



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 32 OF 2014

(FORMERLY KISII HCCRC NO. 59 & 60 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

CHARLES OORO AWINO alias SETH..... 1ST ACCUSED

GEOFFREY ODHIAMBO AGUNGA 2ND ACCUSED

NAFTALI OUMA ODAWO 3RD ACCUSED

JUDGMENT

1. According to the information dated 4th June 2012, **CHARLES OORO AWINO alias SETH, GEOFFREY ODHIAMBO AGUNGA** (“DW 1”) and **NAFTALI OUMA ODAWO** (“DW 2”) were accused of murdering a former councillor **JOHN ONG’ONDO MARIANJA** (“the deceased”) on 26th March 2012 at Kakelo Dudi Sub-location, Kakelo Location in Rachuonyo South District within Homa Bay County.
2. The prosecution case was that early in the morning of 26th March 2012, the deceased was sleeping when a group of about 10 men forcibly entered his house and attacked him with pangas. The assailants took off thereafter. The deceased died before he could be taken to hospital. Family members alerted the police who commenced investigations and arrested the three accused shortly after the incident. After arraignment, they pleaded not guilty and the trial proceeded with the prosecution marshalling 8 witnesses. The first accused, **CHARLES OORO AWINO**, passed away before the trial commenced.
3. The fact and cause of death was not in dispute. On 3rd April 2012, Dr Peter Ogola (PW 2) performed the post mortem on the deceased’s body after it was identified by Charles Marianja and Joseph Awino Ougo. The significant observation was that the deceased had 8 cut wounds on the head measuring between 8 and 12 cms in length. He also had a bone-deep cut wound on the right upper arm and cut wounds on the left lower arm, right shoulder, collar bone and on the lower back. Internal examination revealed that the cut on the back had perforated part of the large intestine causing spillage of the contents while the cuts on the head had underlying fractures of the skull causing blood to accumulate in the skull cavity. PW 2 certified the cause of death as severe head injury and severe haemorrhage resulting from skull fractures and multiple lacerations caused by assault. He noted that the injuries, which were multiple and severe, were likely caused by a sharp object.

4. In order to prove that the accused killed the deceased, the prosecution called the deceased's son, Emmanuel Ochieng Ongondo (PW 1). He testified that in March 2012, he was residing in the same four-bedroom house with the deceased, his step-mother Consolata Achieng', and his brothers; Steve Biko, Humphrey Odera (PW 4) and Emmanuel Otieno (PW 3). He recalled that on the night of 25th March 2012, he went to sleep at about 11.00pm but he was waken up at about 1.00am by a loud scream from the deceased who was calling for help as he ran towards his bedroom. PW 1 got up and ran towards the deceased's bedroom. Before he could reach the deceased's bedroom, he was accosted by a group of about 10 people, some of whom he could identify, on the corridor between his bedroom and his father's bedroom.
5. PW 1 further testified that though it was dark, some of the assailants had torches, which though not very bright, reflected on the white wall hence he was able to see the faces of three of them. Immediately the light was shone on him, PW 1 stated that he saw Charles Ooro ("Ooro"), Geoffrey Agunga (DW 1), and Naftali Odawo (DW 2) and that DW 1 struck him on the left shoulder with a panga. He was also able to identify DW 2 who was carrying a 5 litre-jerrican in his left hand and a torch in his right hand.
6. PW 1 further narrated how DW 1 hit him three times. He was first hit at the corridor then twice as he tried to run and hide behind the door as he screamed. He then heard Ooro telling DW 2 to pour petrol and burn him. As this was happening, he saw the deceased running into his brothers' bedroom which was directly opposite his. He noticed that the deceased's right hand had been cut and his fingers chopped and blood spilling all over the walls.
7. At this point, DW 2 poured petrol on him and since he feared that he would burn, he ran back into his brother's bedroom. When he entered the room, the deceased was lying in a pool of blood writhing helplessly while calling for water. He ran to his bedroom and came with a glass of water. He noticed a deep cut at the back of the deceased's head as he was trying to give him the water. Consolata came in and also tried giving the deceased water. PW 1 further recalled that he had seen PW 3 running into the bathroom which was between his room and his father's room but he did not see PW 4. At that time he could hear the attackers but after a while, they left as it started raining. PW 1 estimated that the entire incident took about 35 minutes.
8. After the assailants left, PW 1 went to look for assistance from their neighbours. One of the neighbours telephoned Matata Nursing Home to ask for an ambulance. By the time PW 1 went back home, his father had died. PW 1 and the neighbours placed the deceased on a wheel barrow and took him to the nearest road junction to wait for the ambulance which could not reach their homestead as it had rained heavily. In the meantime, PW 1 called the Commanding Officer at Oyugis Police Station.
9. When police officers arrived, PW 1 took them to the house and narrated to them what had happened. He identified the people he had seen and since they were people he knew from the neighbourhood, he took the police officers to their respective homes. He first took them to DW 1's home. DW 1 was in the house with his wife and he came out in a shirt and towel wrapped around his waist. PW 1 stated that he saw the accused's muddy shoes and the white short sleeved shirt he was wearing was the one he had on when he attacked him. Thereafter they went to the home of Charles Ooro whom they arrested. The officers then moved to the homestead of Nicodemus Odawa Okello (DW 5) looking for his son, DW 2. PW 1 testified that DW 2 was wearing a jean's short and the black T-shirt he was wearing when he attacked him.
10. The three suspects were arrested by the officers and taken in the police vehicle to Oyugis Police Station. In the meantime, the deceased's body was taken to Matata Nursing Home Mortuary. As PW 1 had sustained injuries on the left shoulder, he was admitted for treatment at the hospital and discharged on 27th March 2012 after he was stitched.
11. The deceased's nephew, Emmanuel Ochieng Otieno (PW 3), testified that on the night the deceased was killed, he was at home and he was asleep when people came and broke into the

house. He recalled that the deceased came to the room where he was sleeping with PW 4. He saw DW 1 and DW 2 cutting the deceased all over the body and head. They were talking in Dholuo saying, *"Today we have found you."* When he saw them, he went into the bathroom and came out screaming. He stated that he saw DW 1 cutting PW 1 and the assailants dousing PW 1 with petrol and threatening to burn him. They started making noise causing the assailants to leave. PW 3 further testified that DW 1 had a small torch and that he also saw PW 2. He knew both of them as villagers.

12. A son of the deceased, Humphrey Odira (PW 4), recalled that he was sleeping in the same room as PW 2 on the material night. He was awoken by his mother screaming that DW 1 and DW 2 were killing the deceased. He recalled that they brought the deceased to the bedroom and they were cutting him. He could recall that the assailants were carrying torches and that they wore white shirts. He stated that he saw something being poured from a jerrican and a fire being lit but it went off. The deceased was calling PW1 to come and help. He stated that DW 1 was cutting the deceased and that he knew DW 1 and DW 2 who were neighbours.
13. The deceased's younger brother, Stephen Ochieng Marianja (PW 5), testified that he was residing next to the deceased's homestead. He recalled that early in the morning of 26th March 2012, he was asleep when heard a scream causing him to go out. He saw PW 1 running towards his house. He asked him what was happening. In the meantime, he saw two people shining torches at him while standing at the door of the deceased's house. He identified them as DW 1 and DW 2. DW 1 had a torch and DW 2 was hitting the window with a panga while saying, *"Today we have finished him."* He knew both DW 1 and DW 2 as neighbours. After smashing the windows, the assailants ran off. After they left, PW 5 went to the deceased's house and found him lying dead in a pool of blood. When the police arrived, he went with them to arrest the accused. In cross-examination, he recalled that when he recorded his statement, he mentioned seven people including the accused whom he suspected to have been involved in the deceased's death. He also stated that DW 1 was their next neighbour and their families had no issues. When he accompanied the police to arrest the accused, he noted the DW 1 came out in shoes with trousers and a shirt, while DW 2 was wearing trousers and a t-shirt.
14. Another son of the deceased, Geoffrey Ochieng Ongondo (PW 6), testified that he knew DW 1 and DW 2 as they lived nearby although DW 1 lived closer. He testified that the deceased had a dispute with the accused. He recalled that the deceased bought land from one Tabitha which was said to belong to DW 2's father, and that the purchase resulted in a court case which was pending at the Oyugis court. PW 6 testified that on the material night, he was sleeping in another house within the deceased's compound. As he was sleeping, he heard the deceased's wife, Consolata, calling for help as DW 1 and DW 2 had come to kill them. He got out of the house and ran towards the gate. Although it was dark and he could not see anyone, he heard the voice of DW 1 and DW 2 saying that they had killed him and he was gone. Since he was scared, he hid in the bush and stayed for a while. He later went into the deceased's house and found the deceased lying in his brother's bedroom in a pool of blood. As he entered the house, he found the kitchen door had been broken and there was a fire burning at the door. There was no one in the house for about 30 minutes until PW 1 came with a cut on his shoulders. His mother and brothers later came. The police also arrived later. When cross-examined, he stated that when he recorded his statement, he had indicated that he could not see the assailants properly and that he did not record that he heard his mother scream. He claimed that Consolata ran away because of threats from the accused.
15. Corporal Thomas Mbuvi (PW 7) of CID, Rachuonyo, recalled that on the morning of 27th March 2012, he received a call from Sgt. Damaris Ombima (PW 8) requesting him to proceed to Kakelo Dudi sub-location at the scene of a murder. He arrived at the scene at about 3.00am and found other police officers already there. He recalled that the night was dark and that it had rained heavily that night. He went into the deceased's house and found that the deceased's body had already been removed and placed in the police vehicle. He also saw a lot of blood in one of the rooms which was not the deceased's bedroom. Most of the items in the house had been scattered and he searched for a murder weapon but he did not recover any.

16. With assistance of family members, PW 8 and the other officers went to search for the suspects. PW 1 led the officers to the suspects' homes and arrested four men and one lady. PW 8 recalled that as per the OB entry, he arrested DW 1, DW 2, Ooro, Nicodemus Odawo Akello and Lillian Akinyi. He took them to Oyugis Police Station and handed them over to Sgt Damary Ombima, the investigating officer.
17. The investigating officer, Inspector Damary Ombima (PW 8), recalled that on 26th March 2012 at about 3.00 a.m., she was informed of a murder that had taken place at Kakelo Dudi by the Divisional Commander. She instructed the duty officer, PW 7, to go the scene, interview witnesses and collect evidence. She testified that PW 7 came with 7 witnesses who were at the scene when the officers arrived and whom she interviewed. PW 8 further testified that she established that the motive of the crime was a land dispute between the deceased's family and some clan members. She established that two of the witnesses, Humphrey Marianja (PW 4) and Emmanuel Ongondo (PW 1), had witnessed the murder of their father and they mentioned two persons; Geoffrey Agunga Odhiambo alias Juma (DW 1) and Naftali Odawo (DW 2), as the assailants. She caused the two of them to be charged in Kisii in March 2012.
18. On 28th March 2012, she interviewed PW 1 after he had been discharged from hospital and established from him that he was at the scene of the attack. He identified Ooro as one of the attackers, and she arrested and caused him to be charged alongside the other accused with murder. She interviewed Nicodemus Odawo Akello and Lillian Akinyi Otieno who were said to be in a dispute with the deceased but she released them as there was no evidence connecting them to the murder. She also organised for the accused to be examined by PW 2 to ascertain their mental status and he confirmed that they were fit to stand trial. She also arranged for PW 2 to conduct the post mortem on the deceased's body.
19. Both accused elected to give sworn testimony when they were put on their defence. DW 1 testified that he was from Kakelo Dudi and that the deceased was his cousin as their fathers were brothers. He denied that he murdered the accused and stated that on the material night, he was at home as he was sick and he had stomach problems. He recalled that on 26th March 2012 at about 4.00am, policemen came into his house and that he had a towel and a vest when he opened the door. The officers examined his clothes, searched his house and took away 3 mobile phones and Kshs. 5000/- but found nothing related to the murder incident. When he got out of the house, it was very dark and there were many people whom he could not identify. They went to another compound and arrested Ooro after searching his house where they found nothing. He testified that it was at sunrise that he finally identified PW 1 as he was talking to the Police Officer and directing him to another house. They walked over to the home of Odawa Akello and arrested DW 2 after searching the house. They also arrested the deceased's sister-in-law, Lillian Akinyi Otieno. He testified that he heard PW 1 tell the Commanding Officer to go and arrest other people but he said it was too muddy. DW 1 was then taken to a waiting vehicle. He also stated that the police wanted to arrest some people as they were leaving but PW 1 told PW 7 that those people should not be arrested as they worshiped together. They were taken to Oyugis Police Station first then to Kosele. It is at Kosele that he learnt that the deceased had been killed. DW 1 testified that he had a problem with PW 5 who wanted to buy his land as his parents died while he was young but the deceased had warned him against selling the land to PW5.
20. DW 2 also testified that he was from Kakelo Dudi Sub Location. He denied that he had murdered the deceased. He recalled that as he was sleeping in his brother's house on 26th March 2012, he was shocked to hear police officers knocking at his door early in the morning. Once he opened the door, the officers searched the house, checked his clothes and feet and arrested him thereafter. He was taken to Oyugis police station and later on to Kosele where he recorded a statement. DW 2 stated that he had once quarrelled with the PW 1 over grazing of animals over his land.
21. DW 2 further testified that he knew the deceased as a retired councillor and a neighbour who was living about 600 metres away. He stated that he had no problems with the deceased and was not aware of any dispute between his family and the deceased. He admitted that he knew PW 1 as they

- were in the same primary school and that he only saw PW 1 when he was being arrested. He only came to know that the deceased had been murdered when he was at the police station.
22. The Assistant Chief of Kakelo Dudi Sub-location, Jackton Ogweno Achieng (DW 3) recalled that on the morning of 26th March 2012, he was called by the Commanding Officer of Oyugis Police Station and informed that the deceased, whom he knew, had been murdered. He proceeded to the scene and found people at a church compound with the deceased on a wheel barrow. After a while, the police arrived with the suspects at the church premises. He also recalled that a vehicle came from Matata Hospital and took the deceased's body.
23. DW 3 could not remember the suspects or who were arrested as it was still dark. Since the Chief was present, he left the place and went home. DW 3 testified that he had not heard of any disputes between the accused and the deceased or his family. He testified that DW 1's home was next to the deceased while DW 2 stayed about 300 metres away. He knew of a land dispute between the deceased and his sister-in-law Lillian Akinyi Otieno. He stated that he was not aware that DW 1's land had been taken over by the deceased's family and that during his time as the Assistant Chief, he never heard of any land disputes between accused and the deceased.
24. Juliana Auma Oindo (DW 4), a village elder from Kakelo Dudi, testified that she knew both accused. She was DW 1's sister-in-law and lived about 200 metres away from his home. Her home was about 300 metres away from DW 3. She recalled that on 26th March 2012, she was at home and she did not hear any noise from the deceased's home. She only realised that the accused had been arrested at about 11.00pm on 27th March 2012. She heard that Mzee Marianja had died when people were screaming and by that time, the deceased's body had already been taken to hospital. She testified that she did not know of any quarrel of any nature, even concerning land, between the accused and the deceased.
25. Nicodemus Odawa Akello (DW 5) testified that he was the father of DW 2. He recalled that on 26th March 2012, he was at home when he was awoken by police officers banging his door at about 4.00am. The officers came in, searched everywhere and told him to accompany them to his son's house where they found him asleep. They arrested him and his son and took them to Oyugis Police Station. It is when they were taken to Kosele that he heard that the deceased had been murdered. He denied that he had any dispute with the deceased or that his son had any dispute with the deceased.
26. After the close of the defence case, Mr Osoro, learned counsel for the accused, submitted that the prosecution had failed to prove the murder charges. Counsel noted that a crucial witness, Consolata Achieng, the wife to the deceased who was with the deceased in the same bedroom during the attack was never called to testify yet she was present and she even recorded a statement. He further submitted that the incident took place at night and none of the neighbours heard anything yet when police officers came, they went on an arresting spree under the direction of PW 1. They arrested 7 people without recovering any material evidence connecting the suspects to the offence. He pointed to the fact that no wet or muddy clothes were found yet it had been raining heavily on the night of the attack. Likewise, no clothes with blood stains were recovered. Counsel also faulted the fact that some of the suspects were released without any reason. Counsel submitted that the prosecution failed to prove motive as it did not prove that there was a court case at Oyugis.
27. The prosecution led by Ms Ongeti countered by submitting that the prosecution had proved its case through eyewitnesses. She contended that PW1, PW2 and PW3 testified that they saw the accused and recognised them as their neighbours. In the circumstances, she submitted that the fact of recognition provided some re-assurance that this was not a case of mistaken identity. Counsel noted that the nature of injuries proved malice aforethought in terms of **section 206** of the **Penal Code**. Counsel submitted that the Prosecution was unable to call Consolata Achieng to testify during the trial since she could not be traced as she left after the funeral. She referred to **section 143** of the **Evidence Act** which provides that it is not necessary to call all witnesses or any number

of them to prove a fact. Counsel also submitted that the investigating officer testified with an explanation as to why the other suspects were released.

28. The central issue in this case is whether the accused killed the deceased. The deceased was killed at night in circumstances that were not favourable to positive identification of the assailants. The principles guiding the court's approach to matters of identification in difficult circumstances are well settled. Our courts have emphasised that unless handled with care, evidence of visual identification can occasion a miscarriage of justice (see *Karanja & Another v Republic*, [2004] 2 KLR 140 and *Wamunga v Republic*, [1989] KLR 424). In *Republic v Eira Sebwata* [1960] EA 174, and *Kiarie v Republic* [1984] KLR 739, the Court of Appeal was even more categorical on reliance on such evidence holding that the evidence must be "absolutely watertight" to justify conviction. In *Wamunga v Republic (supra)* the Court of Appeal warned that;

[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.

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 the 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).

29. In *Anjononi & Others v Republic* [1980] KLR 59, the Court of Appeal observed that, "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." But even in such cases of recognition, the court must exercise caution as mistakes can be made as the Court also warned in *Wamunga v Republic (supra)* that "Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."

30. PW 1 was the key prosecution witness. He testified that when he was awoken by the gang of people who gained entrance into the house, he was confronted when he responded to the deceased's cries for help in a corridor between the deceased's room and his own bedroom. He stated that the assailants had three torches which they shone on the wall and that he was able to see the accused from the light which reflected on the walls. He admitted that the torches were not very bright but he was able to see the accused in the confined space where he was assaulted by DW 1 and DW 2 who wanted to burn him. Although PW 1 testified that the attack lasted about 30 minutes, I doubt that it took that long. Nevertheless, I hold that the presence of three torches reflecting in the confined space where the assailants were, and the fact that they were close to PW 1 when they assaulted him are all factors favourable for positive identification.

31. In addition, the prosecution case was buttressed by the fact that PW 1 knew both DW 1 and DW 2. DW 1 lived next to the deceased and he confirmed that the deceased was his cousin as their parents were brothers. DW 2 lived a little further away from the deceased but he also knew the family as the deceased was once the local councillor. Both DW 1 and DW 2 confirmed that they knew PW 1 as they were from the same village.

32. The testimony of PW 1 was corroborated by that of PW 3 and PW 4. Both of them knew the accused as they had seen them in the village. PW 3 was close to the deceased when he ran into the room and was assaulted by the accused. He testified that DW 1 had a torch with him. He also witnessed PW 1 being assaulted. PW 4 was also in the bedroom when DW 1 came into their bedroom and assaulted the deceased. He also testified that the assailants were carrying torches. I find the testimony of PW 3 and PW 4 credible and further narrowing the possibility of mistaken identity of the accused.

33. Although PW 5 and PW 6 testified that they saw the accused after the incident in the house, I will disregard their testimony as it was clearly inconsistent with what they recorded at the police station after the incident. Counsel for the accused submitted that it was necessary for the Prosecution to call Consolata Achieng, the deceased's wife who was present when he was attacked. I agree with the prosecution that **section 143** of the *Evidence Act* does not require the prosecution to call all or any number of witnesses to prove a particular fact. However, where a material witness has not been called then the court would be entitled to draw an adverse inference. In this case, the failure to call Consolata was clearly explained. PW 6 testified that she ran away soon after the deceased's funeral. Consolata Achieng would have, in my view, merely corroborated what PW 1, PW 3 and PW 4 stated hence the failure to call her would not subtract from the prosecution case.

34. Since PW 1 knew the accused as the assailants, he reported them to police officers who were the first to arrive at the scene. Since he knew where they resided, PW 1 directed them to their houses and they were arrested. PW 1, PW 3 and PW 4 clearly recognised DW 1 and DW 2 during the attack but the other persons arrested were suspects in light of the land dispute existing between the deceased and some of the accused and their family. They were not recognised at the scene of the incident nor were they shown to be acting in concert with the accused. As such, the fact that they were not charged does not undermine the prosecution case.

35. The prosecution case was that the accused had motive to murder the deceased on account of a land dispute. The accused, on their part, disclaimed any motive. The Court of Appeal dealt with the issue of motive in *Choge v Republic [1985] KLR 1* as follows:

Under section 9(3) of the Penal Code, the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.

36. The prosecution case was not grounded on circumstantial but direct testimony of eye-witnesses. The totality of the evidence is that the accused, acting together with others, broke into the deceased's house, attacked the deceased and in the course of the attack were seen by PW 1, PW 3 and PW 4. The accused were known to the witnesses as they resided in the same neighbourhood. They were therefore identified to the police officers and arrested soon after the incident. I therefore find that even absent motive, the prosecution proved that the accused killed the deceased.

37. In determining the question of malice aforethought, the court is entitled to take into account factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased (see *Rex v Tubere s/o Ochen [1945] 12 EACA 63*). Apart from the other injuries on his body, the deceased sustained multiple cut wounds on his head which resulted in fractures of the skull in which caused bleeding into the brain. These injuries were consistent with the unlawful killing of the deceased actuated by malice aforethought within the meaning of **section 206(a)** of the *Penal Code* as they were clearly intended to cause grievous harm or death.

38. I therefore find the accused **GEOFFREY ODHIAMBO AGUNGA** and **NAFTALI OUMA ODAWO** guilty of murdering **JOHN ONG'ONDO MARIANJA** and I convict them accordingly.

DATED and DELIVERED at HOMA BAY this 6th day of May 2016.

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

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