



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL CASE NO. 19 OF 2013**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DAVID OKOTH ALEX ..... 1<sup>ST</sup> ACCUSED**

**DON ODHIAMBO OKETCH ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused **DAVID OKOTH ALEX** and **DON ODHIAMBO OKETCH** are charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information were that on the night of 12<sup>th</sup> and 13<sup>th</sup> January 2013 at Bombo area in Lake Victoria waters in Mbita District within Homa Bay County jointly with others not before the court they murdered **RASHID OKOTH MUOK** (“the deceased”). The accused pleaded not guilty and the prosecution marshalled 9 witnesses before closing its case. I am now called upon to decide whether the accused should be put on their defence.

2. In order to secure a conviction for the offence of murder, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.

3. The fact and cause of death is not in dispute. The deceased’s body was taken to Homa Bay District Hospital Mortuary after it was recovered from Lake Victoria. The autopsy was done by Dr Ayoma Ojwang on 15<sup>th</sup> January 2013 after the body was identified by George Omondi Omollo (PW 4). On external examination of the body he observed two deep cut wounds on the head and a lot of bleeding on the scalp but there was no skull fracture. The lungs were severely congested and full of fluid. He concluded that the cause of death was drowning and bleeding from the cut wounds. This evidence leaves no doubt that the deceased was assaulted and that he drowned in the lake.

4. The prosecution case was the deceased had gone fishing on the night of 12<sup>th</sup> January 2012 on a boat belonging to PW 4 christened *Maure*. He was leading a team comprising George Omondi Otieno (PW 1), Samora Machel Awino (PW 2) and Raphael Odhiambo. As they were fishing, another boat by the name *Cathdrina* came from the Sindo direction. It had four fishermen. The deceased asked them to move closer and demanded to know why they were casting their nets in their area. The fishermen on the *Cathdrina* pulled the deceased to their boat and a fight ensued. They started beating the deceased with their oars. PW 1 steered the boat away back to the shore. When they reached the shore, they saw the deceased’s torch

floating and when they pulled the net they recovered the deceased's body.

5. The chairman of the Gembe Beach Management Unit, John Lumu Dawo (PW 3), recalled that on the night of 12<sup>th</sup> January 2013 at about 11.00pm, he received a telephone call informing him that there was a fight in a boat on the waters of the lake. He went to Bombo beach where he found deceased's body on the beach. He recognised the deceased and noticed that he had a cut on the head and right shoulder. PW 1, PW 2 and other people were present at the scene. When he inquired about what happened he was informed that the people from Sindo were trying to fight them over a place to cast their nets.

6. One of the Police officers who arrived at the scene was PC Edwin Nyongesa (PW 7), the investigating officer, who recalled that they found the deceased's body floating in the water. He interrogated PW 1, PW 2 and Raphael Odhiambo who were with the deceased in the boat. They informed him that the *Cathdrina* had sailed towards Sindo. He communicated with the BMU Chairman of Sindo and they were able to locate with the owner of the *Cathdrina*, Jerim Wesonga Okello (PW 5).

7. PW 5 testified that he owned the *Cathdrina*. He recalled that on the evening of 12<sup>th</sup> January 2013, two people; Peter Otieno and Washington Ojuok went to fish using his boat. They in turn, looked for two other people to assist them in fishing. At about 3.00am he received, he received a call from the BMU Chairman informing him that the people he had sent out to fish had fought in the lake. At about 8.00am he went to report that a murder had been committed by the people who had gone fishing with his boat. The report was received by AP Inspector John Omollo (PW 9) at the AP Office at Sindo.

8. Earlier that morning, PW 9 had received a call from the Commanding Officer of Mbita Police Station informing him that four young men who were fishermen had killed Rashid Muok and had escaped to Sindo in a boat called *Cathdrina*. Together, with PW 5 and other officers, PW 9 set off to start looking for the suspects at the Landhies in Sindo Township. As they approached, the suspects started to run away but they managed to arrest the 2<sup>nd</sup> accused who took them where the 1<sup>st</sup> accused stays.

9. At this stage I am only required to decide whether there is sufficient evidence to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases among them among them ***Ramanlal Trambaklal Bhatt v R [1957]EA 332, Wibiro alias Musa v R [1960]EA 184 and Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR***). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

10. The key evidence against the accused is the testimony of PW 1 and PW 2 in which they identified the accused. Evidence of visual identification particularly in difficult circumstances should always be approached with great care and circumspection. Such evidence must be watertight before a court can return a conviction (See ***Abdalla Bin Wendo & Another v R [1953] 20 EACA166, Wamunga v Republic [1989] KLR 42 and Maitanyi v Republic [1986] KLR 198***). 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 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***).

11. PW 1 testified that the each person on the boat had a torch and they shone their torches at the four men in the *Cathdrina*. He stated that he could identify the men in the boat if he saw them and he then proceeded to point to the two accused seated in the dock as the assailants. When cross-examined, he stated;

*When they were beating the deceased I ran away and they were using oars. I spotted flashed my torch only once. I was able in that one flash to identify the four. I had not known them before. This was the first time I was flashed at them.*

12. PW 2 stated that he saw the accused in *Cathdrina* and that it was dark but they were spotted by the deceased and the attackers who also had torches. When cross-examined he stated that it is only the

deceased who had a torch in their boat and that PW 1 did not have a torch. In cross-examination he stated that he did not know the assailants and that he could not tell who identified them to the police.

13. There is no doubt that the night was dark as incident took place in the water of Lake Victoria. What emerges from the testimony of the two key witnesses is that contradicted each other in a material way. While PW 1 stated that each of them had torches, PW 2 insisted that it was only the deceased who had a torch. In addition, none of them testified how far they were from the deceased or how far the deceased was from the assailants when he shone his torch. Nothing was said of the intensity of the torch light. In these circumstances, it is difficult to say that the circumstances were favourable for positive identification of the accused.

14. In addition both PW 1 and PW 2 stated that they were seeing the assailants for the first time as they did not know them before. The information PW 3 and PW 7 received from PW 1 and PW 2 was that the assailants were from a boat in Sindo. While testing the evidence of identification, the Court of Appeal in ***Maitanyi v Republic, (supra)*** expressed the view that;

*There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid or to the police.....*

15. No such description of the assailants was provided by PW 1 and PW 2 to either PW 3 or PW 7. All in all the identification by PW 1 and PW 2 of the accused was dock identification. Even if the accused could not describe the assailants but could point out the suspects, it would have been helpful for the police to test the identification by carrying out an identification parade once the accused were arrested in order to exclude the possibility of mistaken identity (see ***Muiruri & 2 Others v Republic [2002] 1 KLR 274 and Nathan Kamau Mugwe v Republic NBI CA Criminal Appeal No. 63 of 2008[2009] eKLR***).

16. Apart from the identification evidence, the prosecution relied on the fact that the owner of the *Cathrina*, PW 5, identified the two accused when they were arrested by PW 9. PW 5 recalled that he handed the boat to Peter and Washington the evening of 12<sup>th</sup> January 2013. It is the two who went to look for two other people to assist them. When he took PW 9 to look for Peter and Washington, he stated that they arrested a man that he did not know. The totality of the evidence is that the accused were arrested when PW 9 went to look for Peter and Washington.

17. Apart from the very thin evidence of identification, the additional evidence of PW 5 does not connect the accused to the *Cathrina* or to the incident on the waters of Lake Victoria. PW 5 did not know the accused and could not tell whether they were employed or engaged by Peter and Washington to assist them on that night. He admitted that he had never seen them before.

18. Although there is suspicion that the accused could have been involved in the death of the deceased, in light of the matters I have raised, I find that to call upon the accused to defend themselves would amount to relieving the prosecution of its burden to prove its case beyond reasonable doubt by requiring the accused to fill in the gaps in its case. Even if the accused elected to remain silent, the prosecution case would fail.

19. Under **section 306(1)** of the ***Criminal Procedure Code (Chapter 75 of Laws of Kenya)***, I am required to enter a verdict of not guilty which I hereby do against **DAVID OKOTH ALEX** and **DON ODHIAMBO OKETCH**. The accused are acquitted and set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 3<sup>rd</sup> day of December 2015**

**D.S. MAJANJA**

**JUDGE**

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

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