



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

**CRIMINAL CASE NO. 25 OF 2016**

***(MURDER)***

**STATE.....PROSECUTOR**

**VERSUS**

**KEVIN OUMA OUMA .....ACCUSED**

**JUDGMENT**

1. The Accused **Kevin Ouma Ouma** is charged with an 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 4<sup>th</sup> day of July 2015, at Omia Mwalo Sub-Location, Rarieda Sub-County within Siaya County, murdered one **WELLINGTON NDEGE**.

2. The Prosecution in support of the charge called seven (7) Prosecution Witnesses. The facts of the Prosecution's case are that **PW1 KEVIN OMONDI ONYANGO** on 4.7.2015 at around midnight he was at a funeral at Aduoyo for a person he did not know, that he left for his home in company of Danny Ochieng, Vitalis Oduor Odhiambo (PW2) Simon Damba, Kevin Onyango Ogolla and Wellington Otiango, the deceased and on reaching at a junction they split into two groups. The first group comprised of Danny Ochieng, Vitalis Oduor Odhiambo (PW2) and Kevin Onyango Ogol, while the other group comprised of Kevin Omondi Onyango (PW1), Simon Damba and Wellington Otianga, deceased, Simon Damba was ahead of the group followed by Wellington Ohanga and Omondi Onyango (PW1) then Wellington Otianga, who was about to branch and join the other group called PW1 four times, thus Omondi!, Omondi! Telling him somebody had struck him with a knife, that at that time, he was about 25 metres from PW1. PW1 then called Danny Ochieng three times, who together with the group came to where PW1 was running. That the person who struck Wellington Ohanga ran away. That PW1 saw someone running away in a maize plantation. He saw the person with the aid of moonlight but he could not recognize someone unless one was very close. That Danny Ochieng, his group and PW1 started chasing the person from the gate of PW1's parent's home and as they chased the person he fell down after a distance of about 100 metres from the scene where he had struck the deceased. That after Danny Ochieng caught up with the person he asked him with what he had struck the deceased with and he said nothing. Danny Ochieng asked Vitalis Oduor Odhiambo (PW2) for his mobile, switched its light on and noted the person had struck the knife on the ground. Danny Ochieng asked the person whether that was the knife he used to strike the deceased with but he did not reply, that nearby there was a person who came out and took away that person who had struck the deceased. The person who took that person away was Fredrick Omondi Odhiambo. PW1 and his group then returned to where Wellington Otanga was.

3. PW1 testified that he saw the person they caught up with very clearly as he was a person known to him. He gave his name as "Daddy". He stated he had known him for 4 years being his school mate at

Aduoyo Primary School. He stated the person was wearing a white trouser of Khaki. That the knife they recovered was carried by Danny Ochieng, later taken by Okeyo. He described the knife as a small sword, he identified the knife as MFI-P1. That on arrival at the place, where Wellington Ohanga was, they found other people and they organized to have the deceased taken to the hospital. The deceased was taken to Abidha Health Centre. PW1 noted that before the deceased was taken to the hospital he was bleeding. The following day, PW1 heard, Wellington Ndege died at Madiany Hospital. He stated he saw "Daddy" the following day being taken to the hospital. He identified "Daddy" by pointing at the Accused at the dock. He stated he came to know his name at school as Kevin. He stated the deceased, who was his friend was buried at Kokise. That at the time of his death he was a student at Kokise Secondary School.

4. On cross-examination, PW1 testified, that at the material night it was a dark night and that PW1 and his team mates did not have torches. PW1 admitted he did not witness the accused stab the deceased. He stated that Wellington Ndege did not tell him he had been stabbed by the deceased, adding, he did not know whether Wellington Ndege, the deceased, knew the Accused. He added that in the maize plantation, one could see somebody from the waist level. He admitted that he did not see Kevin. He stated the accused at the material night had a white trouser and that he saw blood on the accused trouser.

5. PW2, Vitalis Oduor Odhiambo told Court that on 4.7.2015 at midnight he was from funeral in company of Danny Ochieng Kevin Omondi (PW1), Simon Damba, Kevin Omolo and Wellington Ohanga (deceased). That on the way at the junction they split into two groups. In one group it comprised of himself, Danny and Simon whereas the other comprised of Kevin Omondi and Wellington Ohanga. That as they proceeded on they heard someone calling Danny and they proceeded there, that PW1 told them someone had stabbed Wellington Ohanga with a knife and they saw someone running away, wearing white clothes, followed "Daddy" who was running away from the scene. That though it was a dark night one could see someone in white clothes, that the person they followed fell down after chasing him for a distance of 10 metres. They questioned him about the stabbing of the deceased, he denied, that the brother to Danny came to the scene and asked Danny what was wrong, he was informed, then Fredrick Omondi came and told them to leave "Daddy" alone. That they got phone light switched on and he saw a knife on the ground. That the people present who saw the knife stuck on the ground, were Danny Fredrick and Daddy. The knife had then been struck on the ground. Danny Ochieng removed the knife and later gave it to Okeyo. PW2 identified the knife as MFI-P1 which he stated was stained with blood. PW2 testified when they caught up with the person they were chasing he was able to recognize him as "Daddy", who he had known for a period of 7 years at Aduoyo Primary school as both of them were in the same Primary school. PW2 stated, when they return to where Wellington Ndege was lying he saw blood oozing from his neck and he stated he did not hear him talk. The deceased was then taken to Abidha Health Centre, that PW2 learned of his death on the same day while at the hospital. That he saw Daddy being carried by the mob on the same night, identify the accused in Court by pointing at the Accused from the dock and states he is "Daddy."

6. On cross-examination of PW2 he testified that on the material night it was very dark, however, someone in white clothes could be seen clearly. That on their way home they did not see the Accused ahead of them and that he did not see Kevin, the Accused, strike the deceased with a knife. PW2 stated he did not know one Kevin Onyango Ogolla. PW2, testified they left the funeral 6 of them. He stated the 2<sup>nd</sup> groups comprised of PW1 and the deceased and that Simon Damba was not in the 2<sup>nd</sup> group but first group. That after the first group heard Kevin Omondi (PW1) calling Danny, they all went to where the caller was but Kevin Amollo went home. He stated when they went to where PW1 was, they did not find any other person other than himself and Wellington Ohanga and stated if Kevin Ouma Accused was there they would have seen him emphasizing that Kevin Ouma was not at the site at that moment. He stated he did not see the accused stab the deceased, that at the place he saw the accused he said he did not see a knife, that the accused had a white trouser and white top. That the white shirt and trouser did not have blood stains. He added the blood from the deceased's neck was flowing with alot of force and could stain clothes of anyone close to the deceased. PW2 stated he saw the knife being pulled from the ground.

7. PW3, Francisca Buya Amolo told court that on 4.7.2015 at around 12.45 a.m. while at a funeral at Aduoyo Village, Simon Damba told them Daddy had struck Wellington with a knife. That they proceeded to the scene of murder about 50 metres from the home where funeral was being held. She

found wellington lying on the ground on his stomach. He told them to call Zadock. PW3, asked him what happened and he said, Daddy "Daddy" and kept quiet. They admitted first aid Jeff called Boda Boda rider, who came, left with Jeff to inform the parents of Wellington Ohanga, who returned with Mama Jeff and another lady. The Boda Boda then took the deceased to Abidha Hospital. PW3 left for his home as youths started seeking for Daddy. PW3 stated at the site where Wellington Ohanga was lying she found Kevin Omondi (PW1). She stated that she had known Wellington Ohanga as her schoolmate for 3 years and that she knows he died on 4.7.2015. PW3 stated in her village she knows only one person called "Daddy". She stated she knows Daddy as he used to come to borrow a bicycle from her father and as she knows him by the name Kevin Ouma. She stated that on the material night she did not see Kevin Ouma but the following day, being taken away by the mob, she identified him as the accused (pointing him at the dock).

8. On being cross-examined, PW3 stated she comes from the same village with the Accused but did not know his name till she inquired of his KPCE results. That at site where the deceased was lying she stated there were many people. PW3 told Court, Melvin asked Wellington Ohanga who had struck him in presence of Kevin Omondi (PW1) amongst other people.

9. PW4 Mary Achieng Agik an Assistant Chief of Omia Mwalo sub-location East Asembo Location, told Court that on 4.7.2015 at 2.00 a.m. while asleep at her home, the Village Elder by the name Nehemiah Nyadawa (deceased) came to her home with a Boda Boda rider and told her Kevin son of Ohulu Anjama had stabbed Wellington Ndege, who died on the way to the hospital. PW4 then proceeded to Abidha Health Centre, found the deceased's body laid on the ground next to the reception, she called the nurse who confirmed Wellington died. She observed that the deceased's clothes were soaked with blood.

10. PW4 Mary Achieng Agik, then reported the matter at Asembo Bay Police and on the way she and the Village elder were picked by Deputy OCS Aram Police Station, went back to Abidha Health Centre, collected the deceased's body and took it to Madiany Hospital that later the Village Elder rang PW4 telling her that they had arrested the accused and got the murder weapon, PW4 then advised the Village elder to escort the suspect to Asembo Bay Police Post. PW4 testified that Kevin, the Accused was not known to her though she knew his father.

11. PW5, Dr. Uyara Alphonse, carried out the postmortem examination on the body of the deceased on 10.7.2015 at 10.15 am at Madiany Sub-County Hospital after the body was identified by two persons, brother to the deceased Peter Odhiambo Ohanga and another. The external appearance of the body had the following injuries: Laceration with straight regular edges of right supradavicular area measuring 3 centimetres. Blish right medial espial of tibia measuring wound with irregular edges on right toe. (1<sup>st</sup>). and on Respiratory System: Penetration through upper tibia of m/a lung and nerve right haemothorax. Cardio-Vascular System: Several right Carotid Artery of external figure vein. The heart appeared normal. The Doctor as a result of examination of the body formed the opinion the cause of death was severe haemorrhage and respiratory arrest secondary to right haemothorax sustained from sharp trauma. He signed the postmortem and stamped it. He produced the postmortem report as exhibit P2.

12. PW6 Lawrence Kinyua Muthuri, Government Analyst at Government Chemist Laboratory at Nairobi told Court that on 12<sup>th</sup> November 2015, Government Chemist Labortory at Nairobi he received items from inspector Francis Nganga of Aram Police Sttion accompanied by Kenya Police Memo Form. The items Labelled "A" was a brown Shirt with black stripes in a Khaki envelope. Item labeled "B" was a knife with a T-shaped metal handle wrapped in a khaki envelope. Item marked "C" blood sample in a bottle indicated as the deceased one Nicholas Ndege and another part Wellington Ndege. The Government Analyst was requested to examine the items and determine presence and some of any blood stains on the shirt item "A" and the knife item "B". On examination of the shirt item "A" and the knife item "B" they were found to be heavily and lightly stained with human blood respectively on DNA profiling in blood stains in the shirt, the knife and blood sample of the deceased as per tabulated results on page 2 of the Report exhibit P4, PW6 came to the conclusions and formed the opinion that the DNA profile generated from the blood stains on the shirt item "A" and the knife item "B" both matched the DNA profile generated from the blood sample item "C" of the deceased Nicholas Ndege. PW6 did the Report on 7.3.2017 and signed the same. PW6 stated that when the items were brought to Nairobi, they were

received by his colleague on duty one Henry Kiptoo Sang, PW6 identified the item as follows, the brown shirt with labeling Mark "A" 282/15 on which PW6 personally put as MFI – P3 and the knife with labeling male "B" 282/15 as MFI P1. He stated in his report he stated the name of Nicholas Ndege and Wellington Ndege. that the blood sample was marked "A" 282/15 and that there would be no variation because of the names and that the names would affect the results. PW6 stated he relied on the documents he received. He stated the items were given unique numbers so that the results would not be affected. Government Analyst Department produced as exhibit memo dated 8.11.2015 received on 12.11.2015 as exhibit P5.

13. On cross-examination PW6 testified that exhibit 5, related to Nicholas Ndege on one part and the name appearing as Wellington Ndege and the accused person Kevin Ouma Ouma adding there was no alias, but PW6 urged that he does not agree the memo referred to two different persons. He stated he received a blood sample of a person called Ndege in a small bottle marked "C" that shirt was marked "A" with no name tag. He stated the Police wanted him to confirm the blood stain in the shirt and the knife matched the blood in the bottle. He claimed he did not find any fibres on the knife other than the blood. He stated the blood he found was only of one individual.

14. PW7 No. 69317 Cpl. Bahati Juma, the Investigating Officer in this case jointly with inspector Francis Ngugi, the Deputy OCS, Aram Police Station testified that on 4.7.2015 at 2.30 a.m., PW4 Mary Achieng Agik, the Assistant Chief of Omia Mwalo Sub-Location went to Asembo Bay Police Post in company of Village Elder of Miare Village, one Nehemiah Nyandiwa (deceased). She explained that a youth by the name Wellington Ndege, a student at Kokise Secondary School in Form II had been stabbed with a knife to death. PW7 booked the report on the Occurrence Book, called OCS, Aram Police Station. Chief Inspector Khera who send his Deputy Inspector Francis Ngugi. PW7 and Inspector Francis Ngugi Proceeded to Abidha Health Centre, where they found the body of the deceased, observed the body had a stab wound on the right side of the neck, which appeared to have been caused by use of a knife. The Shirt of the deceased was stained with blood. PW7 and Inspector Francis Ngugi collected the body and took it to Madiany Hospital Mortuary. On the same day at around 7.30 a.m. the suspect Kevin Ouma under 18 years was brought to Asembo Bay Police Post by over 20 people. PW7 and P.C. A. Langat re-arrested the suspect and PW7 was given the murder weapon, by the Village Elder, Nehemiah Nyandiwa (deceased), who stated had been given the knife by one Danny Ochieng and Vitalis Oduor (PW2). PW1 and P.C. A. Langat took the suspect to Aram Police Station and handed over the suspect to OCS at Aram Police Station and the knife exhibit P1. PW7 subsequently recorded Statements from the witnesses, visited the scene but did not make a formal recording, but noted some blood stains on the ground. He stated he had not known the accused before (pointing at the accused) at the dock. He stated the knife he received is the one before Court (MFI-P1) and emphasizing that when he got it, it had no blood stains. He produced the knife as exhibit P1. That he saw the deceased's shirt stained with blood, MFI-P3) produced as exhibit P3. He stated he was given the name of the deceased as Wellington Ndege who he had not known before.

15. During cross-examination PW7 testified that from the witnesses statements none said he or she saw the accused strike the deceased. PW7 stated he did not recommend the knife for finger printing as it had passed through many fingers. He stated the knife did not have blood at all as it looked like it had been cleaned nor did it have soil on it adding it had been removed from the sheath. He stated at the scene of incident there was no maize plantation. He formed the opinion that at the scene of murder there was a struggle. He stated the exhibit memo was prepared by Deputy OCS and is in the name of Nicholas Ndege.

16. On the Accused being put on his defence he opted to give evidence on oath and opted to call no witnesses. The accused stated that he is 17 years old, a student at Aduoyo Primary School in standard VIII. He stated that he knew the deceased Wellington Ndege Ohanga and that he knew the charge he is facing which he denies, that on 4.7.2015 he murdered the deceased herein. He gave a defence of alibi stating that on 4.7.2015 he was asleep at home at Kokise Village. That the following day he did go to school when people he knew came to his parents' home, arrested him, started beating him, telling him to admit that he was the one who had struck Wellington Ndege with a knife, instead he refused to admit, thereafter as a result of which he was taken to Kamita, thus Asembo Bay Police Post, from where he was

picked and taken to Aram Police Station, then taken to the hospital since he had been injured. That after treatment he was taken back to Aram Police Station, whereby he was asked about the offence, denied the offence and was detained at the Police Station for 3 weeks before he was taken to Kisumu Police Station. He stated the witnesses who stated they arrested him near where Wellington had been struck, lied. He stated Kevin Omondi lied when he stated he was in the same school with him. He stated PW2 lied when he said the accused had a white top as he does not have a white shirt or top, PW3 he stated, she said the deceased gave the name of "Daddy". He admitted he uses the name "Daddy" but that he is not the only person who uses the name Daddy. On Vitalis (PW2) allegation that he was found with the knife, he stated he saw it before the Curt for the first time, urging he had not seen it before. He stated he was arrested after 6 hours from the time of the alleged incident yet no Police Officers went for his clothes and that his blood sample was not taken for testing nor did Police go to his home to look for him.

17. During cross-examination the accused testified that his name is Kevin Ouma Ouma alias Daddy. That in his village he knows three (3) people called Daddy. That on 4.7.2015, he was sleeping at his father's house and that his father knew he did not leave the house during the night. The Accused stated PW1, lied when he stated that they arrested him and denied that any knife was even recovered from him. He denied knowing of one Fredrick Omondi Odhiambo.

18. Upon close of the defence case, both the Prosecution and the defence sought time to put in their written submissions. Mr. Odongo Learned Advocate for the Accused filed his written submissions on 7.4.2017 whereas the state appeared not to file any submissions. I will consider the Counsel submissions in my judgment and need not reproduce their submissions.

19. The Prosecution in a murder case must prove that the accused had formed the necessary intention to cause death or grievous harm to the deceased. **Section 206 of the Penal Code**, describes circumstances which constitute the same as follows:-

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

***a. An intention to cause the death 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 person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be cause;***

***c. An intent to commit a felony;***

***d. An intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony."***

20. 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. The accused possessed an intention to cause harm/kill or had malice aforethought.***

21. Whether the prosecution proved the death of the deceased and its cause? PW1, PW2 and PW3 testified that they saw the deceased with injuries before he was taken to Abidha Hospital PW1, 2 and 3 did not go to the hospital with the deceased but later heard the deceased died. PW4 received information of the stabbing of the deceased herein from the village elder, one Nehemiah Nyandiwa, who she was informed died on his way to the hospital. PW4 proceeded to Abidha Hospital Centre and found the deceased's body lying on the ground next to the reception. She called a nurse who confirmed the

deceased was dead. She later went back to the hospital in company of PW7 and Deputy OCS Aram Police Station. The Deputy OCS collected the dead body and took it to Madiany Hospital mortuary. PW4 testified that the deceased Wellington Ndege was a person well known to her. PW7, No.693317 Cpl. Bahati Juma testified that on 4.7.2015 at around 2.30 a.m. he received report of stabbing of the deceased one Wellington from PW4, who was in company of a Village Elder, one Nehemiah Nyandiwa, and who passed on after the stabbing with a knife. He booked the report in the occurrence book. PW7 and Inspector Francis Ngugi passed through Abidha Health Centre where the deceased's body was and observed it had stab wound to the right side of the neck. They collected the body, was taken to Madiany Hospital Mortuary by Inspector Francis Ngugi. PW1 testified the deceased was his close friend and he buried him at Kokise Village. PW5 Dr. Uyara Alphonse, based at Madiany Hospital testified that he carried out the post mortem examination on the body of the deceased Wellington Ndege Otiang at Madiany Sub-District Hospital at 10.7.2015 at 10.15 a.m. after the body was identified by two persons, one being brother to the deceased Peter Odhiambo Otiang. The Doctor observed the body has the following external injuries:-

***“Laceration with straight regular edges of right supradavicular area measuring 3 centimetres. Blish right medial espial of tibia measuring wound with irregular edges on right toe. (1<sup>st</sup>). and on Respiratory System: Penetration through upper tibia of m/a lung and nerve right haemothorax. Cardio-Vascular System: Several right Carotid Artery of external figure rein. The heart appears normal”***

That after the examination he opined the cause of death was due to severe haemorrhage and respiratory arrest secondary to right haemothorax sustained from sharp trauma. He produced the postmortem Report as exhibit P2. The defence urged that as the person who purportedly identified the deceased's body to the doctor PW5 did not testify, it is not ascertainable that the corpse which was examined and the post mortem conducted thereon belonged to the deceased Wellington Otiang. The defence therefore urged the post mortem failed to prove that Wellington had indeed been murdered. There is able evidence from PW1, PW2, PW3, PW4, PW5 and PW7 on the injuries sustained by the deceased herein. The Doctor PW5, who examined the deceased stated the body of the deceased was identified to him by the deceased's brother one Peter Ohanga. The Exhibit P2 indicated Peter Ohanga and Nehemia Nyadiwa identified the deceased to PW5 for postmortem examination. I have compared the injuries noted by PW5 on the body of the deceased and the evidence by PW1, PW2, PW3 and PW7 on the injuries sustained by the deceased and the Doctor and I find indeed the same are similar. The age given by the witnesses of the deceased and the age noted by the Doctor are the same. No evidence came out that there were similar corpses at Madiany Hospital Mortuary. That the deceased's body had a name tag and it was confirmed to be the body of the deceased which the Doctor performed postmortem. I find failure to have called the persons or person who identified the deceased body to the Doctor did prejudice the Prosecution case nor the defence. I find the deceased's body was sufficiency identified to the Doctor before he carried out the postmortem examination and the body examined by the Doctor was that of the deceased Wellington Ndege. In view of the above, I am satisfied the death of the deceased was proved the required standard of proof.

22. Who caused the death of the deceased? PW1 and PW2 testified that the deceased's death was caused by the accused herein, PW1 and PW2 testified the incident occurred in dark night, where the only source of light was moonlight. That according to PW1, the incident occurred at around 12 midnight, while he was in company of Simon Damba and the deceased. PW1 did not see the person who attacked the deceased, but the deceased called him telling him somebody had attacked him. Wellington Ndege did not tell PW1 the name of his attacker but had stated somebody had struck him with a knife. PW1 then called Danny Ochieng who came with his group, which included PW2, Vitalis Oduor. PW1 saw someone running away in a maize plantation before Danny Ochieng had joined there. PW1, PW2 and Danny Ochieng's group chased the person who was running away, but the person fell down and they caught up with him, they found nothing in his clothes but a knife stuck on the ground. That the person was the accused, otherwise commonly known as “Daddy”. That one Fredrick Omondi Odhiambo came and told them to let “Daddy” to go. He stated Daddy was wearing a white trouser. Danny Ochieng took the knife and given it to Okeyo. PW2, Vitalis Oduor Odhiambo, Ochieng testified his group comprised of four people whereas, that of PW1 comprised of himself and Wellington Ndege. That PW1 called Danny

Ochieng in his group and they returned to check what was wrong, that is when PW1 told them Wellington Ndege was stabbed by someone. PW1 testified they then saw someone in white clothes. They followed the person who was running away, but as it was dark they could see the person due to his white clothes. That they chased the person for 10 metres and he fell down, caught up with him and Danny Ochieng interrogated the person. That one Fredrick Omondi came and told PW2 and his group to let Danny alone. That Danny Ochieng got a phone light, switched it on and it enabled him to see a knife stuck on the ground. Danny removed the knife. The knife was given to Okeyo. PW2 stated the knife had been stained with blood. PW1 identified the knife as MFI-P1.

23. PW3, Francisca Buya Amolo testified that at 12.45 a.m. in company of many people at the funeral she went to where the deceased was lying and he asked them to call Zadock. She asked him what had happened and he said “Daddy” “Daddy” and he kept quiet. That according to PW3 the person who had struck the deceased was “Daddy” the Accused.

24. In the instant case none of the prosecution witness, witnessed the accused strike the deceased, however PW1 and PW2 claim they were able to identify the person who struck the deceased as the Accused.

25. What should be considered herein is whether the accused was positively recognized as the person who struck the deceased? It is well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In the case of **R Vs. Turnball 3 ALLER 549, Lord Widgery C.J.**, had this to say:

***“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”***

.....

***Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

26. PW1 and PW2 testified they saw someone in white clothes. PW1 stated the person was in a maize plantation and had a white trouser whereas PW2 stated the person was dressed fully in white, none stated how far the person was from them but according to PW1 he was arrested after 100 metres chase, after he fell down, whereas PW2 talked of arrest after 10 metres chase, the source of light was moonlight whose intensity was not stated, incidentally none of them saw the accused struck the deceased. According to PW1 and PW2 the person who fell down and who they caught up with was the Accused herein. When the Accused was asked whether he had struck the deceased, he denied. He was asked whether he had iron rode, which he denied. According to PW1 and PW2 when Danny Ochieng switched mobile light on, he saw a knife stuck on the ground (PW1 did not state whether the knife had blood stain or not, whereas PW2 stated it was stained with blood. PW1 and PW2 stated one Fredrick Omondi Odhiambo asked them to let the Accused go.

27. The Accused in his defence of alibi denied that he was arrested by PW1, PW2 and the group of Danny Ochieng and released on the intervention of Fredrick Omondi Odhiambo. He denied knowledge of the knife exhibit P1. I note in this case PW1 and PW2 testified that the knife exhibit P1 was taken by Danny

Ochieng who gave it to Okeyo. That Fredrick Omondi Odhiambo asked them to let the Accused go free. The Accused denied having been at the scene but was at his home asleep. PW1 did not state whether the knife exhibit P1 was stained with blood, whereas PW2 stated that knife exhibit P.1. was stained with blood. PW7 stated when he received the knife from the late Nehemiah Nyandiwa it was clean and had no blood stain. The exhibit memo exhibit 5 prepared by Inspector Francis Ngugi and received by PW6 marked "B" knife with a T-shaped metal handle in Khaki envelope was a blood stained knife.

28. The person who received the knife at the place where the accused was purportedly arrested did not testify. The person who purportedly intervened and had the Accused released did not testify. PW1 and PW2 testified the knife was pulled from the ground, allegedly near the place where the Accused had fallen down. The Prosecution did not explain having caught up with the Accused, who they suspected had seriously injured the deceased did not arrest him and why Fredrick Omondi Odhiambo who intervened was not called as a witness nor arrested. PW1 did not talk of the blood stained knife but PW2. That Okeyo who received the knife from Danny Ochieng was similarly not called as a witness. PW7 received a clean knife yet Inspector Francis Ngugi forwarded a blood stained knife exhibit P1, yet he did not appear to give evidence and explain the source of the blood stain in view of evidence of PW7.

29. Francisca Mbuya Amolo testified that the deceased made a dying declaration, when she asked him who had attacked him, by giving the name of "Daddy" The dying declaration was allegedly made in presence of PW3 and PW1 amongst many other persons, however PW1 Kevin Omondi, never heard such declaration save the deceased asking them to call Zadock. The people named by PW3 as being present including Danny Ochieng were not called as witnesses. The Accused further stated in his defence he is not the only person known as "Daddy" in the Village stating he knows other three people known as Daddy.

30. Whether there are material contradictions in the prosecution's case? The people given by the Prosecution as the people who were at the scene of incident are totally two different sets of persons, according to PW1 the accused was dressed in a white trouser and a shirt of different colour, whereas according to PW2 the Accused was dressed fully in white, that according to PW1 the accused clothes except the trouser was stained with some blood whereas according to PW2 it was the knife but when PW7 got it did not have any blood stain but according to the exhibit memo prepared by Inspector Francis Ngugi it had blood stains as per record by PW6. That the knife received by PW6 had blood stains and this seriously contradicts the evidence of PW7 who received the knife from the members of public. If the knife exhibit P1 is the one forwarded to PW6, then where did the blood come from? That of great interest, is that the accused was arrested 6 hours after the incident yet according to evidence of PW1, his clothes were stained with the deceased's blood, which evidence would have placed the accused at the scene of murder, yet the Police and the members of Public did not get the deceased blood stained trouser, if that was indeed true there was no reason for the failure of the Police to have conducted a search at the Accused place, to ascertain if he had clothes similar to the ones stated by PW1 and PW2, having denied he had such clothes.

31. In **Erick Onyango Ondeng' V Republic CRA No. 5 of 2013** the Court of Appeal addressed itself thus:-

***"Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial Court, after hearing all the evidence accepted that the offence was committed at "about 7 pm" in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in TWEHANGANE AFLRED VS UGANDA, Crim. App. No. 139 of 2001 [2003] UGCA, 6 it is not every contradiction that warrants rejection of evidence. As the Court put it:***

***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

32. I have very carefully considered the contradictions in the Prosecution's case and the law relating to contradictions in a Prosecution case. I note in this case there are several grave contradictions which the Prosecutions has failed to satisfactory explain and in view of that I am convinced that PW1 and PW2 were not able to identify the person who struck the deceased as the accused. Their evidence did not squarely place the Accused at the scene of the incident. The purportedly recovered knife did not place the Accused at the scene of the incident. The Investigating Officer PW7 received a clean knife yet PW6 received a blood stained knife from Francis Ngugi, who never gave evidence. In this case several vital witnesses were mentioned by PW1, PW2 and PW3, they were not called to give evidence. I am aware that under **Section 143 of the Evidence Act, the Prosecution is not required to produce a particular number of witnesses to prove a fact, however where the evidence produced is not sufficient** the Court may draw an inference the witnesses were not called as they would not have given favourable evidence for the Prosecution. In this case I am satisfied the evidence so far adduced is not sufficient to sustain a charge of Murder.

33. The Accused gave a defence of alibi. He stated that at the material night he was asleep at his home that he did not go to the scene of incident. That he was not arrested nor found with the knife exhibit P1, that he does not have white clothes. That he was only being framed by the Prosecution witnesses PW1 and PW2. An Accused person do not have to prove his defence of alibi, is indeed true but needs to put some doubt in the Court's mind. The Prosecution did not dislodge the Accused defence of alibi nor placed the Accused at the scene of murder. That if he was indeed arrested as PW1 and PW2 stated, why was he released having been pursued as the person who had struck the deceased? I find from the evidence and in absence of satisfactorily explanation that the Accused's defence of alibi has not been disapproved. I find the Accused was not at the scene of attack and there is no evidence linking him with the attack of the deceased. I find the prosecution failed to prove that the accused caused the death of the deceased.

34. Whether the Accused possessed an intention to cause harm or grievous harm or kill the deceased? The Prosecution case is based on the purported arrest of the Accused near the scene of murder and the recovery of the knife. There is no evidence from PW1, and PW2 witnessing the Accused attacked the deceased. No evidence has been adduced of any existing grudge between the deceased and the Accused. In this case evidence relied upon by the Prosecution has fallen apart due to numerous contradictions and inconsistencies. And handling of the exhibits. The Accused never knew evidence on record, I find the Prosecution has failed to establish malice afore thought against the Accused herein.

**35. The upshot is that the Prosecution has failed to discharge the burden of proof beyond reasonable doubt. I find that the accused is not guilty of the murder of the deceased person and accordingly discharged the accused of Murder of Wellington Ndege. Accused is set at liberty forthwith unless otherwise lawfully held.**

**DATED AND SIGNED AT SIAYA THIS 15<sup>TH</sup> DAY OF JUNE, 2017**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN THE OPEN COURT THIS 15<sup>TH</sup> DAY OF JUNE, 2017.**

**IN THE PRESENCE OF:**

**MR. ODONGO FOR THE ACCUSED**

**MR. OMBATI FOR STATE**

**COURT ASSISTANTS:**

**LABAN ODHIAMBO**

**PATIENCE OCHIENG**

**ARAH OORO**

**J. A. MAKAU**

**JUDGE**