigating Officer told the court that the accused were suspected as they were the persons to be with the deceased before her death, however, he does not know the last person who was with the deceased. In this case, there is no single witness who witnessed the commission of the offence.

27. In the instant case, both the Learned Prosecution Counsel and the Defence agree that the prosecution case is purely based on circumstantial evidence. The evidence on record which the defence did not deny is that on the material night of the incident as from around 10.00pm upto 1.30am, the accused and the deceased were together when they left for a disco at Mahero area, and after missing it, they decided to return home, but on the way they were attacked by unknown three people in a motorbike. The deceased and the 2nd accused escaped to different direction whereas the 1st accused to another direction. The 1st accused was attacked and his trouser cut, a portion of which was recovered by police officers after the 1st accused took them to Legion site and the other piece recovered from the accused's place. That the three parted at the T-junction and the deceased was found on the following day murdered at 60 metres from the T-junction. No eye witness witnessed the murder and no murder weapon was recovered from the accused persons. PW9, the Investigating Officer stated he suspected the accused persons as they were with the

deceased during the night of attack before they parted at the T-junction.

28. In **Sawe V Republic (2003) KLR 364**, the court stated as follows:-

a) “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt;

b) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on:

c) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

29. Further in the case of **Abanga alias Onyango V Republic, Criminal Appeal No. 32 of 1990 (UR)**, the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence as follows: -

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

30. In the case of **James Mwangi V Republic (1983) KLR 522**, the Court of Appeal set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of guilt of an accused person. The court in that case held as follows: -

“in a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused’s guilt from the circumstances that there are no other co-existing circumstances which would weaken or destroy the inference.....”

31. In the instant case, PW1, PW6 and PW9 stated the accused persons told them that they had proceeded with the deceased to a disco at Mahero but did not find any discos and returned home, however, at Legion, they were attacked by three people in a motorbike, forcing them to flee to different directions; the deceased and the 2nd accused fled to the right side whereas the 1st accused to the left side. The 1st accused fell into a ditch from where the attackers found him, told him to come out, he was subsequently assaulted, robbed and his lower part of his trouser cut and the piece exhibit P6 left there. PW1 and PW9 stated the accused led them to Legion area from where they recovered exhibit P6: which matched with exhibit P5 recovered from the accused home. The accused and the deceased subsequently departed at the T-junction, the sketch plan produced by PW9, exhibit P9 indicates the site of murder to be about 60 metres from the junction. The 1st accused told PW6 how he sustained injuries after the attack. PW6 stated the 1st accused told her they were attacked in company of the deceased. The arrest of the accused persons and six other suspects took place on 18/5/2015. The accused persons told PW1, PW6 and PW9 that they parted with the deceased at the T-junction and proceeded to their home in a different direction and did not hear any screams nor did they mention meeting anyone. It was at around 1.30am in a dark night. The deceased left on her way home alone after telling the accused she did not fear going home alone. In my view, the chain of events from the time the two picked the deceased upto to the T-junction was not broken. The three were attacked at Legion area once. The evidence of PW6 that the 1st accused told her they were attacked twice is an evidence of a suspect and it is evidence which PW6 stated when the 1st accused told her so, they were only two of them; such evidence in my view require corroboration

from an independent witness. Independent evidence is lacking in this case and I find that it would be unsafe to put any weight on evidence of PW6, I find as submitted by defence counsel, the 1st accused did tell the court really what actually happened. I have considered what PW6 stated the 1st accused told her and have noted other than PW6 stating the first accused told her that they were attacked twice, the 1st accused did not give any self-incriminating statement to her. There is still unclosed gap as to what had occurred between the departure point, that is between the T-junction and the point of murder; a distance of about 60 metres.

32. The concatenation of events of the short interval between the point of departure thus the T-junction and point of murder are circumstantial evidence that this court has to take into account before arriving at its conclusion in this matter. On evidence on record exhibit P6, produced by PW1 was recovered at Legion area, the area where accused claimed to have been attacked. It is a different area from the area where the deceased was murdered. There is no dispute, exhibit P6 was torn part of trouser exhibit P5 belonging to the 1st accused. The prosecution did not lay down any evidence to connect the tearing or recovery of exhibit P6 with the murder of the deceased. The exhibit P6 did not place the accused persons at the scene of murder as the exhibit was not recovered at the scene of murder. Further no forensic test was conducted on exhibit P5 and P6 to connect the accused in any way with the death of the deceased. The way the deceased was murdered and especially by severing carotid artery and jugular vein by cutting the deceased's neck with a sharp object and from a close range, the perpetrator's clothes must have been soiled with the deceased's blood. The trouser exhibit P5 and P6 was the trouser the 1st accused was wearing yet PW1 and PW9 did not mention that any of the parts of the accused trouser were stained with blood. That there is evidence on record that the 1st accused sent a text message to the deceased through the 2nd accused's mobile phone as the deceased was using the 1st accused's phone at the time of the murder. The prosecution did not obtain the data from service provider; thus the Safaricom data to check on the defence case that there was communication after departure. The prosecution did not bother to even avail the two phones. The 2nd accused stated he even gave his phone to the police to check on his allegation of the message sent to the deceased, the police did not bother to get sms from the phone which the accused stated belonged to the 1st accused and was in possession of the deceased at the time of the murder. No efforts were made to get the data on the said phones from the Safaricom which would have helped to disclose who might have used the same, during and after the murder of the deceased. The whereabouts of the said phones has to date not been disclosed by the police after the incident. The prosecution in this case did not record evidence from the occupants of the nearby homes which were about 300metres from the scene of the crime. There is also evidence from PW7 that one of the suspects by the name Francis Oduor Odipo, a former boyfriend of the deceased, was arrested for demanding the deceased clothes after her death but there is no evidence what transpired thereafter and why he was not charged with this offence or any offence. The state submitted evidence of the accused persons was inconsistent and contradictory and should not be believed. The two accused persons appeared before me I observed their demeanor. They did not strike me as incredible witnesses, but I noted that the first accused did not have an eye for details and dealt in his evidence with what he considered relevant to the case whereas the 2nd accused was particular and keen on minor details and with intent to make his story flow and cover all details whether they are relevant or not. That to me, did not amount to contradictions or inconsistencies but I took it as a style of narrating the events from one person to another as humans beings are different and perceive things differently.

33. The prosecution urged the accused avoided giving direct evidence and urged the court to consider the accused behavior at the time of the alleged offence and after. The prosecution urged the accused person delay to proceed immediately to the scene of murder after getting the information of the deceased, who they had parted with at early hours of 17/5/2015 had been murdered should be taken as an inference of guilt. The 1st accused delayed for 3 hours before he went to the scene of murder whereas the 2nd accused on realizing the deceased had been murdered, while at the shamba, where he was cultivating, he decided to go and wash before going to the scene. The 1st accused stated he did not go to the scene immediately because he was shocked and did not believe it. The prosecution did not in this case, call a psychologist to explain to the court what can make of such behavior but that aside, different people behave differently when faced with sad news affecting their loved ones, some become hysterical, whereas others keep to

themselves and withdrawn; others may not wish to go to the scene of crime while others go to see the deceased. I find that it would be unsafe and incorrect to draw an inference on the accused's behavior faced with the result of the murder of a girlfriend of the 1st accused and a relative and cousin to the 2nd accused.

34. Having said that much, I find that the chain of events from the time of departure at the T-junction between the accused and deceased upto the point of murder were broken, the distance of about 60metres in a dark night and taking into account the accused were also moving from the T-junction to another direction, the court cannot conclude that the accused were the only persons who could have attacked and killed the deceased. From the evidence on record, I have found that there are other co-existing circumstances that would weaken or destroy the inference that the accused were one of the persons who attacked the deceased. The record show that the accused persons were arrested and explained to the police what they knew, police visited their home and the site, recovered exhibits but none of the exhibits recovered placed the accused at the scene of murder. The prosecution did not adduce any evidence placing any of the accused at the scene of murder. The prosecution in this case failed to prove facts which would justify the drawing of the inference of guilt on the part of the accused by putting in facts to the exclusion of any other reasonable hypothesis of innocence of the accused persons. The accused persons in a criminal case do not have the burden of proving their innocence. PW9 stated that they did not have evidence as to who killed the deceased but the accused were arrested on suspicion. Suspicion, however, strong it is cannot be a basis for conviction.

35. In this case, I find that a young life was brutally taken away through the hands of a cruel murderer or murderers in a circumstance that left no doubt that a human hand or hands was or were involved. The police were informed in good time after the murder, commenced their investigation, however, upon careful consideration of the evidence gathered by the police and availed before this court, I noted there are so many loose ends that deserved consideration and which upon consideration makes it difficult, if not impossible for a court of law, to convict upon reliance on the same. I therefore, find that the evidence on record do not point directly at the two accused persons, as the persons who caused the death of the deceased.

36. Whether the accused had malice aforethought? PW6 told this court, the accused told him during the night of 16/17th May 2015, they went with the deceased to Mahero area looking for a place where there might have been a disco. PW6 stated that the deceased was a girlfriend of the 1st accused. DW1 admitted that the deceased was his girlfriend. DW2 also confirmed that the deceased was a girlfriend of the 1st accused. PW2, mother to the deceased and PW3, cousin to the deceased told the court they did not know any of the accused persons. The prosecution did not call any evidence to show that at the material time the deceased and accused travelled together the whole night beyond the T-junction point. There is no evidence of there having been any misunderstanding or quarrel or arguments between the accused and the deceased. The accused stated that there had been no bad blood between the 1st accused and the deceased nor any between the two accused and the deceased. The deceased was a girl friend of the 1st accused for 1 year and they were very intimate as per evidence of the 1st accused. The 1st accused on being informed by PW6 of a disco at Mahero and on her invitation he called the deceased to accompany him at a short notice and asked his room mate and neighbour, the 2nd accused to accompany him which both accepted indicating the intimacy between the deceased and the 1st accused. The prosecution did not call evidence to rebutt the accused's defence, that they were in good terms and there existed no grudge between the deceased and the accused. I find therefore no evidence on record that the accused either by themselves or with another or others, planned to commit the offence as urged by the prosecution. For the above reasons, I find that the accused did not have the reason nor intention to cause the death of the deceased. I further find therefore, malice aforethought has not been proved.

37. The upshot is that I find the prosecution has failed to adduce evidence to prove the case to the required standard of proof, thus beyond reasonable doubt. In the circumstances, I give the accused the benefit of doubt and acquit the 1st accused and the 2nd accused persons accordingly. The accused are set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 2ND DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 2ND DAY OF MARCH 2017.

In the presence of:

Mr. Ochieng: for the Accused

Mr. E. Ombati: for State

The 1st Accused - Present

The 2nd Accused - Present

Court Assistants:

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

J.A. MAKAU

JUDGE