



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE (MURDER) NO.4 OF 2009

REPUBLIC PROSECUTOR

VERSUS

ERICK OTIENO ODERO ACCUSED

JUDGMENT

Introduction

1. The accused herein, Erick Otieno Odero, was arraigned before this court on 16th January 2009 on one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, it being alleged that on the 2nd January 2009 at Nyangweso village in East Kochia village in Homa Bay District within Nyanza Province, jointly with others not before court he murdered SULMAN OIKE OTIENO.
2. The accused appeared for plea on 12th February 2009 and pleaded not guilty to the charge. The case has been ongoing since then. The prosecution called 10 witnesses namely: Prisca Juma Yogo (PW1), Angelina Auma Luendo (PW2), Gladys Adhiambo Okoth (PW3), Nyangweso Olal (PW4), George Omondi Luendo (PW5) as well as Stephen Matinde Joel Weithe (PW6). The other witnesses were Dr. Ayoma Ojwang' (PW7), George Odhiambo Ojode (PW8), No.218409 Sgt. George Odhiambo Odira (PW9) and No.63459 Cpl. Henry Momanyi (PW10).

Facts of the case

3. In his opening remarks, Mr. Nicholas Mutuku for the State gave the facts of the case as follows:
On 1st January 2009, the accused herein, together with the deceased and one other person who has never been arrested were at a disco at a certain bar. At about midnight, the trio left the disco in search of changaa. They went to the home of Prisca Juma Yogo (PW1) hereafter referred to as Prisca, and bought changaa for Kshs.50/= . The changaa was passed to the trio through a window. As the three were going away from Prisca's house, Angelina Auma Luendo (PW2) – Angelina – and Claris Adhiambo (not called as a witness) and John Nyangweso (PW4) – Nyangweso – heard the deceased pleading with someone not to kill him. They also heard the voice of the accused saying: **“I will kill you.”** The said witnesses did not come out of their houses, but on the same night the accused passed through the home of one Eunice Akoth (not called as a witness) and bought some cigarettes. The accused also asked for water to wash blood stains from a panga. He was not given the water.
4. On the following day the deceased's body was found about 100 metres away from the home of the 3 persons who alleged to have heard the voice of the accused saying **“I will kill you.”** The accused was traced in the morning at a changaa den. He was subsequently arrested and arraigned before the court on this offence of murder. A postmortem examination was carried out on the

body of the deceased by Dr. Ayoma Ojwang, PW7.

Prosecution's Evidence

5. Prisca told the court that at about 1.00 a.m. on 2nd January 2009, she was asleep in her house at Kochia village when some people knocked on her window using a panga. On opening the window, she saw Erick Odero, (the accused herein), Kennedy Odero and Sulman Odero. These three people were well known to Prisca and when she shone her torch light at them, she easily recognized them. The accused, who was then carrying a bottle asked Prisca for changaa worth Kshs.50/=. Prisca obliged and after handing over the changaa to them through the window, the accused and his companions went away. On the following day, Prisca learnt that Sulman Otieno had been found dead in the home of Nyangweso Awei. At about 8.00 a.m., Prisca went to Nyangweso's home and saw the deceased's body which had deep cuts on the neck and on both arms.
6. In cross examination, Prisca admitted to having recorded a statement before Homa Bay police station on 2nd January 2009. She also said that after the accused and his companions left her house, she went out and saw the three men seated. She also admitted that she did not record in her statement that she used torch light to see the accused and his companions upon opening the window. Prisca also admitted that she could not say how the deceased died.
7. PW2, Angelina testified that on 2nd January 2009 at about 1.30 a.m., while she was asleep in her house, she heard a commotion outside. She also heard someone saying **"Kodero people are killing me."** The person spoke in Dholuo language; but she could not say whose voice it was. Angelina also testified that she heard the same person saying, **"they have robbed me of my purse and are now cutting me with a panga."** while another voice was saying, **"Now I am killing you."** According to Angelina, the person who said **"Now I am killing you"** was the accused, a person who she said was a fellow villager and well known to her. Angelina also said that she heard someone else saying **"Erick is killing."** She then went out of her house and saw the accused herein cutting a person.
8. It was also Angelina's testimony that the night was dark though there was some moonlight. She did not say how bright the moonlight was. She also stated that she was about 15 metres away from the spot where the accused was cutting someone with a panga, and that she saw the accused cut that person 3 times. According to her, the incident took place outside the home of one Robert Odero which is next to her own home though separated by a live fence which is not thick. Angelina maintained that with the help of the moonlight, she could see the accused through the fence and that after the accused stopped cutting the deceased, he (accused) asked the deceased to get up and be escorted home. The two then left the scene together.
9. A short while later, the accused returned to Angelina's home and warned her of dire consequences if anyone dared to mention what had just transpired. After about one hour, one Annah Omollo (not called as a witness) went to Angelina's home and informed her as the village elder that she had seen the body of a dead person outside her (Omollo's) home. The body had cuts on the neck and hands. As a result of the report from Omollo, Angelina woke up the villagers and also telephoned the Assistant Chief of the area. During the day the police were called and took away the body of the deceased.
10. During cross examination, Angelina stated that the incident took

place in the home of Prisca which was about 20 metres away from her own home. She also said that the accused escorted the deceased to the home of Nyangweso which was about 200 metres away before coming back to threaten her. She averred that she saw and heard the accused on the material night and that she observed the accused for about 5 minutes before he left. When questioned about her statement to the police, Angelina stated that the same was recorded by somebody else; it was not read back to her though she signed it.

11. PW3 was Gladys Adhiambo Okoth (Gladys). She too stated that at about 1.00 a.m. on 2nd January 2009, she was woken up from sleep by noises outside her house when someone said repeatedly **"Erick, why are you killing me, people from Kodero."** Gladys said she also heard the accused saying in a loud and commanding voice **"stand up."** Gladys said she had known the

- accused since 1989 when she got married in the same village where accused lived. Gladys further testified that she also heard another voice saying, **“I know you are widows in this area. Why can’t you scream so that I am rescued?”** She could not tell whose voice uttered those words, and thereafter she fell asleep again.
12. Later that same night, Gladys was woken up by her father-in-law Nyangweso. She lit her lantern at the request of Nyangweso and then accompanied him to his home. At Nyangweso’s home, Gladys saw a person lying down and dressed in white but blood stained clothes. The person had deep cut wounds on the neck, forehead and hands. Gladys saw many other people at Nyangweso’s home, among them Angelina. At about 8.00 a.m., the accused was brought to Nyangweso’s home by the police.
 13. During cross examination, Gladys testified to the following: Angelina and Prisca’s homes are separated by a common boundary. There was moonlight on the material night, though she had told the police in her statement that it was dark and that she could therefore not go out. The accused was the only person in the village known by the name Erick. She did not know the person who was being assaulted and that she did not come out of her house to see who Erick was as she was afraid.
 14. PW4, Nyangweso Olal (Nyangweso) testified that at about 1.00 a.m. on 2nd January 2009, he was woken up from sleep by screams and a voice saying, **“I am being killed at K’Odero’s place.”** He went out of the house and again heard someone saying **“I am being killed at K’Odero’s home.”**, and that the voice uttering those words was that of Sulman Otieno, the deceased in this case, a person known to Nyangweso from birth. Nyangweso also stated that when he went out he could not see the accused since it was at night.
 15. Later, at about 4.30 a.m., Nyangweso went out to check on his animals. That was the time he noticed someone lying down on his back. As he drew nearer, Nyangweso realized that the person was dead and there was blood all over the clothes. Nyangweso could not however tell whose body it was, so he went and called Angelina the village elder and Gladys his daughter-in-law. At about 6.00 a.m. Nyangweso made a report to the AP camp. He accompanied the AP’s to the accused’s home where he saw some blood stains all over outside the accused’s mother’s house. Both the accused and his mother were not in the home but Nyangweso said he could see the trail of blood from the accused’s mother’s house right up to where the body of the deceased lay.
 16. When Nyangweso was cross examined, he admitted he did not see the accused killing the deceased though the deceased’s body was in his (Nyangweso’s) compound. He also said that during the commotion, he heard the accused saying, **“what have you come to do in our homestead. I will kill you today.”**
 17. PW5, George Omondi Luendo (Omondi), then a student at Ochienya Secondary School testified that on 2nd January 2009 he saw a dead body at Nyangweso’s home. Omondi said he knew both the deceased and the accused. He also knew one Kennedy Odero. He looked for both the accused and Kennedy Odero but found only the accused at a changaa den. The accused was then arrested and handed over to the AP camp. Omondi also told the court that he did not hear any screams on the night of the attack.
 18. Stephen Matinde Joel Weithe (Stephen) a Government Analyst testified as PW6. He was requested to examine two items marked as follows:-

X – Blue pair of long trouser with red and white stripes

Y – Blood sample from one Sulman Otieno

19. On examination, the findings were that item X was found to be moderately stained with human blood of group O. Item Y was found to be blood group O, thus the blood on the two items was of the same blood group. The report filled and signed by Stephen, together with the exhibit memo was produced as **P. Exhibit 4 (a)** and **4(b)** respectively.
20. Stephen stated during cross examination that no blood sample from the accused was submitted to the Government Chemist for analysis. He also testified that the larger part of the world’s human population has blood group O. He also confirmed that he did not carry out a DNA test.
21. PW7 was Dr. Ayoma Ojwang’, a medical specialist at Homa Bay District Hospital. He produced a postmortem report prepared by Dr. Okumu who carried out an autopsy on the body of the

- deceased. From the examination by Dr. Okumu, the findings were: the body had a deep cut wound on the left side of the neck measuring about 4 cm, and there was also a stab wound on the left anterior head measuring about 2 cm wide. Dr. Ojwang also told the court that the thumb of the deceased's left thumb was severed and hanging. The doctor formed the opinion that the cause of death was haemorrhagic shock secondary to severed major blood vessels.
22. Dr. Ojwang also examined the accused and certified him fit to stand trial. The postmortem report and the P3 form on mental status of the accused were produced as **P. Exhibits 5 and 6** respectively. During cross examination, Dr. Ojwang denied a suggestion by counsel for defence that the postmortem report, **P. Exhibit 5** was inconclusive as to the cause of death of the deceased.
23. George Odhiambo Ojode (George) testified as PW8. George testified that on 2nd January 2009, he was woken up at about 5.30 a.m. by Angelina who informed him about the body of the deceased having been found at Nyangweso's home. He accompanied Angelina to Nyangweso's home where he saw the body. Angelina mentioned to him that Erick Odero, the accused herein had a hand in the death of the deceased. George therefore joined the villagers in looking for the accused. The accused was eventually traced at a changaa den, subdued and arrested, then tied with a rope and later handed over to AP's from Kamenya sub location. George also identified a panga **PMF1-1** which he said the accused had when they found him at the changaa den. George also told the court that he had known the accused for the latter's entire life.
24. During cross examination, George stated that the panga which was recovered from the accused was not blood stained and that it was not criminal for the accused to carry a panga.
25. PW9 was NO.218409 Sgt George Odhiambo Odira, who was attached to Chief's office Kochia West Location. He testified that on 2nd January 2009 at about 6.30 a.m., while he was at the chief's camp, he received a report of the murder from Nyangweso. Together with APC Simon Biwot and APC Jackson Keitum, he accompanied Nyangweso to the scene and after confirming that somebody had been killed, he telephoned the OCS, Homa Bay police station. While the police were awaited, the accused was brought to Nyangweso's home. PW9 re-arrested the accused from the members of the public. He interrogated the accused about the allegations and decided to arrest the accused in connection with the deceased's death. He also said that the accused's brother disappeared and is still at large. The accused was eventually handed over to OCS Homa Bay police station. PW9 also testified that he knew both accused and his brother who is still at large. PW9 was the arresting officer.
26. PW9 confirmed during cross examination that the panga which was recovered from the accused did not have any blood stains on his; that the accused was not assaulted although he had blood stains on his clothes and that the accused had been at an overnight disco at Nyangweso shopping centre and never slept at his home.
27. PW10 was No.63459 Cpl Henry Momanyi of Homa Bay police station. He was the investigating officer in this case. According to Cpl Momanyi, he received a call from his OCS at about 7.00 a.m. on 2nd January 2009 with a request to accompany the OCS to Nyangweso shopping centre. The two went together with one Salim from Scene of crime and PC Nelson Ndambi. On arrival at Nyangweso Trading centre, they found the accused under arrest by PW9.
28. After re-arresting the accused from the AP officers, PW10 and his OCS together with the other officers visited the scene of crime which was about 1 km away from Nyangweso's home. The officers found the body of the deceased which had injuries on the head, neck, both hands and on the right leg. Beside the body was a pair of green floaters or slippers.
29. Thereafter, PW10 said he commenced his investigations which led him to the actual spot where the deceased was killed in the home of the accused. According to Pw10, there was lots of blood on the ground with signs of a big struggle. PC Salim took photographs of the body before the same was transferred to Homa Bay District Hospital for preservation.
30. On the 3rd January 2009, PW10, together with PC Ndambi (not called as a witness) accompanied the accused to his house from where they recovered one blue red stripped long trouser that was soiled with blood. On the 8th January 2009, Dr. Akuma carried out a post mortem examination on the body of the deceased. Blood samples from the deceased were taken to the Government Chemist for analysis and comparison. PW10 stated that the accused's brother, Kennedy Odhiambo Odero was still at large. Pw10 produced the following exhibits in support of the

prosecution's case against the accused:-

- *P. Exhibit 1 – panga*
- *P. Exhibit 2 – Blue long trouser*
- *P. Exhibit 3 – Green Floaters*
- *P. Exhibit 4 – Red slippers from scene of crime*
- *P. Exhibit 7 (a) – (f) photographs of the scene and body marked 1-6*

31. During cross examination, PW10 stated that at the time of arrest, the accused did not have blood stained clothes though **P. Exhibit 2** which was blood stained was recovered from his house. PW10 also testified that he sent a sample of the accused's blood to the Government Chemist for analysis but from **P. Exhibit 4 (a)** there seems to have been no comparison between the blood found on **P. Exhibit 2** and the accused's own blood. It was also PW10's evidence that though the accused had some blood on his head at the time of arrest, there was no visible injury and the accused never made any complaint of assault. PW10 denied a suggestion by defence counsel that the accused was assaulted. He also denied a suggestion by defence counsel that since there was no eyewitness of the alleged crime, the accused was arrested on mere suspicion.

The Defence Case

32. At the close of the prosecution's case, the accused person was put on his defence. The accused elected to give unsworn evidence during which he denied committing the offence. He also analyzed the evidence of each of the prosecution witnesses.
33. Briefly, the accused stated that on 2nd January 2009 at about 11.00 a.m., he was in his garage at Nyangweso market. He was together with Omondi and George. The two had gone to the garage to ask him to make some steel windows for them. The three of them left on a motor cycle. On arrival at their destination, the accused saw a big crowd of people, at the home of Nyangweso and when they alighted from the motor cycle, the accused saw a dead body. It was then that Angelina shouted the accused's name whereupon the crowd descended on him, on allegations that he had killed the deceased. He refused to admit the allegation. The people continued to beat him until he was rescued by the police who later took him to Homa Bay police station.
34. The accused also stated that he remained locked in at Homa Bay police station from 2nd January 2009 until 16th January 2009 when he was arraigned before court on a charge he knew nothing about. The accused denied going to Prisca's home in the wee hours of 2nd January 2009 to buy alcohol. The accused stated that at the said hour, he was asleep at his place of business at Nyangweso market since he was on temporary assignment as a security guard for the owner of the garage on the night in question. In a nutshell, the accused branded Prisca a liar. He maintained that he could not have bought chang'aa on the material night because he has never taken any chang'aa the whole of his life.
35. The accused also testified that the prosecution's allegation that he was in the company of his brother Kennedy Odhiambo Odero (still at large) on the night in question could not possibly be true because the said Kennedy Odhiambo Odero has been absent from home since the year 2005. He also testified that the deceased was a stranger to him.
36. Regarding Angelina's evidence, the accused stated that Angelina's testimony can only be one of mistaken identity because there are many other people in the locality known as Erick Odero. The accused also wondered how Angelina was able to see him in the night through a fence from a distance of 20 metres. The accused stated that Angelina's evidence was not only contradictory but was a pack of lies.
37. The accused also testified that Nyangweso's allegations that he (Nyangweso) heard accused's voice on the night of the attack was not true, because he (accused) was not at the scene of the alleged crime. The accused also pointed out some contradiction between Nyangweso's, Angelina's and Gladys' testimonies regarding the time when Nyangweso saw the body of the

- deceased in the compound. The accused also told the court that the prosecution, through the evidence of Nyangweso had failed to discerns trite that the accused was killed in the accused's home and later dragged to Nyangweso's compound.
38. The accused also urged the court to discard the evidence⁴ by both Omondi and George the reason being that what the two witnesses allegedly told the court was hearsay, and further for reason that the allegations that these 2 witnesses bought some changaa for the accused were unfounded since he does not take changaa. The accused also disputed the allegation that the blood stained trouser that was recovered from his house by PW10 belonged to him (accused). He said he only saw the trouser while in court.
39. In summary, the accused denied all the allegations made against him. The accused did not call any witnesses.
40. In his final submissions on behalf of the accused, learned counsel Mr. Sonye Ondari submitted that the offence of murder as defined under the Penal Code was not proved beyond any reasonable doubt. First that the prosecution failed to prove an intention by the accused to commit the offence and that he planned and executed such an intention well. In other words, counsel submitted that the prosecution had not met the threshold set out in **Section 206** of the **Penal Code**.
41. **Section 206** of the **Penal Code** reads as follows:-

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- a. **an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b. **knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- c. **an intent to commit a felony;**
- d. **an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

42. Counsel further submitted that the entire evidence adduced by the prosecution is based on mere suspicion that the accused person is the one who murdered the deceased, and that the circumstantial evidence is too weak to connect the accused to the offence. It was also counsel's submission that the fact that deceased was found dead on the morning after the alleged murder does not make the situation any better for the prosecution. In any event, counsel argued there was material contradictions in the testimonies of Angelina and Nyangweso and that the benefit of such contradictions should go to the benefit of the accused.

43. It was also counsel's submission that contrary to Angelina's allegation that there was bright moonlight on the night of the alleged offence, Gladys and Nyangweso clearly stated that the night was dark. He urged court to give the benefit of the contradictions in the evidence to the accused. That the essence of these contradictions is that none of the prosecution witnesses identified the accused as being at the scene of crime on that night and that the truth is that the accused was not at the scene of crime as testified to by Omondi who allegedly told the court he did not see the accused that night.

44. To support his submission that the prosecution has miserably failed to prove its case against the accused person, counsel relied on the following authorities:-

1. ***Abdallah Bin Wendo –vs- R[1953] 20 EACA 166*** for the proposition that mere suspicion no matter how strong cannot form the basis for a conviction.
2. ***Mary Wanjiku Gichira –vs- Republic Nairobi CRA NO.17 of 1998*** in which the Court reiterated the holding in the Wendo case to the effect that an accused person who is convicted on the basis of mere suspicion is entitled to an acquittal on appeal.
3. ***Abel Monari Nyanambia & 4 others –vs- Republic – Court of Appeal CRA No.86 of 1994*** for the

proposition that it is always unsafe to uphold a conviction based on improper identification, and where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely water tight to justify a conviction.

4. **Kipkering Arap Koske & another –vs- R [1949] EACA 135** for the proposition that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”
 5. **Omar Mzungu Chimera –vs- Republic Court of Appeal at Mombasa, CRA No.56 of 1998** for the proposition that where a case rests entirely on circumstantial evidence, such evidence must satisfy three tests **(i)** the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; **(ii)** those circumstances should be a definite tendency unerringly pointing towards guilt of the accused; **(iii)** the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.
45. From an analysis of the evidence on record, it is not in dispute that the offence herein took place at night after midnight on 1st January 2009. Prisca is the one who testified that the accused knocked on her window asking for changaa at about 1.00 a.m. on 2nd January 2009. Prisca said she saw the accused with 2 other people Kennedy Odero and Sulman Odero, the deceased herein. In the morning, Prisca learned that the deceased, whom she had seen in the company of the accused, had been killed. Prisca did not testify as to the source of light she used in identifying the accused and his 2 companions.
46. Angelina said she only heard voices of one saying **“Kodero people are killing me”** and the other saying **“Now I am killing you.”** She testified that it was the voice of the accused saying **“Now I am killing you.”** According to Angelina, the accused was a fellow villager and well known to her. She also testified that she went out of the house and saw the accused cutting someone. Although Angelina said there was some moonlight that night, she did not say how bright the moon was though the gist of her testimony was that the night was dark. Angelina also said that the incident took place outside the home of one Robert Odero which is next to her own home though separated with a live fence and that she saw the accused through that live fence.
47. Gladys also alleged to have heard the voice of the accused whom she had known since 1989 ordering another person to stand up. The other person was repeatedly saying **“Erick why are you killing me.”**
48. From the testimonies of Prisca, Angelina and Gladys, the accused was well known to all the three witnesses, both physically and by voice. However, from the circumstances described by each of the three witnesses as to how they were able to see the accused on that dark night, this court finds it improbable that any of them saw the accused that night. The circumstances were difficult. The witnesses could not say whether or not there was moonlight and if so, how bright it was for them to be able to see the accused clearly with the help of that light.
49. It is now a well established principle that where the prosecution case against an accused rests on identification under difficult conditions, the court must carefully assess such evidence with the greatest care. Though the three witnesses say that the accused was known to them for many years, they could not have easily picked him out of the group under those circumstances.
50. Having ruled out physical identification of the accused by Prisca, Angelina and Gladys, can it be said that the three were able to recognize the accused’s voice on that night. On this point, I am guided by the case of **Choge –vs- Republic [1985] KLR 1** in which the Court of Appeal held in part that:-

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in

testifying to that which was said and who said it.”

51. In the case of Karani –vs- Republic – CRA No.181 of 1984 at Kisumu, the Court of Appeal stated that:-

“Identification by voice recognition is admissible however, care must be taken to ensure that the voice is that of the appellant.”

52. In the more recent case of Peter Musau Mwanzia –vs- Republic [2008] e KLR, the Court of Appeal comprising Tunoi, Bosire and Onyango Otieno JJA held as follows:-

“We do not agree that for evidence of recognition to be relied upon the witness claiming recognition of a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect has been close to him for sometime or is a relative”

53. In the instant case, Prisca said that the accused, who was known to her asked her to sell changaa to him worth Kshs.50/=. The accused spoke to Prisca through an open window. Angelina said she had known the accused for a long time and that on that night, she heard him saying, **“Now I am killing you.”** Angelina also said the accused came back to her house and warned her of dire consequences if anyone dared mention what had happened. In my considered opinion, that conduct on the part of the accused was of someone who knew that the person he was speaking to (in this case Angelina) knew him. Gladys also testified that she had known the accused since 1989 and that she heard his voice ordering someone to stand up. Nyangweso also testified that he heard the accused tell the deceased, **“What have you come to do in our**

homestead. I will kill you today.”

54. Piecing the evidence of Prisca, Angelina, Gladys and Nyangweso together, I am persuaded that the accused was heard speaking to the deceased on the night the deceased died. I have no doubt in my mind about the recognition of the accused’s voice by these 4 witnesses.

55. The remaining issue is whether in the circumstances of this case, the prosecution proved any one or more of the ingredients of **Section 206** of the **Penal Code** (supra). Thus the prosecution is under a duty to prove that the accused herein had the intention to cause the death of or do grievous harm to the deceased or to any other person; or that he had knowledge that his acts or omissions causing death would probably cause death to the deceased or to some other person regardless of whether he (accused) wished that such an eventuality would not occur; or that the accused intended to commit a felony or finally that the accused had an intention by his act or omission to facilitate the flight or escape from custody of any person who had committed or attempted to commit an offence.

56. **Section 206** of the **Penal Code** thus gives the prosecution a wide arena from which to operate when prosecuting the offence of murder. The question to be determined now is whether from the evidence on record, it can be said that the prosecution proved one of the above stated ingredients.

57. From the testimonies of Angelina, Gladys and Nyangweso, they all heard the accused tell somebody he was with: **“I will kill you”** and also saying **“now I am killing you.”** Angelina also heard the other person saying **“Erick is killing me”**, and **“Kodero people are killing me.”** Gladys also heard the other pleading and saying, **“Erick, why are you killing me, people from Kodero.”** Gladys also heard the accused telling that person, **“stand up.”** Nyangweso also heard that person being killed saying, **“I am being killed at Kodero’s place”** and again **“I am being killed at Kodero’s home.”** Nyangweso also said he heard the accused saying, **“What have you come to do in our homestead? I will kill you today.”**

58. In my humble view, the cumulative effect of all the above stated utterances is that the accused had the intention to cause the death of someone, and he verbalized that intention. The accused also gave the reason why he wanted to kill that person: the person had come into their (accused’s)

home. From all the above, the accused also had the intention to commit a felony. He carried out his intention by inflicting fatal injuries on the deceased. See **Republic –vs- Ndalamia & 2 others [2003] KLR 638**.

59. In his defence the accused put forward the defence of alibi, contending that on the night of the alleged offence, he was on duty as a night watchman at Nyangweso market, and that in the circumstances, he could not have been at the scene of the alleged crime. In my considered view, the defence of alibi was completely destroyed by the evidence given by Angelina, Gladys, Nyangweso and even Prisca.

60. In the case of **Msembe & another –vs- Republic [2003] KLR 521**, the Court rightly stated that the burden of proof for the defence of alibi rests with the prosecution and the prosecution alone and the accused herein does not assume the burden of proving it. I have myself considered the accused's defence against the backdrop of the prosecution's case and find that the said defence was a mere afterthought with no truth in it whatsoever.

61. I am fortified in my conclusion regarding the defence of alibi by the fact that a lot of blood was found in the home of the accused and according to PW10, there was evidence of a big struggle.

62. All in all I am satisfied that the prosecution proved the charge of murder against the accused person beyond any reasonable doubt. I therefore find the accused guilty as charged and convict him accordingly under **Section 322** of the **Criminal Procedure Code**.

63. Orders accordingly.

Dated, signed and delivered at Kisii this 6th day of February, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. P.O. Ochieng for State

Mr. Minda for Sonye Ondari for Accused

Mr. Bibu - Court Clerk