

**JUDGMENT**  
**HCCR E005 OF 2024**



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**  
**(CHERERE-J)**  
**HCCR E005 OF 2024**

**BETWEEN**

**REPUBLIC .....**  
**.....PROSECUTOR**  
**AND**  
**EVANCE OCHIENG**  
**ODHIAMBO.....1<sup>ST</sup>ACCUSED**  
**BOAZ ODUOR**  
**ODHIAMBO.....2<sup>ND</sup>ACCUSED**

**JUDGMENT**

1. The two accused persons, Evance Ochieng Odhiambo (1<sup>st</sup> accused) and Boaz Oduor Odhiambo (2<sup>nd</sup> accused), stand charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 16<sup>th</sup> September 2022 at Miruka Market in Nyamira South Sub-County within Nyamira County, the accused persons jointly and together murdered Kevin Abuga (*Abuga*).
  
2. The accused persons were arraigned before Okwany J. on 14<sup>th</sup> May 2024, when each denied the charge. The matter

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thereafter proceeded to full hearing before this court. The prosecution called five witnesses in support of its case.

3. PW1 Stella Kemunto Kiboro testified that she resides in Miruka although she works in Nairobi selling clothes. She stated that prior to the incident she did not know either of the accused persons but knew Kevin Abuga as the brother of her friend.
4. PW1 testified that on 16<sup>th</sup> September 2022 at about 2.00 p.m. she was at home with her mother Joyce and her friend Moureen when she heard screams emanating from the road. She immediately rushed towards the source of the screams and upon reaching the road found Abuga lying on the ground bleeding. By the time she arrived at the scene Abuga had already been injured and she did not witness the actual attack.
5. PW1 stated that she observed two men at the scene near a motorcycle. One of the men was seated on the motorcycle while the other stood beside it holding what she described as a bloodstained panga. When members of the public began to scream the two men fled from the scene on the motorcycle in the direction of Kisii. PW1 testified that she later recorded a

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statement with the police and was subsequently called to attend an identification parade where she identified the accused persons as the individuals she had seen at the scene.

6. PW2, IP Hillary Kiplimo, testified that on 26<sup>th</sup> April 2024 he conducted identification parades involving the accused persons. He conducted two separate parades consisting of eight members each drawn from the station. It was his testimony that during the first parade PW1 identified the 1<sup>st</sup> accused, stating that she recognised him by a deformed finger and by his voice, while in the second parade she identified the 2<sup>nd</sup> accused, stating that she recognised him by his hairstyle and voice. PW2 produced the identification parade forms as exhibits.
  
7. PW3, Dr. Handson Ong'uti, a medical doctor attached to Nyamira County Referral Hospital, conducted a post-mortem examination on the body of Abuga on 22<sup>nd</sup> September 2022. He observed a deeply penetrating cut wound on the right side of the neck extending to the mandibular bone and the cervical spine. The jugular veins had been completely severed and the spinal nerves transected at two points. In his opinion the cause of death was severe haemorrhage resulting

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from a deep cut wound inflicted by a sharp object on the right side of the neck.

8. PW4, PC Peter Juma who took over the investigations from CPL Silas Owenga, the original investigating officer, testified that according to the report contained in the investigation file, Abuga, had been attacked by two men who fled from the scene on a motorcycle.
  
9. PW4 further testified that the accused persons were arrested on 17<sup>th</sup> April 2024 at Ringa Police Station in Homa Bay County, nearly two years after the incident, following which they were brought to Nyamira where an identification parade was conducted during which PW1 identified them.
  
10. The final prosecution witness, PW5 Candy Kerubo Abuga, testified that Abuga was her elder brother. She stated that on the material day she received information that her brother had been assaulted and upon going to the scene found him lying on the ground covered in blood and unresponsive. She did not witness the assault and did not know the persons responsible for the attack.

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11. The 1<sup>st</sup> accused, Evance Ochieng Odhiambo, gave sworn evidence in his defence. He stated that he comes from Homa Bay County and that prior to his arrest he worked as a tyre repairer. He denied being at Miruka on 16<sup>th</sup> September 2022 and denied knowing Abuga. He testified that he was arrested on 17<sup>th</sup> April 2024 at Ringa Police Station while he had gone to collect fish at Ringa stage and that he was not informed of the reason for his arrest. He further stated that he had never absconded from his home and raised complaints regarding the identification parade, stating that an unidentified man had taken photographs of him and the 2<sup>nd</sup> accused the day before the parade.
12. The 2<sup>nd</sup> accused, Boaz Oduor Odhiambo, also gave sworn evidence. He stated that he comes from Ng'enye village in Homa Bay County and that he was working as a general worker before his arrest. He denied ever living or working in Miruka and denied knowing Abuga. He testified that he was arrested on 17<sup>th</sup> April 2024 at their shopping centre without being informed of the reason for his arrest. He similarly stated that photographs of both accused persons were taken by unknown individuals shortly before the identification parade. He denied ever absconding from his home and further stated that he was not a motorcycle rider.

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13. I have carefully considered the evidence on record. For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of Abuga and the cause of that death; (b) that the accused committed the unlawful act which caused the death of Abuga and (c) that the Accused had the malice aforethought. (See **Nyambura & Others-vs-Republic, [2001] KLR 355**).

14. The fact and cause of death of Abuga were established through the medical evidence of PW3, who conducted the post-mortem examination. The doctor observed a deeply penetrating cut wound on the right side of the neck which severed the jugular veins and transected the spinal nerves. In his opinion the cause of death was severe haemorrhage resulting from a deep cut wound inflicted by a sharp object. The medical evidence was neither challenged nor contradicted and conclusively established that Abuga died as a result of a violent and unlawful attack inflicted with a sharp weapon.

15. The nature of the injury, being a deep cut directed at the neck, a vital and vulnerable part of the body, leaves little

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doubt that the person who inflicted it did so with the requisite malice aforethought. Instances when malice aforethought is established are set out under Section 206 of the Penal Code which provides that:

**“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.”**

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16. The Court of Appeal has further held that intention to cause death or grievous harm may be inferred from the nature of the weapon used, the manner in which it is used, and the part of the body targeted. In **Anthony Ndegwa Ngari v Republic [2014] KECA 424 (KLR)**, the Court observed that stabbing a victim on the neck resulting in severe neck injuries demonstrated the deliberate use of a lethal weapon on a vital part of the body from which the necessary intent may readily be inferred.
17. From the foregoing, I find that the elements of death of Abuga and the existence of malice aforethought in causing that death have been proved beyond any reasonable doubt.
18. I now turn to the critical question for determination namely whether the prosecution proved beyond reasonable doubt that the accused persons were the ones who inflicted the fatal injuries on Abuga.
19. Of all the dangers that lurk within the criminal justice system, few are as silent or as devastating as the danger of mistaken identity. An honest witness, certain in her own mind, may nonetheless be wrong. Courts have known this for generations, and the law has responded by requiring that

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identification evidence be scrutinised with the greatest of care before a court acts upon it. This case calls that principle into full application.

20. The entire prosecution case on that issue rests upon the identification evidence of PW1. It is therefore necessary to approach that evidence with the greatest caution, particularly given the well-recognised risk of error inherent in visual identification.
21. The Court of Appeal has emphasised that evidence of visual identification must be examined with great care before it can safely be relied upon. In **Peter Wachiuri Gichira v Republic [2014] KECA 659 (KLR)**, the Court reiterated that where the evidence against an accused person rests substantially on identification or recognition, the trial court must carefully examine such evidence and be satisfied that the circumstances of identification were favourable and free from the possibility of error before relying on it.
22. In **Suleiman Otieno Aziz v Republic [2017] KECA 441 (KLR)**, the Court held that evidence of identification by a single witness must always be received with circumspection

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because of the real risk that the identifying witness may be honest yet genuinely mistaken.

23. Guided by these principles, the court must carefully examine the circumstances under which PW1 claims to have identified the accused persons, including the opportunity for observation, the duration of the encounter, the proximity between the witness and the persons observed, and whether any prior description of the suspects was given.

24. PW1 did not witness the attack itself. By her own account she arrived at the scene after Abuga had already been injured and was lying on the ground bleeding. Her observation of the two men at the scene was therefore brief and occurred in circumstances of urgency and confusion following the discovery of a gravely injured person on a public road.

25. During cross-examination PW1 acknowledged that in the statement she recorded with the police she had indicated that she saw the face of the pillion passenger but did not see the face of the rider. She further confirmed that the police statement did not contain any description of a suspect with a bent finger and conceded that the identification parade took place nearly two years after the incident.

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26. A careful examination of PW1's testimony also reveals inconsistency concerning the positions attributed to the two men she observed near the motorcycle. While initially assigning one position to each of them, her evidence during cross-examination placed the accused persons in opposite positions. That inconsistency raises doubt as to whether the witness had a clear and reliable recollection of the persons she observed.

27. The description relied upon by PW1 to identify the accused persons was also limited. In relation to the 2nd accused, the feature relied upon was a hairstyle which PW1 conceded was common among many young men. Such a description is not sufficiently distinctive to reliably single out a particular individual.

28. Similarly, the alleged deformity of the 1st accused's finger was not mentioned in the statement PW1 recorded shortly after the incident. The omission of such a distinctive feature from the contemporaneous statement raises doubt as to whether the feature was in fact observed at the scene.

29. The identification parade conducted nearly two years after the incident presents further difficulty, as the passage of

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such a long period inevitably raises concerns regarding the reliability of memory.

30. The parade itself was attended by procedural irregularities acknowledged by the parade officer. PW2 confirmed that both accused persons appeared as members in each other's identification parade and that the other parade members did not share the distinguishing features attributed to the suspects. Where a suspect possesses a distinctive feature not shared by the other members of the parade, the identification exercise ceases to provide an effective safeguard against mistaken identification.

31. Equally significant is the fact that PW1 did not give any prior description of the suspects before the identification parade was conducted. The description relied upon was obtained only after she had already identified the accused persons.

32. The circumstances surrounding the identification parade also raise concern regarding possible prior exposure. The evidence of PW4 established that after the accused persons were arrested the father of Abuga saw them in custody and was subsequently sent to locate PW1 and inform her to

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attend the parade. The involvement of a close relative of the deceased who had already seen the suspects in custody as the intermediary between the investigating officer and the identifying witness creates a real possibility of suggestion or inadvertent disclosure.

33. The defence evidence also raised concerns regarding photographs allegedly taken of the accused persons shortly before the identification parade. Although these allegations were not independently verified, they were not effectively rebutted by the prosecution.

34. The prosecution case was also devoid of any independent corroborative evidence linking the accused persons to the offence. No murder weapon was recovered and the motorcycle allegedly used by the attackers was never traced.

35. The evidence further revealed that another witness, Thomas Nyamweya, who had reportedly witnessed the incident and recorded a statement with the police, was not called to testify.

36. Equally significant is the fact that the arresting officer and the original investigating officer did not testify before the court. The absence of their evidence leaves a significant gap

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in the prosecution case and the investigative trail linking the accused persons to the offence remains unexplained. In particular, it is not clear on what basis the accused persons were identified as suspects and subsequently arrested, given that PW1 had not provided any prior description of the individuals she allegedly observed at the scene. Without evidence explaining how the accused persons came to be connected to the offence before their arrest, the court is left without a clear account of the investigative steps that led to their apprehension.

37. The defence evidence, though brief, was consistent and amounted to a complete denial of involvement in the offence. Both accused persons stated that they originate from Homa Bay County and denied ever being present at Miruka on the material day or having any prior knowledge of Abuga. They testified that they were arrested on 17th April 2024 without being informed of the reason for their arrest and maintained that they had never absconded from their places of residence. They also raised concerns regarding the integrity of the identification process, stating that photographs of them were taken by unknown individuals shortly before the identification parade was conducted. Their evidence was not

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displaced by any independent evidence from the prosecution linking them to the offence.

38. When these factors are considered cumulatively, the court cannot be satisfied that the identification evidence in this case is free from the possibility of error.

39. From the evidence on record, the prosecution succeeded in proving that Abuga died as a result of a violent and unlawful attack inflicted with a sharp weapon. However, it failed to prove beyond reasonable doubt that the accused persons were the individuals responsible for that attack.

40. The evidence connecting the accused persons to the offence, however, falls short of the standard required in criminal proceedings.

41. In the circumstances, the court finds that the prosecution has failed to prove the charge of murder against the accused persons beyond reasonable doubt.

42. Accordingly,

**1) The 1<sup>st</sup> accused, Evance Ochieng Odhiambo is found not guilty of the offence of murder contrary to section 203 as read with section 204 of the**

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Penal Code and is acquitted. He shall be released from custody forthwith unless otherwise lawfully held.

2) The 2<sup>nd</sup> accused, Boaz Oduor Odhiambo, is likewise found not guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is acquitted. His bond and surety obligations are hereby discharged.

DELIVERED AT NYAMIRA THIS 12<sup>th</sup> DAY OF March 2026



**WAMAE.T. W. CHERERE**  
**JUDGE**

**Appearances**

<b>Court Assistant</b>	<b>- Anita</b>
<b>1<sup>st</sup> Accused</b>	<b>- Present</b>
<b>2<sup>nd</sup> Accused</b>	<b>- Present</b>
<b>For Accused persons</b>	<b>- Mr. Marita Advocate</b>
<b>For the DPP</b>	<b>- Mr. Chirchir (SADPP)</b>

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