



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 13 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

EVANS OMONDI BOYL.....1ST ACCUSED

THOMAS OCHIENG OWADHO.....2ND ACCUSED

KEVIN NAM GEMBO.....3RD ACCUSED

WYCLIFFE ODHIAMBO ONYANGO.....4TH ACCUSED

JUDGMENT

1. The 4th accused, **KEVIN NAM GEMBO** (“the accused”), is charged with the offence of murder together with other accused contrary to **section 203** as read with **section 204** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. His co-accused were acquitted as they had no case to answer. The accused is alleged to have been part of the group that attacked the deceased, **PETER ONDORO ACHAR**, on the night of 8th February 2013 at Kakola Location, Nyando District within Kisumu County.

2. The prosecution case was that the accused attacked the deceased while he was in his house at night. The principal witness, Helida Anyango Ondoro (PW 2) told the court that she recognized the accused who speared her husband and left him for dead. PW 2 told Raymond Oluoch Ojor (PW 4) that she suspected the accused as he had come to her complaining that the deceased’s son had attacked him. The investigating officer Corporal Kilonzo Ruriu (PW 6) conducted investigations that revealed that the accused was involved in the incident.

3. The cause of the deceased death is not disputed and was confirmed by the post mortem conducted by Dr. C.K Muturi on 20th May 2013. The report was produced by Dr. Steve Onyango (PW 5) under **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. The doctor established the cause of death to be a penetrating injury to the heart.

4. The main issue in this case is whether the accused murdered the deceased. In dealing with the evidence before the court, I note that the incident took place at night in difficult circumstances that call for caution in order to avoid miscarriage of justice. In ***Cleopas Otieno Wamunga v Republic [1989] KLR 424***, the Court of Appeal sounded a word of caution in matters of identification of suspects at night so as to avoid possible miscarriage of justice through mistaken identity. The Court urged careful examination of evidence in order to minimize risk of error which is possible even in the case of relatives or friends. The

Court of Appeal has also noted that the evidence of recognition of a suspect is more assuring and reliable than the identification of a stranger but it nevertheless must be examined carefully because mistakes can also be made (see *Anjononi & Others v Republic* [1980] KLR 59). At all events, such evidence and recognition must be watertight to justify conviction.

5. When I put the accused on his defence, he gave an alibi defence which was supported by his spouses Phylis Akinyi Ogada (DW 2) and Pamela Zeruya Awino (DW 3). His case was that he arrived at DW 2's home, which is in Ahero area, at about 8.00pm. He had dinner then left for DW 3's home which is in Awasi. He arrived there at 9.30pm. He stayed there overnight and left for work the following morning.

6. In addition, the accused told the court that on 3rd February 2013, he had been attacked by a gang of boys at night. He raised alarm and one of them was caught. The suspect named a group of 9 village boys including one Rodger whom he reported to the police station on 4th February 2013. He told the court that on that night he went to each of the boys' parents home to talk to them. One of the parents he spoke to that night was the deceased who was related to Rodger. In his view, the fact that he was accused in this matter arose from the prior incident. The accused called for and produced the Occurrence Book from Ahero Police station to support his defence.

7. I have reviewed the evidence and I find that PW 2 testified that she knew the accused and recognized him as a suspect. However, her testimony is undermined by the fact that in the first report made to Ahero Police Station and recorded in OB 04/08/02/2013, he was not named. The report was made by PW 1, who is the one who called the accused to come to the police station yet he did not name him.

8. The prosecution case is further undermined by the earlier incident of 3rd February 2013 which was never brought up by the prosecution. It is clear from the evidence that during that period, there was a spate of lawless incidents in the area and this one incident, involving her son, may have coloured PW 2's testimony. Moreover, she told PW 4 that she suspected the accused. She did not tell him she saw the accused. The accused's defence has some credence which would make conviction on the basis of the sole testimony of PW 2 unsafe.

9. The totality of the evidence is that I find the prosecution has failed to prove its case beyond reasonable doubt and I acquit **KEVIN NAM GEMBO** of the murder of **PETER ONDORO ACHAR**. The sureties are also discharged.

DATED and DELIVERED at KISUMU this 20th day of July 2017.

D. S. MAJANJA

JUDGE

Mr K'opot, Advocate for the 3rd accused.

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