



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL CASE NO. 52 OF 2013**

**BETWEEN**

**REPUBLIC .....PROSECUTOR**

**AND**

**ZADOCK WILLIAM AYOO OLELO.....ACCUSED**

**JUDGMENT**

1. The prosecution case is that on the night between 31<sup>st</sup> October 2013 and 1<sup>st</sup> November 2013 cattle raiders attacked Boarder II Sub-location of Awasi Location and made off with cattle. When alarm was raised, the villagers gathered to pursue the raiders and while in hot pursuit of the raiders, one of the villagers was killed. Consequently, on 4<sup>th</sup> November 2013, this court was informed that **ZADOCK WILLIAM AYOO OLELO** (“the accused”) had murdered **LAWRENCE OCHOLLA BUMBE** (“the deceased”) contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The prosecution marshalled 6 witnesses while the accused gave sworn testimony.

2. On the material night, Samuel Nyage Mbogo (PW 3) was awoken by barking dogs. When he went to check, he found that his cattle had been stolen. Together with his wife, they started raising alarm causing people to come and gather at his homestead. The people formed two groups to pursue the raiders. One group went proceeded on one side while the a group comprising PW 3, Jomo Joash Olale (PW 1), Elly Orende Mbogo (PW 2), Samora Machel Omollo (PW 6) and the deceased decided to go toward the border of the former Nyanza and Rift Valley Provinces.

3. As the group proceeded, the heard the noise of cattle hoofs along a murram road. They were suddenly confronted by a group of people who flashed torches at them. PW 2 recalled that he and the deceased raised their torches whereupon he saw the accused. The group started hurling stones at them and one of the stones hit him on the knee disabling him for a while. The others scampered for safety while he remained in the sugar cane plantation. As the deceased tried to run, he was caught in a bush and started crying for help as the assailants beat him. The deceased was flashing his torch at the deceased and saying, “*Ayoo why are you killing me, forgive me.*” One of the assailants, who was nearby saw PW 3 with the torch in his pocket and threw a stone at him whereupon PW 3 decided to run away.

4. PW 2 testified that when he flashed his spotlight, he saw the accused holding a white cow and when the raiders started throwing stones at them and they also retaliated by throwing stones at them. As they scattered, PW 2 went ahead of the deceased who remained behind. He told the court that the raiders caught up with the deceased and started assaulting him. PW 2 told the court that he heard the deceased asking the accused why they were killing him. PW 2 run away as he raised alarm for others to come and rescue them. He further testified that the deceased was dragged to the road by the assailants.

5. On his part, PW 3 testified that when he flashed his torch at the raiders he was able to see the accused holding a white bull but could not recognise the other attackers. When the raiders threw stones, he ran sought refuge at a nearby homestead. PW 6 testified that when the raiders shone torches at them and started throwing stones, he ran to the nearby sugar plantation where he heard the deceased shouting three times, “Ayoo, why are you killing me.” After the deceased went silent, his group gathered around the deceased who was injured and was on the road. The police sooner arrived and took the deceased away to hospital where he succumbed to his injuries.

6. The accused gave sworn testimony. He denied that he was part of the group of raiders and that on the material night he was at home and nothing unusual happened. He testified that on the next day at about 10.00am, while he was grazing cattle, that PW 2, PW 3 and PW 6 came to see him and told him that they wanted to conduct some investigations regarding some stolen cattle. The proceeded with him to Ongoro Co-operative Offices where he was assaulted on suspicion that he had stolen a cow. As a result, he had to be taken to hospital. After hospital he went home but was later arrested by police from Ahero Police Station who later charged him with murder. He accused PW 6 of bearing a grudge against him.

7. To prove murder the prosecution must establish three key ingredients beyond reasonable doubt: first, the prosecution must prove the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

8. The testimony of PW 1, PW 2, PW 3 and PW 6 is that the deceased accompanied them on a search for the stolen animals whereupon he was assaulted and died as a result. The cause of death was confirmed by the post-mortem performed by Dr Macrine Adhiambo Olwala (PW 5) on 5<sup>th</sup> November 2013 after the body was identified by John Otieno Ogada (PW 4). PW 5 observed several laceration and abrasion on the body. Significant injuries included a fracture of the tibia and fibula, fracture of the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> ribs of the right side, massive bleeding in the rectum, superficial liver lacerations, fracture of the skull horizontally from ear to ear and scalp haematoma. She concluded that the cause of death was brain hypoxia secondary to severe head injury.

9. The prosecution case against the accused is direct evidence of identification PW 1, PW 2, PW 3 and PW 6. It not in dispute that the incident took place at night in circumstances that call for careful examination of the evidence to exclude the possibility of mistaken identity. Such evidence must be watertight before a court can return a conviction (see ***Abdalla Bin Wendo & Another v R [1953] 20 EACA166***, ***Wamunga v Republic [1989] KLR 42*** and ***Maitanyi v Republic [1986] KLR 198***). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See ***R v Turnbull [1967] 3 ALL ER 549***). This requirement is, however, relaxed when dealing with the case of recognition because, “*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*” (see ***Anjononi & Others v Republic [1980] KLR 59***). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

10. Where the assailant is a person known to the witnesses then it is expected that the witness will report the accused at the first available opportunity. In ***Simiyu & Another v Republic [2005] 1 KLR 192***, it was stated there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises. If the name is not given to the police at the first opportunity then giving the name subsequently is either an afterthought or the evidence given is not reliable and tends to weaken the evidence. (see ***Morris Gikunda Kamunder v Republic NYR CA Criminal Appeal No. 332 of 2012 [2015]eKLR***).

11. It is against these legal precepts that the evidence of identification must be examined to determine the quality of evidence and see whether it meets the standard necessary to support a conviction. In their testimony, PW 1, PW 2 and PW 3 all testified that they saw the accused whom they recognised. They also

confirmed that they recorded their statements on the morning of 1<sup>st</sup> November 2013. However, when their statements were put to them in cross-examination they all confirmed that the accused was not named as the assailant. When pressed on the issue, in cross-examination, PW 3 told the court that he only identified the accused by his voice. Since the prosecution did not call the investigating officer to confirm the position of the first statements recorded by the key witnesses, I must conclude that the quality of the evidence of identification cannot be relied upon to support the accused's conviction.

12. The other piece of evidence the prosecution relied upon to support its case against the accused is the statements that the deceased made while he was being assaulted. PW 1, PW 2 and PW 6 heard the deceased name the accused as the person who was assaulting him. These statements, having been made by the deceased as he was being assaulted and prior to his death, fall within the definition of dying declarations and are admissible under the provisions of **section 33(a)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Such statements must however be received with the necessary caution and circumspection although it is not a requirement of law that they must be corroborated to support the conviction (see *Choge v Republic* [1985] KLR 1 and *Pius Jasunga s/o Akumu v R* [1954] 21 EACA 331). Although the evidence is clear that the witnesses knew the deceased, I am hesitant to rely on the statements of PW 1, PW 2 and PW 3 as I am not sure they were telling the truth considering the conclusion I have reached regarding evidence of identification. This is a case where it is difficult to rely entirely on the dying declaration without corroboration.

13. I therefore find and hold that the prosecution has failed to prove the charge of murder against the accused **ZADOCK WILLIAM AYOO OLELO**. I therefore acquit him of the murder of **LAWRENCE OCHOLLA BUMBE**.

**DATED and DELIVERED at KISUMU this 11<sup>th</sup> day of May 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Anyul, Advocate for the accused.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.