



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL CASE NO. 34 OF 2013**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**NELSON OTIENO ODIRA ..... 1<sup>ST</sup> ACCUSED**

**CHIEFSON OLUOCH ODIRA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. **NELSON OTIENO ODIRA** and **CHIEFSON OLUOCH ODIRA** (“the accused”) are brothers. This court was informed that on 3<sup>rd</sup> March 2013 at North Sakwa Location of Migori county, that they, jointly with another not before court, murdered **BENARD ODICHO LIVINJE** (“the deceased”) contrary to **section 203** as read with section **204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The accused pleaded not guilty and the trial commenced before Maina J. I completed the trial under **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The prosecution marshalled 7 witnesses in order to prove that the accused and their father, George Odira Odemba, hacked the deceased to death with pangas in his shamba. George Odira Odemba has not been apprehended to date. The evidence led by the prosecution was as follows.
3. On 3<sup>rd</sup> March 2013, PW 1, Douglas Opiyo Githinji, a student and son to the deceased, Shem Otieno Ogembo (PW 2), a tractor driver and Jack Omondi Mideyo (PW 2), the turnboy, were ploughing the deceased’s shamba situated at Raywer Village, Ndede Division of Awendo District. The deceased’s shamba and that of George Odira Odemba are next to each other and are separated by a river.
4. At about 8.00 am, PW 2 and PW 3 recalled that a man, who was later identified as George Odira Odemba (“Odemba”), came from the neighbouring shamba, called PW 3 and talked to him. PW 3 testified that Odemba wanted to know where the owner of the shamba they were ploughing was. Odemba left and they continued to work until the tractor ran out of fuel. PW 2 called the deceased and asked him to bring fuel. At about 11.00 am, while the tractor was parked, Odemba returned and asked why they had parked and whether the owner of the shamba had returned. PW 2 told him that the deceased was coming to bring fuel. At about that time, the deceased came in his vehicle and asked PW 1 to bring the fuel. PW 1 went to collect the fuel while the deceased remained with PW2 and PW 3 at the tractor.
5. As they were fuelling the tractor, PW 3 heard Odemba call the deceased aside and ask him why he

had cut the trees separating their shamba. Just as he about to start ploughing, PW 3 heard Odemba tell the deceased that, *“Today you will either kill me or I will kill you.”* When PW 2 heard what was being said, he went and told Odemba that they should discuss the matter but he was told that if he too wanted to die he should continue standing there.

6. Odemba then removed something like a panga from his trouser and as they were talking two men approached them. The deceased started running and one of the two men who had come hit him with a stone and he fell. In the meantime, the two men, who had pangas, turned towards PW 1, PW 2 and PW 3 and chased them away. Odemba and the two men then set upon the deceased and began cutting him with the pangas. From a distance of about 75 meters away, PW 1, PW 2 and PW 3 testified that they could see clearly the three men assault the deceased.
7. As they could not intervene, PW 1 went with PW 3 into the deceased’s car and drove to Ndede Administration Police Post to report the incident. At Ndede, they were referred to Awendo Police Station. PW 2 also went with the tractor to Ndede AP Post to make the report. At about midday, PW1 returned to the scene with police officers. When they returned they found the deceased’s body lying with several cuts.
8. PW 6, Corporal Peter Mutua, the investigating officer of this case, is one of the officers who attended to the scene of the incident after members of the public reported that the deceased had been attacked while at his shamba and killed. Upon arrival at the scene, he found the body of the deceased at the scene lying on ploughed land for sugarcane planting. He observed that the body had multiple cuts all over the body. They were cuts on head, the neck was severed by a deep cut at the back, both hands had been and legs had been cut and the deceased had bled seriously. PW 6 prepared a sketch plan and took photographs of the deceased body and interrogated members of the public whom he found at the scene. He organized for the deceased’s body to be taken to Rosewood Mortuary at Rongo for the postmortem.
9. Before the postmortem was carried out, PW 4, Nancy Achieng Odinjo, a daughter of the deceased, identified the deceased’s body. The post mortem was done by PW 7, Dr. Emmanuel Odhiambo Oyier, a medical doctor based at Awendo Sub-district Hospital on 11<sup>th</sup> March 2013 at Rosewood Mortuary, Rongo.
10. PW 7 observed that the body had multiple cut wounds. On the left forearm there was a cut wound about 2 cm long and another one on the left shoulder which did not extend to the bone measuring about 6 cm long. On the right arm there was a small cut wound about 2 cm long on the anterior side. On the right leg there was a cut wound about 2 cm on the anterior side. He observed that the left ear was chopped off and that there was a cut wound on the left side of the head about 4 cm long and on the right side there was a bone deep 7 cm long cut wound. On the back of the head there was a large cut wound on the occipital part extending to the neck with fracture of cervical spinal column. There were also 7 multiple cut wounds of varying depth extending into the abdomen. Internally, he found that about a litre of blood in the abdomen. The skull had multiple fractures on the skull accompanied by intercerebral hemorrhage. The spinal column was fractured. PW 7 concluded that the cause of death was severe bleeding from multiple cut wounds sustained from physical assault with a sharp object.
11. PW 5, SGT Nicholas Ochieng, an Administration Police Officer, testified that on 9<sup>th</sup> March 2013, while he was in the office he was approached by a group of people who had warrants of arrest for some residents of Awendo who were said to be in Sori area of Nyatike. He proceeded there with APC Charles Rodi and Titus Maasai where they arrested the accused. He testified affirmatively that it is the two accused he arrested in Sori. PW 6 further testified that on 8<sup>th</sup> March 2013, the 2<sup>nd</sup> accused was arrested by members of the public and handed over to Awendo Police Station. PW 6 further stated that a brother to the accused, Jackson, was arrested but was released as he had no connection with the matter. He added that Odemba fled to Tanzania and has not been traced to date.

12. After the prosecution closed its case, the accused were called upon to make their defence. They both elected to give sworn testimony. DW 1 Nelson Otieno Odira, the 1<sup>st</sup> accused, testified that on 3<sup>rd</sup> March 2013, he was at Sori, Nyatike District where he worked as a hand cart pusher. He stated that he did not know the deceased nor hear anything that happened on that day from the village. On 9<sup>th</sup> March 2013, five police officers from Awendo Police Station went to his house and asked for his father, George Odira Odemba. He told them he had not seen him. He was then taken by vehicle to Awendo Police Station where he was remanded in custody until he was taken to plead to the charges at the High Court at Homa Bay.
13. DW 2, Chiefson Oluoch Odira, testified that he was a Form 2 student at Kanyasrega Secondary School. He stated that on 3<sup>rd</sup> March 2013, he was in school and on that day, he was doing the examination preceding half term. On 7<sup>th</sup> March 2013, he went to see his uncle who was paying his fees. He told his uncle that he was required to come with books. His uncle told him that he should pick the books on 8<sup>th</sup> March 2013. He remained with his grandmother during that time. On that day two police officers came and asked him where his father was. He was asked to accompany them to Awendo Police Station to assist them. He was taken to Awendo Police station and placed in police custody until 11<sup>th</sup> March 2013 when he was taken to court to plead to the charges. He denied that he knew the deceased.
14. In order to establish the offence of murder under the provisions of **section 203 and 204** of the **Penal Code**, the prosecution must prove beyond reasonable doubt the following ingredients;
- a. Proof of the fact and the cause of death of the deceased.
  - b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.
  - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the **Penal Code**.
15. The fact and cause of death were readily proved by the prosecution. PW 1, PW 2 and PW 3 gave direct testimony that the deceased was killed by three people who used pangas to assault the deceased. When they returned after reporting the incident to the police, they found the deceased dead with multiple injuries. PW 6 confirmed that the deceased had died and caused his body to be taken to the mortuary where it was identified by PW 4. The injuries observed by PW 1, PW 2, PW 3 and PW 6 were confirmed when PW 7 was carried out the autopsy and concluded that the death was caused by excessive bleeding caused by multiple cut wounds sustained from physical assault with a sharp object. I therefore find and hold that the deceased died and he died as a result of excessive bleeding caused by multiple cuts wounds inflicted by a sharp object.
16. The principle issue for consideration in this case is who inflicted the fatal injuries on the deceased. Mr Osoro, learned counsel for the defence, submitted that eyewitnesses did not know the accused and saw them for the first time and that when the accused were arrested, PW6 did not conduct an identification parade for PW 1, PW 2 and PW 3 to identify the people who murdered the accused. He contended that the accused could have been mistakenly arrested and that the identification amounted to dock identification. Counsel urged the court to review the evidence of identification carefully.
17. On the part of the prosecution, the Ms Ongeti, learned counsel, submitted that although the eye witnesses did not know the accused the conditions were appropriate for favourable identification as the incident occurred at daytime in broad daylight and that PW1, PW2 and PW3 were able to identify the attackers.
18. In evaluating the evidence, it is the duty of the court to carefully consider the conditions prevailing at the time of identification and the circumstances under which the witnesses identified the accused and test them for the possibility of error. In doing so, I have warned myself of the dangers inherent in placing reliance on the evidence of identification as a basis for conviction. The

issue of identification has been the subject of various appellate decisions among them **Francis Kariuki Njiru & 7 others v Republic Cr. Appeal No. 6 of 2001 (UR)** where the Court of Appeal stated as follows:

*The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see **R v Turnbull [1976] 63 Cr. App. R. 132**). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in **Mohamed Elibite Hibuva & Another v R Criminal Appeal No. 22 of 1996** (unreported), held that: “.....If is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.*

19. What then was the evidence of the identification? It is clear that PW 1, PW 2 and PW 3 did not know Odemba and the two assailants. PW 1 testified that he saw the father of the accused and the accused whom he identified as wearing a green T-Shirt and dirty jeans respectively. It is only later that he was informed by the woman who managed the farm that the two boys were the sons of the neighbour. PW 2 and PW 3 did not know the accused before. PW 1, PW 2 and PW 3 all stated that they saw the accused assaulting the deceased.
20. Although, PW 1, PW 2 and PW 3 made the first report the incident to Ndede AP Post and then to the Awendo Police Station, they did not state what they told the police or how they identified the assailants. PW 6, the investigating officer, was not of much assistance, as he did not testify as to the nature of the report first made to the police by the three witnesses that led them to conclude that it was the accused. The police did not procure any testimony of members of the public who were at the scene or who made any report identifying the accused as possible perpetrators. This leaves the question how were the accused identified as the deceased assailants.
21. The testimony of the arresting officer, PW 5, had many gaps. He stated that some people wanted some residents of Awendo arrested. He could not identify these people. He also stated that the two accused were arrested and identified by the complainants. He did not name the complainants and how they identified the persons they arrested. He positively identified that two accused as the people he arrested in Sori, Nyatike. Since PW 1, PW 2 and PW 3 did not know the assailants, this would have been a suitable case for conducting an identification parade.
22. The testimony of PW 6 also contradicted that of PW 5. PW 6 testified that the 2<sup>nd</sup> accused was handed over to the police in Awendo by members of the public while the first accused was arrested in Sori. The prosecution did not call any member of the public to testify and confirm the basis upon which the 2<sup>nd</sup> accused was arrested. PW 5, on the other hand, was positive that he arrested the 2<sup>nd</sup> accused in Sori. The 2<sup>nd</sup> accused testified that he was arrested by the police from his uncle's home at Kamagambo. Moreover, PW6 recalled that it is Jackson, a brother of the accused, who was arrested in Sori but was later released. This begs the question, who did PW 5 arrest. There was a further contradiction on the dates of the arrest. PW 5 testified that the accused were arrested on 9<sup>th</sup> March 2013 while PW 6 testified that the 2<sup>nd</sup> accused was arrested on 8<sup>th</sup> March 2013.
23. As required by the law, I have scrutinized the evidence of identification carefully. The period of 5 days between the date of the incident and the date of the arrest was unaccounted for in so far as it

related to efforts made to identify the accused to the offence. A part from this evidence, there is nothing else that connects the accused to the felonious act that led to the deceased's death.

24. The chain of evidence of identification leaves doubt as to whether the two accused were actually the people who attacked the deceased. In my view the identification of the accused was basically dock identification and convicting them on that basis would be unsafe.

25. In the circumstances, I find the accused **NELSON OTIENO ODIRA** and **CHIEFSON OLUOCH ODIRA** not guilty of the murder of **BENARD ODICHO LIVINJE** and acquit them. They are set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 12<sup>th</sup> day of February 2015**

**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.