



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 42 OF 2013

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID KWABI OLUM 1ST ACCUSED

DANIEL AYIETA OLUM 2ND ACCUSED

JUDGMENT

1. **DAVID KWABI OLUM** (“DW 1”) and **DANIEL AYIETA OLUM** (“DW 2”) are brothers. They 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 being that on 30th April 2013 at Ramula Village, Tonga Sub location in Suba District within Homa Bay County jointly with others not before court they murdered **ELLY AKIDA ASAWA** (“deceased”). I completed the trial in accordance with the provisions of **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* after it had commenced before Maina J. The prosecution called 13 witnesses while the accused elected to make unsworn statements. The prosecution case was as follows.

2. The deceased’s wife, Rebecca Anyango Akida (PW 1), testified that on the night of 30th April 2013 she was at home with her husband and their grandson Calvince Otieno (PW 2) taking tea. At about 9.00pm she heard someone hit the iron sheet roof. Her husband confirmed that he too had heard that noise. The deceased went out with a torch and panga to find out what was causing the noise. As he did not find anything, he came back to the house. After a few minutes, they heard the kitchen door being shaken. The deceased went out again with the torch and panga. She heard him screaming. She also started screaming but as she attempted to go outside, PW 2 got hold of her and pulled her back into the house.

3. Calvince Otieno (PW 2) recalled that on the material night, he too heard someone shaking the kitchen door. He testified that PW 1 told the deceased to go to the kitchen and bring the flour she had left there. The deceased went to the kitchen and as he was coming back, he started screaming. PW 2 opened the door and flashed his torch and spotted one person who was right in front of him. There were other people with him but he could not see them. The person he saw was about 2 meters from him. He did not go outside because the person he saw tried to cut him with the panga. PW 2 and PW 1 began screaming. After a while, PW 1 went outside and when he flashed his torch outside and saw some people fleeing. When they went outside, they found the deceased lying in front of the door. He had a cut on the forehead, right ear and on the neck. Their screaming attracted neighbours who came. PW 2 then called his father, Robert Odhiambo Akinda (PW 3) who was at Magunga. After about 30 minutes, police officers came to the homestead and started investigations.

4. PW 3 testified that the deceased was his father and that on 30th April 2013 at around 9.00pm he was at Magunga when he received a phone call from PW 2 informing him that his father had been murdered. He went to report the matter to Magunga Police Station and was given a contingent of about 9 police officers to accompany him to the deceased's home. At the homestead they found the deceased lying in a pool of blood. PW 3 observed that the deceased throat had been severed and a cut extended from the right ear end and cut both the lower and upper jaw. After viewing the body, he called PW 2 and inquired from him about the incident. PW 4 narrated to him what transpired. He recalled that when the deceased was attacked he opened the door and saw one person who had tattooed himself and two other people when he flashed his torch. PW 3 concluded that the person whose intention was to kill the deceased was on the run and he asked the police to block the roads. He accompanied police officers to Magunga and then to Sori where they arrived at about 1.30am.

5. PW 3 further testified that while they were at Sori, a minibus christened *Okay Kamolo* arrived from Nyandiwa headed to Kisumu. The police officers stopped it and he went in the bus with three officers. On the third row, PW 3 identified the person who PW 2 had described to him. The police officers handcuffed and arrested him. They also confiscated his bag. PW 3 stated that the person arrested was DW 1 whom he knew as his home was about 700 metres from the deceased's home. He stated that there was a land dispute between their families. When the conductor of the minibus was asked about DW 1, he informed them that DW 1 had boarded the bus at Kiabuya which the road junction for the roads from Magunga, Nyandiwa and Sori.

6. After the arrest of DW 1, PW 3 took the officers to the Olum homestead. Upon arrival, the police officers began searching the houses in the compound. They went in to the house of DW 2 who declined to open the door at first but when he opened the door, PW 3 noticed that he was wearing jean shorts and a T-shirt which were wet and that he had bruises on his legs. When the police officers asked DW 2 where his brother was, he told them that he had gone to Homa Bay on the previous day and that they had parted ways. His brother went to Kisumu and while he came to back Gwassi. DW 2 was handcuffed and taken to his mother's house and when she was asked about the whereabouts of DW 1 she said she had not seen him in a month. PW 3 further testified that DW 2 was taken to Magunga Police Station while the Commanding Officer and other officers accompanied him back to the deceased's homestead. At about 4.30am, officers from Homa Bay Scenes of Crime office arrived, took photographs of the deceased then left at around 5.00am. He accompanied the deceased's body to St. Camilus Mission Hospital Mortuary. PW 3 identified the deceased's body when the post mortem was done on 3rd May 2013.

7. Administration Police Inspector George Otieno Ndire (PW 4) recalled that on 30th April 2013 at about 9.30pm, the Deputy Commanding Officer called him to report to the Magunga Police Station. At the station, he was informed that there was an incident of murder at a homestead next to Ramula Primary School. He proceeded to the scene of the incident with other officers and when they arrived they found the deceased lying outside his house with deep cuts on the neck and right side of the head. He recognized the deceased as a person he knew from the village. As there were many people, PW 4 decided to secure the scene. After receiving information from members of the deceased's family particularly PW 2, who stated that he had seen one of the assailants with his torch, the officers decided to go into formations to look for the suspect. The officers split in two groups; one group went to Sori and another went to Ndhiwa. PW 4 was in the group that went to Sori.

8. They arrived at Sori at about 2.00am on 1st May 2013 and started looking for vehicles travelling at night from Sori to Kisumu. While at the junction of Sori-Homa Bay road, they stopped a vehicle. They went into the vehicle with PW 3. PW 3 identified DW 1. They arrested DW 1 and collected his bag. When they came back to Magunga, PW 4 took DW 1 to Magunga Police Station. Thereafter, PW 4 proceeded with the other officers to the Olum homestead which was about 200m from the deceased's home. They found the accused's mother who told them that DW 1 had been in court the previous day and that he had gone to Kisumu. Thereafter PW 4 went back to the deceased's home and accompanied the deceased's body to the mortuary.

9. The Deputy Commanding Officer of Mbita Police Station, Inspector Ben Kiplagat Biwott (PW 5) was

called on the morning of 3rd August 2013 to go to Magunga Police Station to perform an identification parade. At about 9.00am, he gathered eight people including the suspect in the cells where the parade was conducted. The suspect, whom he identified as DW 1, chose the position No. 3. He was the only one on the parade with dreadlocks. He informed PW 2, who was seated in the office of the OCS, that the suspect may or may not be in the parade. After the parade was ready, PW 2 identified person No. 3 on the parade by touching him. PW 5 testified that the suspect did not make any comments on the process. After completing the parade, he filled the identification parade form and signed it.

10. On 3rd May 2013, Dr Julius Ondigo (PW 6), the superintendent of Suba District Hospital, performed the postmortem on the deceased's body at St. Camilus Mission Hospital Mortuary. The significant finding was that the deceased had a 10 cm deep cut on the front of the skull which caused a skull fracture measuring about 3cm. When he opened the skull there was a 3cm X 3cm blood clot. He observed a 20 cm cut extending from the right side of the mouth to the right ear which had been sliced into two. The cut had gone through the mandible, fractured it and dislodged the right molar and pre-molar. A 15cm deep cut on the upper neck region had sliced off the carotid artery and jugular completely, fractured the cervical spine and dislodged the spinal code. PW 6 concluded that the cause of death was massive intracerebral bleeding and massive blood loss from the severed blood vessels on the neck. He also concluded that the injuries had been caused by a sharp object likely a panga.

11. A bus conductor, Charles Kiboi Masara (PW 7) testified that in 2013, he was a bus conductor working on the Nyandiwa-Kisumu route. He recalled that on 1st May 2013 at about 12.00am, he was in working in a Mitsubishi Minibus registration No. KBR 306P coming from Nyandiwa to Kisumu. They left Nyandiwa at 12.00 am and at Kiabuya junction, they stopped to pick up a passenger who refused to the fare of Ksh 500/=. The vehicle was stopped by police officers at Sori. Several police officers entered bus looking for a suspect who had killed someone. The police searched the vehicle, identified the passenger and arrested him. He recalled that the passenger had braided hair and an ear ring. The passenger had a small black bag which they took. He identified DW 1 as the passenger. After the passenger alighted they proceeded with the journey.

12. APC Amisi Nyerere (PW 8) recalled that on 30th April 2013, he was at the Magunga AP lines, when the siren was sounded and he went to the Police Station. At the Police Station, he and other officers were informed by the Deputy Commanding Officer that a person had been killed at Ramula village. They proceeded to the village and went to the home of the deceased. Upon arrival he saw the deceased's body in the front of his house. He also found PW 4 and Sgt Robert Mutai (PW 12) interrogating PW 1 and PW 2. PW 1 stated that when he shone his torch, he saw a person whom he described as "Ninja" as he had tattoos on his face. Thereafter the officers fell into two formations. PW 8 was in the group that went with Inspector Kibet and PW 4 to Sori. He recalled that after they stopped the bus coming from Nyandiwa, they entered into the vehicle and PW 3 identified that suspect who had the features described by PW 1. The conductor informed them that the suspect had boarded the vehicle at Kiabuya junction. They arrested the suspect and brought him to Magunga at about 2.30pm. They proceeded with DW 1 to his homestead where they went and found another person sleeping in wet jean shorts and arrested him. They went back to Magunga Police Station with both suspects.

13. A Government Analyst from the Government Chemist, Nairobi Caroline Njoki Wamae (PW 9) testified that on 10th June 2013, at Government Chemist Laboratory in Nairobi, Sgt Robert Mutai (PW 12) of Magunga Police Station submitted the following items to the laboratory through a police Exhibit Memo (Exhibit No. 10) with to examine items to determine the presence and source of blood stains. The following items were received;

- Item A- Blood sample of David Kwabi Olum
- Item B- Blood sample of Daniel Ayieta Olum
- Item C 1- A pair of trousers wrapped in a khaki envelope.
- Item C 2- A jacket wrapped in a khaki envelope
- Item D- A pair of blue jean wrapped in khaki paper
- Item J- Soil wrapped in Khaki envelope taken from wall of deceased house.

- Item F- A T-shirt wrapped in khaki envelope
- Item J- A panga wrapped in a khaki envelope
- Item K- A travelling bag containing assorted items belonging to David Kwabi Olum.
- Item X- Blood sample indicated as that of the deceased ELLY AKIDA.

14. PW 9 examined all the items and observed that item C1- the pair of trousers, item C2- the jacket and item J - the soil and item K - the travelling bag had no blood stains. Item D - the pair of jean trousers was lightly stained with blood human origin. Item G – the panga was lightly stained with blood of human origin. Item F- the T-shirt was moderately stained with blood of human origin. She proceeded to carry out DNA analysis on all items that were stained with blood. The DNA profiles were generated and tabulated in the report dated 3rd April 2014 (Exhibit No, 11A and 11B) showing the profile of the deceased-Item X. Profile of Item B - blood of accused Daniel Ayieta. There was also the profile of Items D, F and G. After studying the profiles, PW 9 concluded as follows; that the DNA profiles from the blood stain on Item D – the blue jean trousers, Item F – the T-shirt and item G - the panga all matched the DNA profile generated from Item X - the blood sample of the deceased, Elly Akida.

15. A gazetted scenes of crime officer, Corporal Shem Ondiek Mogaka (PW 10) attached to Crime Scene Support Services, Homa Bay recalled that on 1st May 2013 at around 4.30am, he arrived at the scene of a murder. He was shown where the deceased was lying. He observed that the deceased had sustained injuries on the head and neck. PW 12 requested him to take photographs of the scene which he took and produced in evidence.

16. Dr Ayoma Ojwang (PW 11) testified that he was requested to examine the both accused to determine whether they were mentally fit to stand trial. He examined them on 3rd May 2013 at Homa Bay District Hospital. After examining them he concluded that they were mentally fit to stand trial. PW 11 further recalled that on 15th May 2013 the accused were brought to Homa Bay District Hospital for blood samples to be taken by Dr Adoyo. Their respective blood samples were extracted and reports to that effect signed by the said Dr Adoyo.

17. The investigating officer, Sergeant Robert Mutai (PW 12), testified that he was stationed at the Magunga Police Station Crime branch in April 2013. On 30th April 2013 at around 9.30 pm, he was informed by the Deputy Commanding officer that there was a murder at Ramula Village. He was instructed to sound the alarm and mobilise officers. In 15 minutes time, they had officers mobilized from the regular and administration police at Magunga under the charge of IP Kibet and AP IP Ndire (PW 4) and proceeded to the scene at Ramula Village with 20 officers including APC Amisi (PW 8). When they arrived at the deceased's home together with PW 3, the found members of the public present. The deceased was lying dead in a pool of blood outside the doorstep of his house. He had deep cuts on the head, lower jaw and neck and he was already dead.

18. PW 12 managed to get PW 2, who narrated how the incident occurred to the officers present among them the Commanding Officer, IP Kibet, AP IP Ndire (PW 4). PW 1 stated that it was about 8.30 pm when dogs started barking as someone was trying to open the kitchen which was about 5m away. This prompted the deceased to check what was happening outside. In a minute he heard the deceased shouting followed by a struggle. He also rushed out, opened the door and with a spot light he saw a person armed with a panga charging towards him with tattoos on the face. He went back and closed the door and started shouting. He heard the person running away. PW 2 said he saw someone with a tattoo face changing towards him. He said they were three persons. He did not recognize the other two persons. He did not say the person's name but he said it is someone he knew from the village. He said the other two people were armed with pangas.

19. After getting this information, the two inspectors decided to cover the possible escape routes. Inspector Kibet covered Sindo route while PW 4 covered the Sor i - Nyandiwa route. After the police the other officers left, he did not see PW 2 until the time he was summoned to come for the identification parade. At about 4.00am, PW 10 arrived at the scene and took photographs. PW 12 prepared a sketch plan in the morning before removing the body of the deceased to St. Carmilus Mission Hospital Mortuary

where he organized for a post mortem.

20. The deceased was wearing a green T-shirt which contained blood stains (Exhibit No. 1). At the scene, he also took a torch (Exhibit No. 2) which PW 1 was using. He was informed that the accused had been arrested and were at Magunga Police Station. He saw both suspects at the cells at around midday and was informed that DW 1 had been arrested at Sori in a minibus that was coming from Nyandiwa and going to Kisumu between 2.30am and 3.00am and that DW 2 was arrested at home in Ramula village. He stated that Nyandiwa is about 10-12km from Ramula Village.

21. At the Police station PW 12 was given a blue bag with belongings which DW 1 was found with. He recovered inspected it in the presence of the accused. At the time the items including the bag were wet. He produced the bag and the items contained therein as exhibits. DW 1 was wearing a blue jacket and a blue long trouser which were still wet. The long trouser (Exhibit No. 8) was blue in colour and had some mud at the bottom. The jacket was also blue in colour with some whitish stains on the left side (Exhibit No. 4).

22. PW 12 was informed that DW 2 was arrested in his house by PW 4. He was wearing a shirt and blue jeans short. He was bare footed and his clothes were wet. After close examination, PW 12 found the trouser (Exhibit No. 9) he was wearing had blood stains. He recovered the blue jeans shorts from DW 2 and marked it as Exhibit "D".

23. On 1st May 2013 in the evening, PW 11 visited the Olum homestead with other police officers. While there they met a brother of the accused, Philip Olum, who was aged about 15 years. After introducing themselves and the purpose of their visit, they were shown the houses in the compound and as a result PW 12 prepared a sketch plan. PW 12 recovered a panga, which he marked "G" (Exhibit No. 19), in the house of Grace Olum, the mother of the accused, under a bed. He noted that the Olum homestead was about 2 km from the deceased home. Philip Olum told them that the panga was mainly used by the 2nd accused. Grace Olum arrived while they were still interrogating Philip, she conversed with him in Dholuo and he became uncooperative and did not record any statement. PW 12 did not record the statement of Grace Olum as she was uncooperative. PW 12 stated that the panga had fresh soil as if it had been cleaned. According to the information he gathered from Philip, the accused were living in the homestead and used to take their meals from their mother's house. Philip had not seen DW 1 for some months but the DW 2 was always at home. Upon recovering all the exhibits and marking them, he forwarded them to the Government Chemist through the Exhibit Memo dated 1st May 2013 (Exhibit No. 10).

24. PW 12 also arranged for an identification parade to be conducted on 3rd May 2013. The parade was conducted by Inspector Ben Biwott (PW 5) at Magunga Police Station. He was not present when it was being conducted. He did not see PW 2 on 3rd May 2013 and had only seen him at the scene prior to that.

25. PW 12 further testified that before the incident there was a dispute between Olum, who was now deceased, and the deceased and between Marigot Akondo and Olum. He recalled that Olum was killed because of a land dispute and that there was a murder case in that respect. PW 12 informed the court that on 29th April 2013, a day before the incident, he was given an arrest warrant for DW 1 from Homa Bay Magistrate's court in respect of a case of creating disturbance in a manner likely to cause a breach of the peace. He arrested DW 1 with another officer and kept him at Magunga Police Station cells. DW 1 was taken to Homa Bay on 30th April 2013. PW 12 expressed surprise when DW 1 was arrested at Sori.

26. Sammy Sintake (PW 13), the Deputy Executive officer, Homa Bay Law Courts. PW 13 produced court file being Homa Bay Criminal Case No. 940 of 2012 (*Republic versus David Kwabi Olum*). According to the file, the charges against DW 1 were withdrawn because he was said have mental problems.

27. When put on his defence, David Kwabi Olum (DW 1) elected to make an unsworn statement. He denied that he had killed the deceased. He recalled that he been arrested on 29th April 2013 and brought to Homa Bay Law Courts. He was discharged by the court at around 4.00pm. He wanted to go to Kisumu

as he needed medication for his mental problems but he did not have money so he called his elder brother who sent him Kshs. 2,000/-. He left Homa Bay at around 4.30pm arrived at Sori and then took a motorbike to Nyandiwa where he had a room in house which belongs to the family.

28. After arriving home, he took a bath, ate a snack and slept for a while. At around 8.10 pm, he invited his neighbour to go for a drink with him at Nepatis Bar as he waited for a vehicle to Kisumu. A bus called *Okay Kamolo* arrived at about 9.30pm. He paid the fare of Kshs. 500/- to book a place to Kisumu. As the vehicle was not leaving for Kisumu immediately, he went back to the bar and continued drinking soda waiting for the vehicle to leave. The bus finally left at about 1.00am. The vehicle made some stops along the way to collect passengers. He testified that one of the people who boarded the vehicle was PW 7 who was known to him but was not a conductor as he alleged. At about 2.00am, the vehicle left for Sori.

29. The vehicle was stopped by security officers at Sori and at that time DW 1 testified that he was feeling sleepy and that he could not hear what was being said. When the vehicle stopped, the first person to get in was the PW 3, whom he knew, accompanied by the Chief of Ramula. He also observed that the passengers who had embarked on the vehicle, a man and the two ladies were cousins of PW 3. He saw PW 3, the man and the two ladies who had boarded the vehicle talking in low tone and then the area chief pointed towards him and said he is the one.

30. After this police officers including the Commanding Officer and PW 12 who were outside got into the vehicle. The two ladies seated each removed and introduced themselves as flying squad officers. They dragged out of the vehicle. As he was being dragged out he informed them that he had bag which one of the ladies carried. After alighting, the officers started beating him. He was ordered to lie on the ground as the officers searched his bag. DW 1 further testified that he heard PW 3 ordering the officers to shoot him and say that he was escaping but one of the Administration Police Officers said he should be taken to Magunga. DW 1 testified that he was stripped naked while it was drizzling and that PW 3 was directing the police officers to do the search of his personal bag as he is was not satisfied about the manner in which the officers were searching the bag so he decided to do so himself. PW 3 asked the conductor where he had boarded the bus and the conductor told him that the he was a well-known musician and that he had boarded the vehicle at Nyandiwa stage. The bus proceed on its journey after the DW 1 had been arrested.

31. DW 1 was thereafter taken to Magunga in the police Land Cruiser while it was raining heavily. In the vehicle were the area chief, Charles Akondo, PW 3 and PW 12 other officers. While in the vehicle he stated the PW 3 told him that he will not be set free as the Olum family had been disturbing them. As they were going, PW 3 was telling the police officers that he was killer. One of the police officers slapped him and ordered to lie on floor of the vehicle. Later on they reached Magunga Police Station and he was taken to the cells dressed only in his underwear. At around 5.00 am, the cell was opened and the officers brought in the 2nd accused. DW 1 was surprised that he had been arrested. On 3rd May 2013, he saw PW 2 and PW 3 at the police station. He was told to move out of the cell and told to sign some forms. He was later brought to Homa Bay where he was charged with murder.

32. Daniel Ayieta Olum (DW 2) also elected to make an unsworn statement. He recalled that on 30th April 2013, he went to school as usual and returned in the evening at 5.00pm. After that he went to the river to take a bath and returned home at about 6.30 pm. By around 7.00 pm, he rounded up the animals and then went to do his private studies upto about 8.30 pm when he went to his mother's house to eat. He went to back to his house at about 8.40 pm. At about 1.00am in the morning, he went outside for a short call and went back to sleep. At about 5.00am, he heard a knock on his door and after the second knock, he inquired who it was. It is the chief who introduced himself and he opened the door. He found the chief, the village elder and 8 police officers. They entered and searched the house and asked whether he had slept with anyone else in the house. He told them he was staying alone and did not sleep with anyone. They proceeded to search the compound but did not find anything. On the way to the police station, near Ramula Primary school, it started raining heavily. They found a police Land Cruiser and when he got in, he saw a dead body soaked in blood. He was told to sit on the floor and was taken to Magunga Police Station where he was put in the cell where he met DW 1. He further stated that as he sitting in the vehicle the blood of the dead person soaked onto his shorts. He denied that he had anything to do with the

murder.

33. In order to secure a conviction for the offence of murder under **section 203** of the **Penal Code**, 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.

34. The cause of death is not in dispute. The deceased was hacked to death outside his house. The prosecution witnesses, who came to the scene of the incident outside his house, confirmed that the deceased was lying in a pool of blood with massive cut injuries on his head as illustrated by the photographs (Exhibit No. 3A –I) taken by PW 10. The injuries described by the witnesses were confirmed by the post mortem carried out by pW 4. I agree with the conclusions of PW 4 and I also find and hold that that the deceased died and he died as a result of massive bleeding in the brain and massive blood loss from the severed blood vessels on the neck. I also find that the injuries were inflicted by a sharp weapon and that the object most likely a panga.

35. The next issue concerns who committed the unlawful act that caused the death of the deceased. The prosecution relied on both direct and circumstantial evidence to implicate the accused in the murder of the deceased. Both parties filed written submissions to support their respective positions. The common position in the submissions is that the prosecution relied on direct evidence of identification in respect of DW 1 and circumstantial evidence in respect of DW 2.

36. Counsel for the accused submitted that this is a case where there was only one witness who could have seen the assailant and his evidence was not corroborated by any other witness, that there was a lot of darkness and visibility was not possible without proper lighting and whose intensity the prosecution did not explain, that there inconsistent evidence whether in fact the identifying witness knew the assailant and that the identification parade was not conducted in accordance with the established rules.

37. The prosecution counsel countered that the intensity of the light was sufficient to reveal the facial characteristics of the assailant and though the encounter was brief the circumstances were favourable for positive identification. Counsel further submitted that the witness gave a description of the accused to the other witnesses leading to his arrest and that the identification parade that was carried out sufficient to confirm the identity of the assailant and that on the whole the identification of DW 1 was free from error.

38. The prosecution case against DW 1 is based on the testimony of a single witness, PW 2. PW 2 testified that he saw DW 1 briefly before the assailants ran away. It has been said time and again that the court ought to warn itself of the danger of relying on the evidence of such a witness and the court should scrutinise the evidence carefully before proceeding to convict the accused. Such evidence must be watertight to justify a conviction (see **Kiarie v Republic [1984] 739**). This principle has been reiterated by the Court of Appeal in several cases following the Court of Appeal for Eastern Africa decision among them **Abdalla Bin Wendo & Another v Republic [1953] 20 EACA 166**, the Court stated as follows;

Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions following a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

39. On the material night when PW 2 opened the door and flashed his torch he saw one person who was about 2 metres ahead. The incident occurred between the deceased's main house and the kitchen which PW 12 measured to be 5 metres (Exhibit No, 17). PW 1 had a torch (Exhibit No. 2) he said he was close enough as the person tried to cut him causing him to recoil into the house. He also stated that there were two other people whom he did not see. PW 2 was able to describe the assailant's distinctive features to

PW 3, PW 4, PW 8 and PW 12 when he was interviewed.

40. Following the arrest of DW 1, PW 12 felt it was necessary to test the description of the identity of the suspect by subjecting him to an identification parade conducted by PW 5. Counsel for the accused, attacked the identification parade on the ground that it was not conducted in accordance with the general rules for conducting identification parades in various cases **R v Eria Sabwato [1960]EA 174**. He pointed out PW 2 knew the suspect before and that even though he denied in his testimony that he knew him before and that the fact the suspect was the only person with clearly distinctive features rendering the identification parade useless.

41. PW 12 testified that when he interviewed PW 2 at the scene of the incident on the material night, PW 2 did not say the name of the person he saw but he knew it was someone from the village. When PW 2's father, PW 3, was cross-examined, he stated that both his sons including the witness must have known the accused as they lived in the same area. On his part, PW 3, confirmed that he knew the accused since they were children. In fact it is PW 3 who identified DW 1 when he was arrested in the minibus at Sori.

42. Whether or not PW 2 knew DW 1 is critical because, if he knew him, then the identification parade was worthless. Further, if he knew DW 1, he would have mentioned his name to those he knew in the first instance. What comes out in this case is that DW 1 had distinctive features which when they were mentioned, PW 3 immediately knew who it was and was thus able to identify him in the bus at Sori.

43. From the evidence, I find that it is unlikely that PW 2 would not have known DW 1 from the village particularly because he had very distinctive features. He was a neighbour and their respective families had a long standing land feud that would have coloured his evidence in this respect. I am drawn to this conclusion because he told PW 12 that he knew the assailant was someone from the village. When PW 4 was cross-examined he also stated that he heard from PW 1 and PW 2 that they suspected the sons of Obade Olum were suspects. Furthermore, given the very distinctive features of DW 1, the identification parade was worthless as DW 1 was the only person with tattoos and dreadlocks on that parade. As he clearly stood out, PW 2 would have picked him out anyway.

44. Whereas there is ample suspicion against DW 2, I am not convinced that the testimony of identification against the DW 2 is watertight to justify conviction of on the basis of the testimony of PW 2 alone. Whether PW 2 actually recognised DW 1 on that night or whether, because of the past history of the family feud, he implicated DW 1 is a question that remains open.

45. The evidence against DW 2 is purely circumstantial and it is that the blood of the deceased was found on his blue jean shorts (Exhibit No. 9) and that the panga (Exhibit No. 19) recovered from the Olum homestead connected him to the death of the deceased. The pair of jean shorts worn by DW 2 is a personal item of clothing and since he was found wearing it, he bears an evidential burden to provide a reasonable explanation how the deceased's blood was found on his clothing. **Section 111(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which casts the burden of proof on the accused, in certain instances, provides as follows:-

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

46. Where the accused fails to offer any reasonable explanation as to how the deceased's blood came to be found on his clothes, the court is entitled to presume certain facts under **section 119** of the *Evidence Act* which provides:-

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

47. When called upon to make his defence, DW 2 stated that after he was arrested from his home he was escorted to the police vehicle. When he got into the vehicle he found a dead blood soaked body. His brother, DW 1 was already there and he was told to sit on the floor. As he was sitting on the floor, the deceased's blood soaked onto his shorts.

48. In considering evidence of this kind, the integrity of the chain of evidence is of supreme importance and I am called upon to determine whether there was any contamination of DW 2's clothes by the deceased's blood. As the case against him is grounded on circumstantial evidence, it is also important to recall that the principle that has been restated by our court on many occasions that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt and that it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see ***Rex v Kipkering Arap Koske & Another [1949] 16 EACA 135*** and ***Mwangi & Another v Republic [2004] 2 KLR 32***).

49. PW 1 testified that the deceased's body was taken from the homestead at about 6.00am. PW 3 stated that after they returned from Sori, he took the police officers to the Olum homestead where DW 2 was arrested and taken to Magunga Police Station. At about 4.30pm, he went back to the deceased's homestead with the officers to await the arrival of Scenes of Crime Officers from Homa Bay who came and left at about 5.00am. Thereafter, the police organized for a vehicle to take the body to St. Camillus Mortuary. PW 4 also confirmed that after the arrest of DW 2, some officers went back to Magunga Police Station while he went back to the scene of the incident and escorted the body to the mortuary. PW 8 also confirmed that after they returned from Sori, they went to the Olum homestead. He recalled that he found DW 2 dressed in wet jean shorts, arrested him and brought him to the Police Station.

50. The investigating officer, PW 12, went back to the Police Station after escorting the deceased's body to the mortuary. He arrived at the Police Station at about 12.00pm and found the accused had been arrested. DW 2 was wearing wet jean shorts with blood stains. He took the jeans and marked them as "D". The jean shorts were forwarded by the Exhibit Memo (Exhibit No. 10) to PW 9 who confirmed that they were indeed blood stained with the deceased's blood.

51. It is clear from the evidence that DW 2 was arrested while wearing wet jean shorts. He was taken to the police station by PW 8 while the body of the deceased was still at the Akida homestead awaiting Scenes of Crime Officers from Homa Bay. The deceased body was never taken back to the police station but was taken directly to St. Camilus Mortuary. I therefore reject DW 2's explanation that the jeans shorts were contaminated with the deceased's blood while he was being taken to the police station in the police vehicle. At no time did DW 2 come into contact with the deceased's body after the incident had taken place. By the time he was being arrested and taken to the police station, the deceased's body was still *in situ*. I also find that by the time he was arrested he was still wearing the jean shorts that had the deceased's blood. I am therefore satisfied that the chain of custody of evidence established that indeed DW 2's clothes were stained with blood from the deceased. The deceased blood cannot be explained in any other way other than the fact that he was present when the deceased was murdered.

52. Although various witnesses gave varying distances of proximity of the home of the Olums and the Akida's, I would accept that the distance given by PW 12 which is most favourable to the accused. He stated that the homes were 2 to 3 km apart. DW 2 testified that he had been home on that evening which puts him within the area and as the incident took place between 9 and 10pm, there was sufficient time him

to leave the scene after committing the murder and go home only to be arrested at least 5 hours later at about 4.00am. Since it had rained that night, the jean shorts were wet. The injuries sustained by the deceased were so vicious as evidenced by the fact that the neck was almost severed and the blood vessels cut. Such injuries would have led to the spilling of blood on a person who was close by when he was cut with a panga.

53. Additionally, the panga (Exhibit No. 19) produced in evidence by PW 12 points to the DW 2. The blood stained panga was recovered under the bed in Grace Olum's house a day after the incident. PW 12 stated that an attempt had been made to clean the panga with soil which looked fresh. DW 2 was residing at the homestead and from his own testimony, he had access to her house as he would eat there. PW 12 was told by Phillip Olum that the panga was used by DW 2. Even absent the testimony of the said Philip Olum, it is only DW 2 who could have used the panga. The only explanation of the deceased's blood on the panga is that it was used to slay the deceased and I so find.

54. Taking the evidence of the deceased's blood stains on his jean shorts and the evidence of the panga, I therefore find that DW 2, in the company of others, went to the attack the deceased on the night of 20th April 2013. DW 2 brutally cut the deceased causing blood to spill on him. He thereafter went back home, attempted to clean the panga with soil and hid beneath the bed in his mother's home after which he went to sleep in house.

55. The kind of injuries inflicted on the deceased were definitely inflicted with such ferocity and violence leaving no doubt that they were inflicted with, "*[a]n intention to cause the death of or to do grievous harm to any person, whether the person is actually killed or not*" within the meaning of **section 206(a)** of the **Penal Code**. I therefore find that the prosecution proved that the injury was inflicted with malice aforethought.

56. Under **section 9(3)** of the **Penal Code** the prosecution is not required to prove motive to establish the offence of murder. Motive may however be useful in piecing all the circumstantial evidence together (see **Choge v Republic [1985]KLR 1** and **Libambula v Republic [2003] KLR 683**). **In this case there was a long standing land dispute between the Olum and Akida families. Even without establishing a motive the totality of the evidence is clear and it points to DW 2. I therefore find and hold that the case against DW 2 is watertight and proved beyond reasonable doubt.**

57. In light of the findings, I hereby acquit **DAVID KWABI OLUM** of the murder of **ELLY AKIDA ASAWA**. He is set free unless otherwise lawfully held. I find **DANIEL AYIETA OLUM** of the murder of **ELLY AKIDA ASAWA** and I convict him accordingly.

DATED and DELIVERED at HOMA BAY this 1st day of December 2015

D.S. MAJANJA

JUDGE

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

Mr Okoth instructed by G.S. Okoth and Company Advocates for the accused.