



**IN THE HIGH COURT**  
**AT HOMA BAY**  
**CRIMINAL CASE NO. 37 OF 2013**  
**(FORMERLY KISII HCCRC NO. 34 OF 2012)**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**WILLIAM OCHIENG OGAO.....ACCUSED**

**RULING**

1. The accused, William Ochieng Ogao, is 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 are that on the night of 18<sup>th</sup> and 19<sup>th</sup> September 2009 at Kethia East within Homa Bay County he murdered Enock Otieno Kemo (“the deceased”).

2. On 19<sup>th</sup> September 2009, the body of the deceased was found lying along a footpath near a thicket. According witness accounts, the accused was the last person to be seen with the deceased. Pathological tests conducted on the body confirmed that he had been poisoned. The case of the prosecution is that it is the accused who murdered the deceased. The accused pleaded not guilty and the prosecution marshalled 13 witnesses to prove its case. At the end of the prosecution case, counsel for the accused and the prosecution, called upon the court to determine whether a prima facie case had been made to warrant the accused being put on his defence.

3. The accused’s mother, Anna Omollo Kemo, PW1, testified that she last saw the deceased on the evening of 19<sup>th</sup> September 2009 when he came home alone, took a bath and informed her that he was leaving to follow some people he had been working with so that he could be given his wages. The next time she saw him, he was dead and a week later she identified the body at the Homa Bay District Hospital when the post-mortem was conducted on 23<sup>rd</sup> September 2009.

4. PW2, Elisha Pamba Ongoro, testified that on 18<sup>th</sup> September 2009, he was building a new house. He contracted Charles Okeyo Michura (PW 8) who had two helpers, the deceased and Nickson Mboya Lwelo (PW 7). He could not recall the names of other people who came to assist but he saw the accused amongst them. He paid PW 8 Kshs. 1,000 in one note after they completed the task at about 6 pm. At about 3 pm, on the next day, he heard people screaming and when he went to Olare, he found the body of the deceased. He did not see any visible injuries on the body.

5. On the same day, 18<sup>th</sup> September 2009, between 6.30 pm and 7 pm, Mary Akinyi (PW3), a *chang’aa* seller, recalled that the accused, the deceased, PW 7 and PW 8 came to her to house to look for the

change for a Kshs 1,000 note. She gave PW 8 the change after which they asked for *chang'aa*. She served them *chang'aa* in a glass which they all shared. She recalled that PW 7 and PW 8 went home while the accused and the deceased left for Olare where there was a disco. PW 3's husband Vitalis Abongo (PW 4), was present when the four came and asked for the *chang'aa* and drank it in their house. He testified that they all left at around 8 pm. He also recalled that the accused and the deceased went to the disco at Olare. PW 3 and PW 4 heard that the deceased had died the next day.

6. PW 7 confirmed that he was one of the people working for PW 1 on 18<sup>th</sup> September 2009 together with the deceased and PW 8. He also confirmed PW 8 was paid Kshs. 1000 after which they went to look for change at the home of PW3 and PW4 accompanied by PW 8, the accused and the deceased. After ordering and drinking a glass of *chang'aa*, they parted company as he and PW 8 went to their respective homes while the accused and deceased went to a disco at Olare.

7. PW 8, the contractor, confirmed that he, PW 7 and the deceased worked at the home of PW 1. He recalled that they were paid Kshs 1,000 after finishing work at about 6.30 pm. Thereafter they went to the home of PW3 and PW4 got change and bought *chang'aa*. He testified that while he went home, the deceased and the accused went to Olare. He never saw the deceased after that.

8. PW5, Salome Anyango Obob, the Assistant Chief of Kamenya Sub-location, testified that she received a phone call on 19<sup>th</sup> September 2009 at about 4.45 pm from a clan elder, Enos Ocholla Ogenga (PW6) that the deceased was dead. As she was far away, she informed him to call the police. She arrived at the scene where the deceased body was at about 6 pm. She observed that the body had not visible injuries and the clothes had no blood stains. PW6 confirmed that he called PW5 after he had been informed that there was a dead body near Olare Centre. He identified that body of a person he used to call *Onalo*. He did not observe any visible injuries on the body.

9. PW 9, George Omondi Mbui, an artisan, recalled that on 18<sup>th</sup> September 2009 he saw the accused come to the disco between 8.30 pm and 9 pm alone while at the gate of the disco place at Olare. He stated that the deceased left the disco in the morning. On 19<sup>th</sup> September 2009, he was learnt that the body of the deceased had been found. He went where the body was at about 6.30 pm which was about 200 metres from where the disco place.

10. PW 10, Leonard Okota, a preacher at Roho Israeli Church at Olare, testified that on 19<sup>th</sup> September 2009 at about noon, while on his way to the Church, he found someone lying beside the footpath. He did not see any visible injuries and the person had his clothes and shoes. He thought the man was drunk and made nothing of the scene. He was only called later to record a statement by the police.

11. PW13, Dr Ayoma Ojwang, a medical doctor, testified that he was instructed by the Homa Bay Police Station to carry out a post mortem of the body of the deceased. It was identified by PW1 and another relative, Kennedy Ogoma. He carried out an autopsy on 23<sup>rd</sup> September 2009. He observed that the body was peeling off but he did not see any fractures of bones, bruises, lacerations or haematoma formation. Likewise, the internal examination of the body did not yield any abnormal results or injuries. He concluded that the cause of death was unknown. He therefore removed a part of the liver, stomach contents, part of the small intestine and blood for further examination by the Government Chemist.

12. PW11, Eunice Wangui Njogu, an officer at the Government Chemist, testified that she received specimens originating from the CID Homa Bay Police Station. These post mortem specimens were parts of the liver, stomach, intestines and blood taken from the body of Enock Otieno Kemo. She was instructed to examine and ascertain whether they contained any chemical poisons. She found traces of a chemical used to remove ticks from animal known as *Chlorfenvinphos (steladone)* in the deceased's stomach. No other chemically toxic substances were detected in the other post-mortem specimens. She prepared a report dated 23<sup>rd</sup> October 2009 which she produced in evidence.

13. PW 12, Chief Inspector Peter Mwangi, the investigating officer, testified that he received a report of sudden death at Olare from Ngegu Police Post. He proceeded, with other police officers to the scene,

near Olare Primary School. They arrived there at about 8.30 pm and found the body of the deceased was lying near a foot path. He carried out investigations by recording statement from various witnesses. He requisitioned the post-mortem and examination of specimens from the deceased's body. After investigations, the matter was handed over to the Office of the Director of Public Prosecutions. The Director of Public Prosecutions advised that a public inquest should be conducted. He testified that the accused was charged after the magistrate conducting the inquest concluded that the accused should be charged with the murder of the deceased.

14. At the close of the prosecution case, the defence called upon the court to acquit the accused on the account of lack of evidence connecting the accused with the death of the deceased while the prosecution submitted that called upon the court to consider the evidence in totality and find that there was sufficient evidence to put the accused on his defence.

15. It is the duty of the prosecution to lead evidence pointing to the fact that the accused committed the act for which he is charged. It is not in dispute that the Enock Otieno Kemo died. His body was identified by PW 1 as that of her son. The cause of death was established by PW 11 as poisoning by ingestion of a chemical substance found in a tick removal agent. The question that remains to be answered is who poisoned the deceased.

16. No one saw the accused administer the poisonous substance to the accused. The last people to see the deceased saw him with the accused, at the home of PW 3 and PW 4 where they took *chang'aa*. Could the *chang'aa* the deceased took have been laced with poison? Once the cause of death was established, the police did not go further to establish whether the accused had the chemical substance in his possession or exclude the possibility of anyone else having the substance. The police who investigated the matter did not carry out any tests on the glass that was used to drink the *chang'aa* and the containers used to dispense the *chang'aa* at the home of PW 3 and PW 4. In short the substance could have come from anywhere. Finally, there is no evidence that the accused caused the deceased to ingest the poisonous substance.

17. Furthermore, PW 11 did not give evidence of how long the chemical substance would take to kill someone after ingestion. So that even if the accused was the last person to be seen deceased, it is possible that the deceased could have ingested the poison prior to meeting the accused.

18. The prosecution has not demonstrated that the accused has a case to answer. It has not established any evidence to link the accused to the poison that led to the death of the deceased. According to the provisions of **section 306(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, I record a finding of not guilty.

19. The accused is set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 15<sup>th</sup> September 2014**

**D.S. MAJANJA**

**JUDGE**

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

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