



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 22 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOAB ODHIAMBO OMOLLO.....ACCUSED

JUDGMENT

Joab Odhiambo Omollo, the accused, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars given in the Information dated 16th March 2016 are that on the night of 31st December 2014/1st January 2015 behind Nairobi Pentecostal Church, Buruburu Phase V in Embakasi West District within Nairobi County jointly with others not before the court murdered Aflin Amondi Oyengo. The accused, represented by Mr. Mwangale, has denied committing this offence.

Eleven witnesses have testified for the prosecution. The evidence of the prosecution in support of the charge is straightforward. Aflin Amondi Oyengo, the deceased, spent the last days of December 2014 with her mother Patricia Akinyi, PW1, at the latter's home in Mwiki Kasarani in Nairobi. Aflin went to stay with her mother on 24th December 2014 and left on 31st December 2014. She intended to spend the evening of that last day of December 2014 with her cousins in Donholm Nairobi in a party they hosted to usher in the new year 2015 at their uncle's home. She had also planned to attend church later that evening for an overnight vigil commonly known as "keshu". In company of her cousin Kevin Otieno, PW2, Aflin went to Donholm. The cousins gathered together that evening and bought food and drinks for the end of year party. Aflin prepared chapatis for her cousins.

At around 11.00pm on the same date, Aflin told her cousins that she wanted to go to church at CITAM Buruburu to usher in the new year with prayers. Her cousins Kevin, Alloys Obok Oluoch (PW2) and Tom Ogallo (not a witness) escorted her to the matatu stage to pick transport to the church. She boarded a matatu and left. She was not reachable to her mother and cousins the following day. Calls placed on her mobile telephone number went unanswered. The last call by her mother went through at midnight on 1st January 2015 but it was not picked. Her mother, intending to wish the daughter happy- new-year, thought that her daughter was not able to pick the phone because she was in church. Attempts to reach the deceased after this were unsuccessful. On 3rd January 2015 PW1 called her daughter's work place to find out if she had reported on duty. She was informed that the deceased had not reported on duty.

PW1 called Kevin and told him to report the matter at Buruburu Police Station. Kevin showed police at Buruburu Police Station a photograph of the deceased. He was informed that there was an injured woman picked by the police and taken to Mama Lucy Hospital but she had died and the body taken to the City Mortuary. In company of PW1 Kevin went to the City Mortuary and confirmed that the body was that of the deceased. The deceased's Alcatel Phone (Ex. 1) was not found. Using the IMEI number of the phone, No. 865469020533205, given to the police by PW1, the police were able to investigate the matter and trace the phone to Jane Fundya, PW6, in February 2016.

Jane Fundya, a Surveyor with the Ministry of Lands based in Kisumu in March 2015, was approached by her friend and colleague Joann Odumbe (PW4). Joan told her that a friend of Joan's known as Brown wanted to borrow Kshs 4,000 from her but Joan did not have the money. Jane agreed to loan the money to the man introduced to her as Brown on the understanding that Jane holds a phone given to her by Brown as security until the money was paid back. She was given a black phone with a flap and black in colour. The phone had a crack according to Jane. She gave the man Kshs 4,000 and they parted ways. It took some time and by February 2016 Jane had not been paid the money. She still held the phone until the police from DCI Nairobi travelled to Kisumu to recover the phone. Jane explained how she came by the phone. She told the court that all this time she knew the man that had given her the phone in exchange for Kshs 4,000 as Brown but on the day police caught up with her she learned that the man was called William. Joan and Jane led police to arrest William in Siaya.

The evidence of Jane is confirmed by Joan Odumbe, PW4 who told the court that she is the one who introduced Jane to William. She confirmed that William gave Jane the phone identified as belonging to the deceased in exchange for Kshs 4,000. She confirmed leading police to arrest William.

The IMEI number of the phone 865 469 020 533 205, Exhibit 1, was passed on to Daniel Hamisi, PW8, through a request letter (Ex.8), to investigate and provide the police with incoming and outgoing data from 1/12/2014 to 12/1/2015 as well as subscriber details. PW8 extracted the information and prepared his report which he produced as Exhibit 3. According to his evidence, the first telephone number to be paired with the phone whose IMEI is shown above was a Safaricom number 0716089614 registered in the name of Aflin Oyengo. This is the

deceased. This number was active on 31st December 2014 at 23.47hrs in Donholm area, an incoming call SMS from telephone number 0721700474. Court was not told who the subscriber for this latter number was.

On 1st January 2015 at 15.09.33hrs the phone was activated on telephone number 0728977266 registered in the name of John Raloki of identity card number 11715896. On the same date another number 0721470880 belonging to Joab Odhiambo Omolo (the accused) of identity card number 23657812 was used with two transactions, one at 15.14.52hrs and another at 15.15.48hrs. The phone went back to Raloki who did one transaction at 15.19.55hrs. The phone went back to Joab Odhiambo Omolo at 15.16.45hrs. PW8 testified further that Joab Odhiambo Omolo continued using the handset from 2nd January 2015 08.07.33hrs to 13.48.15hrs when it changed to 0721231409 in the name of William Anyango identity card number 21407861. William used the phone up to 13th January 2015 at 23.29.37hrs. The details of the deceased (Ex. 4), John Raloki (Ex. 5), and accused (Ex. 6) were all produced in court. PW8 produced the certificate he prepared as Ex.7.

PC Patrick Mugambi, PW7, testified that he investigated this case in company of CPL Njoki (not a witness) after the matter was handed over to them by the previous investigating officer. He said they took over the matter in February of 2016 and found John William Onyango in custody having been arrested in Siaya. William named the accused as the person who had sold the phone to him. PW7 testified further that they were advised to release William to assist them with investigations. He did not disclose who advised them to do this. He testified that William led them to arrest the accused on 6th March 2016.

CPL Hesborn Otieno, PW10, confirmed investigating this case first. He testified that following the trail left by the deceased's handset and with the help of Safaricom service provider they traced the phone to William who was mentioned as having given the phone to Jane Fundya.

The body of the deceased was examined by Dr. Oduor Johansen on 7th January 2015. The doctor found extensive bruises on the scalp, upper limbs and face. He found scratch wounds on the right side of the head and a fractured skull on the right side with bleeding in the brain. He found whitish secretions in the vagina and took swabs for examination for suspected rape. His opinion is that the deceased died as a result of head injury due to blunt trauma. The vaginal swabs and nail clippings were given to the investigating officer for analysis.

The specimen retrieved from the deceased, together with buccal swabs from William Anyango, the accused and Isaac Adabwa were examined at the Government Chemist Laboratory and findings presented in court by Lawrence Kinyua Muthuri, PW5. The results of DNA profiles from the bloodstains found on the deceased's nails matched her DNA. The three men including the accused were not implicated in the DNA profiles.

After the conclusion of the evidence by the prosecution this court placed the accused on his defence. He is the only defence witness. He gave an unsworn statement. He told the court that he spent 31st December 2014 with his family and went to church on 1st January 2015 to usher in the new year. He said he was called by one Isaac Ndegwa around noon on 1st January 2015. Isaac told him that he had an emergency and wanted to meet the accused. After church he met Isaac at a place known as "Kwa Maji" along Kangundo Road. Isaac told him he needed Kshs 3,000 to pay for a hospital bill for his wife who was admitted in hospital. The accused said he had only Kshs 2,000 in his pocket which he gave to Isaac. In exchange Isaac gave him an Alcatel Phone as security. The accused said he took the phone and inserted his sim card to test if the phone was working. He found the phone working well. He parted ways with Isaac. After two days Isaac called him and told him to sell the phone because Isaac was not able to repay his money. The accused sold the phone to William for Kshs 3,000. After one (1) year he was arrested after William identified him to the police and later charged with this offence.

The case for the defence was concluded on 10th May 2021. The defence filed their submissions dated 19th May 2021. In the submissions in support of defence case it is stated that the prosecution bears the burden of proof; that the prosecution must prove that the accused committed murder as defined under section 203 of the Penal Code. Mr. Mwangale on behalf of the accused submitted that Section 206 of the Penal Code defines what malice aforethought is. He cited **John Mutuma Gatobu v Republic [2015] eKLR** where the Court of Appeal stated that:

“Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code..... There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing harm and all the related negative feelings. Not, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought.”

The defence cited **Joseph Kimani Njau v. Republic [2014] eKLR** where the Court of Appeal stated that:

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution.”

It is submitted that the circumstances that led to the death of the deceased remain unclear; that no evidence was led by the prosecution placing the accused person at the scene of crime; that the only connection that the accused person has with the deceased was the handset that the accused was given as a collateral for the loan he advanced to a friend and that without evidence placing the accused at the scene of murder this court is left with no option but to make deductions from the available circumstantial evidence.

On the issue of the handset being used by the accused person on 1st January 2016, it was submitted that the accused has offered an explanation and this court was invited to consider that explanation as a plausible one. Counsel cited the case of **Fella Okelo Ogunda v Republic [2006] eKLR** where it was stated that:

“Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against an accused throughout the case, in a case where one is found in possession of recently stolen property like this one, the evidential burden shifts to the accused to explain his possession. That explanation need only be a plausible one but he needs to put forward it forward for the court’s consideration.”

It was submitted that the prosecution has failed to discharge its duty to prove this case against the accused persons and therefore this court cannot find him guilty of the offence of murder. Counsel asked this court to acquit the accused person for the offence of murder.

Though parties were given up to 24th May 2021 to file their submissions, as at the time of writing this judgment on 31st May and 1st June 2021, the submissions by the prosecution were not in the court file the same having not been filed. I have no reason to hold on any longer and must conclude writing this judgment.

The offence of murder is committed when any person of malice aforethought causes the death of another person by an unlawful act or omission. The law places the burden of proving the ingredients of murder to the prosecution. It is the duty of the prosecution to prove beyond reasonable doubt that the accused person before the court under trial for murder is the person that caused the death of the deceased person in the case under trial; that the accused person in so killing the deceased did so with malice aforethought and committed that offence by an unlawful act or omission.

On the issue of proof of the fact of death, there is on record evidence to the fact that Afline Amondi Oyengo died. Her mother Patricia Akinyi and cousin Kevin Otieno saw the body of the deceased at the City Mortuary. Her death has been confirmed by Dr. Oduor Johansen, a pathologist who examined her body at the City Mortuary on 7th January 2015. The doctor found extensive bruises on the scalp, upper limbs and face. He found scratch wounds on the right side of the head and a fractured skull on the right side with bleeding in the brain. He ascertained that the deceased died as a result of head injury due to blunt trauma. This evidence settles the first issue that the fact of death of the deceased and cause of that death have been proved beyond reasonable doubt. She was assaulted with a blunt object leading to fatal injuries to her head. This is an unlawful act.

On the second issue as to who assaulted the deceased leading to the injuries that caused her death, I have examined all the evidence on record. The prosecution has not led direct evidence to show that the accused is the person that assaulted the deceased leading to her death. There is no evidence placing the accused person at the scene where the deceased was assaulted. All the evidence connecting the accused to the offence is circumstantial and evidence surrounding the doctrine of recent possession. The circumstantial evidence linking the accused to this offence requires close analysis to determine if it satisfies the principles of circumstantial evidence and perhaps to some degree the principles recent possession.

To prove a case basing the same on circumstantial evidence requires the prosecution to establish the following:

a. That the circumstances from which the inference of guilt must be drawn must be cogently and firmly established;

b. That those circumstances should be of a definite tendency unerringly pointing to the guilt of the accused;

c. That 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 and that before drawing the conclusion it is necessary to ensure that there are no other co-existing circumstances that would weaken or destroy the inference.

In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of *Musoke v. R [1958] EA 715* citing with approval *Teper v. R [1952] AL 480*, thus:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

These principles are well settled in various decisions including *Musili Tulo v. Republic [2014] eKLR*; *GMI v. Republic [2013] eKLR* and *R. v. Kipkering Arap Koske & Another, 16 EACA 135*.

The circumstances of this case are that the deceased was attacked after 11.00pm on 31st December 2014. Her phone got lost that night, perhaps stolen from her at the time of her attack. The said phone was traced to Jane Fundya in February 2016, one year later. Data extracted from Safaricom led police through a trail left by the phone as it exchanged hands from person to another until it landed in the hands of Jane. One of the people who handled the phone is the accused. He handled that phone on 1st January 2015 at around 3.00pm. He was not the first person to handle that phone. The evidence by the accused is that the phone was given to him by one Isaac Ndegwa as security upon the accused loaning Isaac Kshs 2,000. After failing to pay the money back Isaac is said to have told the accused to sell the phone. The accused sold the phone to William who gave the phone to Jane as security for a loan of Kshs 4,000.

What I find disturbing in the evidence by the prosecution is that the named Isaac Ndegwa, John Raloki and William Anyango were not called as witnesses. These three people have been connected with this case either through Safaricom data or through evidence of the defence. Why did police choose to leave out these key witnesses? Why did the ODPP not follow through and ensure that these witnesses testified? Who is Isaac Ndegwa? Who is John Raloki? These are the questions I am grappling with because the prosecution left them unanswered.

The Safaricom data does not have the name of John Raloki. The mystery of this person remains unresolved. Is he the same man as Isaac

Ndegwa? I have no answer to this. Evidence of the accused is that Isaac Ndegwa called him and met him. Isaac told him he needed money to pay hospital bill for his wife and the accused gave him Kshs 2,000 in exchange for Ex. 1 as security. This was on 1st January 2015 sometimes in the afternoon. Indeed one person handled the phone after the deceased and before it changed hands to the accused. The problem is that the prosecution has not tendered evidence to identify that person as the Isaac Ndegwa mentioned by the accused or to confirm if Isaac Ndegwa is the same as John Raloki.

Evidence further shows that the phone changed hands on 2nd January 2015 at 13.48.15hrs from the accused to William Anyango who stayed with it the rest of the time until perhaps he gave it to Jane Fundya. The explanation as to why the phone went to William came from the accused not the prosecution.

With this kind of evidence it is my considered view that this court cannot state with certainty that the principles of circumstantial evidence have been established. There are gaps breaking the chain that ought to have been so complete that there would have been no escape from the conclusion that within all human probability the crime was committed by the accused and none else. There are other co-existing circumstances that would weaken or destroy the inference of guilt on the part of the accused. There is evidence showing that someone else, John Raloki or Isaac Ndegwa or whatever the name of that person was, used the phone before it went to the accused. Perhaps the evidence of that person would have established the missing link in this evidence. But this was not to be the case because one decision, either by the investigators or the ODPP, caused the failure to have crucial witnesses called to testify.

Turning to the doctrine of recent possession, I have noted that in the case of *Isaac Ng'ang'a Kahiga & another v. R [2005] eKLR* the Court of Appeal had this to say on the doctrine of recent possession:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly that, the property is positively the property of the complainant; thirdly, that property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property,, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses,”

Under **Section 4(a)** of the *Penal Code*, **“be in possession of”** or **“have in possession”** includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.

The Court of Appeal in *Kinyatti v R [1984]eKLR* held that in defining *“being in possession”*, full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It further held that in order to prove possession, it is enough to prove either that the accused was in actual possession of the item or that he knew that the item was in the actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. The Court further explained that knowledge that the item is in actual possession or in one’s custody or of another person may be inferred from the circumstances or proved facts of the particular case.

It is my considered view that the prosecution has failed to establish circumstantial evidence and also failed to establish the doctrine of recent possession. There is no evidence from the prosecution to prove possession. The phone was not found with the accused. It was not found with William whom the accused had contact with through his own admission by selling the phone to him. It was found with Jane Fundya. There is no evidence to show that the accused knew that the phone was with Jane Fundya. Failure to prove that part of the ingredients of recent possession is fatal to the prosecution case.

As submitted by the defence, the accused has discharged his evidentiary burden of proof by explaining how he came by the phone. On that point alone, the prosecution is highly faulted because they left out the evidence of the only witnesses who could have shed some light on the trail left behind by the phone as it moved from hand to hand. I find the explanation by the accused plausible. It casts doubt on the prosecution case and given that the prosecution has failed to tender evidence to prove this case beyond reasonable doubt, it is my finding and I so hold that the case by the prosecution falls by the wayside. I am alive to the fact that a life was lost and that the family of the deceased have been hurting waiting for justice. I am saddened that justice has eluded them due to the poor manner the case was investigated and for the reasons that key witnesses were left out. What this court has amounts to suspicion of the accused as having been involved with the death of the deceased, but suspicion alone, no matter how strong, cannot form a basis of a conviction (see *Joan Chebichii Sawe v. Republic [2003] eKLR*).

I believe I have said enough in this judgment to demonstrate that the prosecution has failed to prove this case beyond reasonable doubt. The law is clear on this point that in such circumstances the only option open to the court is to acquit the accused person. Consequently, it is my finding that based on the evidence before me and the reasoning in this judgment the accused is not guilty of the offence he faces. The shortcomings in the evidence of the Prosecution leads me to the conclusion that the benefit of doubt goes to the accused. He is hereby acquitted of the offence of murder. He is at liberty to go home and enjoy his freedom unless for any other lawful cause he is held in custody. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 28TH JUNE 2021.

S. N. MUTUKU

JUDGE