



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 65 OF 2013

BETWEEN

REPUBLIC PROSECUTOR

AND

HEMSTONE OOKO ODHIAMBO 1ST ACCUSED

DAVID OTARO OKEBE alias OJAA 2nd ACCUSED

JUDGMENT

1. **ERIC OTIENO MUNGUSA** (“the deceased”) had come from Kisumu to attend the funeral of his sister at Kauma Koyugi, Rachuonyo North District, Homa Bay County. As he was leaving the funeral in the company of his relatives early in the morning of 15th October 2013, he was attacked by a weapon wielding gang. He was injured and died as a result of the injuries suffered during the attack. Later that morning, **HEMSTONE OOKO ODHIAMBO** (“*Ooko*”) and **DAVID OTARO OKEBE alias OJAA** (“*Ojaa*”) were charged with the murder of the deceased contrary to **Section 203** as read with **Section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They pleaded not guilty and the trial proceeded a pace with the prosecution marshalling 7 witnesses. The accused gave sworn testimony and called two witnesses in their defence.
2. The prosecution case was as follows. The deceased was with Duncan Odhiambo Juma (PW 4), Hannington Odhiambo Okech (PW 5), Jared Onyango Mungusa (PW 6), Salmon Juma Mungusa (PW 7) and Benson Ouma at about 3.00am as they were leaving the Karucho homestead where they had been attending a funeral meeting. PW 5 recalled that as they were walking to their respective homes, he was with the deceased in front while the others were following them from behind. After about 20 metres from the homestead, they saw people sitting by the path-side but he could not tell who they were since it was dark. The group in front passed them but those behind were blocked. PW 6 called the deceased who had a torch in front. PW 4 heard him say, ‘*Otieno come back, some people are blocking the way.*’ The deceased turned back and using the torch, he spotted the assailants. Those who were ahead decided to follow the deceased back. The assailants followed the direction of the torch and started attacking deceased.
3. PW 4 recalled that he could see the attackers with the light from the torch. He noted that it was a group but he could see two of them clearly. He identified *Ojaa* and *Ooko* whom he knew. He testified that *Ojaa* was his fellow villager and was younger than he was while *Ooko* was also from the village. He further stated that they had a panga, an axe and a club. He testified that immediately the deceased shone his torch, he saw *Ojaa* cut the deceased on his head causing the deceased to fall down. As the assault was taking place, they ran back to the homestead calling for help. People who were attending the funeral came back with him and found the deceased lying

down breathing heavily with injuries on the head and hand.

4. The deceased's cousin, Hannington Odhiambo Okech (PW 5), recalled that he was in the group ahead and that they passed 3 people standing by the road carrying pangas, rungas and spears. After passing them, Jared Onyango called the deceased and asked him to flash his light behind. He saw three people carrying the weapons and he identified one of the assailants as **Ooko**. He ran back to the homestead and called people attending the funeral. When he returned, he found the deceased, whose head was injured, lying down gasping for air.
5. The deceased's brother, Jared Onyango Mungisa (PW 6), recalled leaving his sister's funeral with the deceased, PW 4, PW 5 and PW 7. He was walking with PW 7 behind the deceased, PW 4 and PW 5. He saw four people standing by the road side with pangas, rungas and an axe. After passing them, he saw one of them shining the torch from behind. He turned back and saw the person shining the torch approach him. As he was scared, he ran towards the deceased while calling him to come back. When the assailants heard his voice, they turned and before he could catch up with the group ahead, one of the assailants hit him with a rungu causing him to fall in a nearby ditch. He heard the deceased ask, "*Why are you killing me? What have I done.*" When he regained consciousness, he quickly went where the deceased was and found him lying alone with a cut on the head, left hand and leg. He went back to the homestead and called the relatives to come over.
6. The deceased's brother, Shalmon Juma (PW 7), recalled walking home with the deceased, PW 4, PW 5 and PW 6. He was with PW 6 while the deceased, PW 4 and PW5 were ahead of them. Although he saw four people standing by the road side carrying pangas, spears and rungas, he could not identify them. They shone the torch towards the deceased and PW 6 also shone his torch. PW 7 heard someone being beaten but he did not see the assailants. He ran home where he stayed until daybreak. He was later informed that his brother had been killed.
7. After the deceased was attacked, he was first taken to Kandiege Hospital. From there he was referred to Homa Bay District Hospital but was pronounced dead upon arrival. People then went back to the funeral. PW 4 testified that when he went back to the Arucho homestead after the attack, **Ooko** came there and was arrested and locked in a house within the compound until day break. The local Member of County Assembly, Boaz Odhiambo Ondiek, now deceased, came and called the police and took away the suspect.
8. The Chief of Koyugi location, Kefa Ongo Kokute (PW 2), was called in the morning of 15th October 2013 and informed of a murder that had taken place at a homestead near Bala. He proceeded to the homestead with other police officers but when they arrived, the deceased had already been taken to hospital. He was informed that the suspect had been taken away by Boaz Ondiek. He called Boaz who returned with the suspect who was identified as **Ooko**.
9. Ernest Opar Ataro (PW 3), the Assistant Chief of Kawadhgone Sub-location recalled that at about 8.00pm on 15th October 2013, Boaz Ondiek came to inform him that he had arrested **Ojaa**. He knew him as his brother's son. He proceeded with him to Kendu Bay Police Station where he handed him over to the police.
10. Dr Ayoma Ojwang (PW 1) conducted the post mortem on the deceased's body on 1st November 2013 at Homa Bay District Hospital Mortuary. The significant observation was that the deceased had bruises on the body and more particularly, that he had three very deep stab wounds on the anterior part of the scalp, each measuring 6x2x2 cm. Internal examination of the head revealed that there were 3 linear skull fractures which caused bleeding into the skull. He certified the cause of death as head injury due to multiple fracture of the skull due to violent assault. He opined that the injuries may have been caused by a sharp object. PW 1 examined the accused persons and determined that they were both mentally fit to stand trial.
11. The investigation officer, PC Richard Chemjor (PW 7), gave an account of how he was instructed to investigate the murder of the deceased which took place on the morning of 15th October 2013 within Koyugi Location. He testified that police officers who visited the scene in the morning

came to the police station with four people who were in the company of the deceased when he was assaulted. They also came with **Ooko**, who was rescued by the area MCA from irate members of the public. He further testified that **Ojaa** was brought from Nyangweso where he had run to. After arresting the accused, he recorded statements from the witnesses and organised for a post mortem and mental assessment to be done before charging the accused with murder. He produced in evidence the recorded statements of Boaz Odhiambo Ondiek (Exhibit No. 4), Shalmon Juma Okongo (PW 7) and Hannington Odhiambo Oketch (PW 5). As a matter of law, the statement by Boaz Ondiek is only admissible to show that he made a statement but not for establishing the truth of the contents therein as it does not fall within the exceptions to direct evidence set out in **section 33** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*.

12. The accused elected to give sworn testimony when put on their defence. **Ooko** testified that he was a boda boda rider operating from Kandiege stage. He denied that he murdered the deceased or that he knew him. He stated that he came from Kamuga village and that he was at home on 15th October 2013. He recalled that on the previous day at about 4.00pm, he met customers at Kandiege and took them to Bala where they were going to attend a funeral. The customers requested him to collect them from Bala the next morning at 6.00 am to take them to Kandiege. The customers called him the next morning whereupon he proceeded to Bala. When he arrived at Bala, he parked his motorbike about 100 metres from the homestead as the road was impassable since it had rained. As he was removing his mobile phone, he heard some people pointing at him and accusing him of being one of the people who had attacked someone as he was wearing similar clothes to the people he had seen. The people searched him, took his phone and tied him up. After a while, someone came with a car and took him to the police station.
13. DW 1's younger brother, Peter Achuna (DW 3), testified that on the material night, he was at home with DW 1 and that they slept together in the same house. He recalled that DW 1 was called in the morning at about 6.00am to pick a customer and did not come back home.
14. **Ojaa** (DW 2), testified that he was a secondary school student. He denied that he had murdered the deceased or that he knew him. He testified that on 15th October 2013, he was at home sleeping in his mother's kitchen with his elder brother Clement Okebe Okello (DW 4). He recalled that on the material day, he woke up at 5.30am and left for school. As he was returning home at 5.00 pm, he met a group of about 5 people standing along the road with a vehicle. When he got close to them he heard them say that he was the one they were looking for. Before he could respond, he was tied up and put in a vehicle and taken to the Assistant Chief, Ernest Opar Otaro (PW3) where he heard that he was a suspect in a murder at Koyugi Location and that one other suspect had been arrested. Clement Oboi Okebe (DW 4), DW 2's elder brother, confirmed that he slept in the same house with DW 2 on the material night and that DW 2 woke up at around 5.30 am, dressed up and went to school while he went to plough. When he got back home, he was told that his brother had been arrested by strangers.
15. As there is no dispute that the deceased died and that he died as a result injuries inflicted on him by a sharp object, the key issue is whether the accused inflicted the injuries that led to his death. In resolving this issue, the identification of the accused is critical. Our courts have recognised that basing a conviction solely on the evidence of visual identification can easily cause a miscarriage of justice as witnesses have been mistaken even in the identification of their relatives or close friends. It is for this reason that the Court of Appeal has held in several cases that for a conviction resting entirely on the evidence of visual identification to be upheld, that evidence must be watertight (see *Kiarie v Republic* [1984] KLR 739). It must be shown that conditions at the scene including lighting and the time taken in the commission of the crime were favourable for a positive identification (see *Ogeto v Republic* [2004] 2 KLR 14). This requirement is, however, relaxed when dealing with the case of recognition because, as the Court of Appeal observed in *Anjononi & Others v Republic* [1980] KLR 59, "*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 such, the Court also

warned in **Wamunga v Republic [1989] KLR 424** that, “Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.” In **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.

16. In addition, the name or description of the assailant given by the complainant is of great importance in weighing the evidence of identification. In **Simiyu & Another v Republic, [2005] 1 KLR 192**, the Court of Appeal held that in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purported to identify the accused, and then by the person or persons to whom the description was given.
17. The principal witnesses in this matter were PW 4 and PW 5. They both agree that the material night was very dark and they identified the accused using a torch which the deceased had. In cross-examination, PW 4 described the torch as bright with batteries and that he was able to see **Ojaa** cutting the deceased with an axe while he was about 8 metres away from him. PW 4 further admitted in cross-examination that he did not record in his statement issued to the police and recorded on the same day that he saw **Ojaa** cut Eric with an axe. Further, while he stated in his testimony that he also saw and recognised **Ooko**, he admitted in cross-examination that in the statement he recorded with the police, he had indicated that he did not see **Ooko** at the scene of the incident but later at the funeral.
18. In his testimony, PW 5 recalled that he saw **Ooko** as part of the group of the assailants who attacked the deceased and that he was the first one to hit the deceased. In cross-examination, he stated that it is only the deceased who had a two battery torch which he shone in the direction of the assailants. According to the testimony, **Ooko** returned to the funeral venue where he was arrested. In the statement recorded later that day, PW 5 stated that he knew **Ooko** before and that he had worn the same clothes when he identified him. He stated that, “*Duncan Odhiambo and Benson Odhiambo pointed to the people who were in the funeral the suspect and were arrested and locked him up.*” He further recorded in the statement that **Ooko** was wearing a white sweater, white shoes and black trousers. In his testimony, he stated that the first accused was wearing a white sweater, black trouser and white shoes but when he came to the funeral, he was wearing a yellow T-shirt when he was arrested.
19. In assessing and giving weight to the testimony of the eyewitnesses, the statements made to the police after the incident are of immense value. In this case, the statements were recorded on the same day as the incident hence they were recorded when the memory was still fresh. In **Tekerali s/o Korongozi & 4 Others v R [1952] 19 EACA 259**, it was observed that;

We have had reason before to commend on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in authority has not been adduced. Such Statements are admissible under Section 157 of the Indian Evidence Act which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.
[emphasis mine]

20. In the case of PW 4, the issue of **Ojaa** striking the deceased with an axe was such a central and material fact that it ought to have been recorded in the first statement since he also stated that he knew **Ojaa**. PW4’s testimony regarding what **Ooko** was wearing when he is alleged to have assaulted the deceased and when he was arrested was equally material particularly in identifying the accused after the incident in a funeral setting. It is also noteworthy that according to the statement, *Duncan Odhiambo and Benson Odhiambo*, are the ones who pointed to **Ooko** as the

assailant yet they were not called as witnesses. There is also no evidence that they were present when the deceased was struck and absent any other evidence they could not have identified **Ooko**.

21. In light of these inconsistencies, I cannot call the testimony of PW 4 and PW 5 watertight to justify conviction. I therefore acquit **HEMSTONE OOKO ODHIAMBO** and **DAVID OTARO OKEBE alias OJAA** of the murder of **ERICK OTIENO MUNGUSA**. They are set free unless otherwise lawfully held.

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

D.S. MAJANJA

JUDGE

Mr Ongoso instructed by Ongoso Ayoma and Company Advocates for the accused.

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