



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO 20 OF 2017-MURDER

STATE.....PROSECUTION

VERSUS

EVERLYNE AWINO ONYANGO.....1ST ACCUSED

ALBERT OTIENO OKWARO.....2ND ACCUSED

PETER OTIENO OYUGI.....3RD ACCUSED

JUDGMENT

INTRODUCTION

1. The three accused persons herein **Everlyne Awino Onyango, Albert Otieno Okwaro and Peter Otieno Oyugi** are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code as per the information dated the 6th /9/2017 and filed in Court on the same day. The particulars of the Information for Murder are that on the diverse dates between 18th and 17th day of August 2017 at Sirowa village, in Segwa Sub location of Ugenya Sub County within Siaya County, with others not before the court, jointly murdered **CAO**. The accused persons pleaded not guilty to the Information.

2. The Prosecution called a total of 7 witnesses to establish a prima facie case against the three accused persons. Placed on their defence, the first accused person gave sworn testimony and called one witness, her sister. The second accused gave sworn testimony and called one witness, his neighbour while the third accused gave sworn testimony and called one witness, his wife.

EVIDENCE

3. The prosecution's case is that the deceased, CAO a teacher at [particulars withheld] High School had on 18th August 2017 gone to receive her dues from the Ugenya IEBC offices , which dues were payment for her conducting elections that had just taken place earlier in the month. She was last seen in the evening of the 18th August 2017. According to PW2, Obel Michael Ouma, the deceased went to his shop with a motorcyclist from the direction of [particulars withheld] High School. The motorcyclist was unknown to PW2. After the deceased had made purchases from his shop, she left and the witness could not remember the direction she took. PW4 Vitalis Ogwar Otekra who is the motorcyclist testified that after taking the deceased to PW2's shop, he was paid the transport fee then he went away.

4. According to PW 1 MOS, the deceased's husband, he last spoke with the deceased at around 5.00 pm. According to PW1, the body of the deceased appeared to have been dropped at the place near the homestead after the deceased had been killed elsewhere. According to the Scenes of Crime, the deceased was murdered where she was found. PW4 Isaiah Khunyole Nabwayo testified that he was an IEBC official at Ugenya and that on 18/8/2017 the deceased went to the IEBC offices at Ugenya on 18/8/2017 at about 2pm and was paid for her services rendered to the Commission during the general elections.

5. PW5 PC Simon Likonya was tasked to go to the scene of murder and he took several photographs which he produced as exhibits together with certificate of production of the said photographs. He also identified some items recovered at the scene namely, 5 books and a pair of shoes one for a male and another for a female.

6. According to PW6, CPL David Warutumo, upon investigating the murder report, as per his detailed testimony of what he did in his investigations, he recorded statements of witnesses and was able to get the three accused persons upon first tracing the 1st accused who led the police to the 2nd accused and the latter led the police to the third accused. The witness recovered and produced as exhibits the deceased's phone and its cash sale receipt for purchase, its manual, cover, phone data of the deceased. He arrested the 1st accused who stated that she was given the phone by the 2nd accused. The 2nd Accused mentioned that he bought the phone from the third accused. The 3rd accused, however, denied giving the subject phone to the 2nd accused. The third accused raised an alibi defence saying he was at his house the day the

offence is alleged to have been committed.

7. The prosecution produced exhibits including the Phone belonging to the deceased and the receipt for purchase thereof, the photographs at the scene, the mobile data for the said mobile phone, some clothing and books which were found at the scene and which were identified by PW1 as being school books used by the deceased who was at teacher at [particulars withheld] Boys High School, Flour which the deceased had bought from a shop from PW2 Obel Michael Ouma before she disappeared and post mortem form showing cause of death of the deceased.

8. PW7 Dr Allan Rabur testified and produced the post-mortem report on the deceased done on 23/8/2017 showing the injuries she sustained and the cause of death being severe haemorrhage from rupture of blood vessels around the neck secondary to trauma from a sharp penetrating object coupled with haemorrhage around other parts of the body caused by cut wounds.

9. PW8 James Makobi a Safaricom security Liaison Officer testified and produced the data records on the phone No. 0721[...] with Imei No. 866508021409599 belonging to the deceased CO ID No. [...] for the period 15th July 2017 to 28th August 2017. He testified that the deceased's mobile phone was used by a different sim card of Everlyne Onyango ID No. [...] on 22/8/2017 at 09.08hours who used it until 28/8/2017 at 20.08 hours. He also produced a certificate of data extraction as an exhibit.

10. Called upon to give their defence, all the accused persons gave sworn testimonies and called one witness each, denying committing the offence. The 1st accused Everlyne Anyango a mobile money operator at Ugunja and a neighbour to the 2nd accused testified that she was given the recovered phone by the 2nd accused who was her friend and neighbour on 22nd August 2017 when her phone that she used for Mpesa business malfunctioned. Her witness DW4 who lived with her confirmed this position. The 2nd accused admitted giving the phone to the 1st accused to use temporarily saying he bought it from the 3rd accused and another introduced as Evans Odhiambo from Alego on or about the 19th or 20th August 2017 when the two took to him the phone while he was at his house and sold it to him at a negotiated price of kshs 1500 out of which he paid 800/ leaving a balance of kshs 700 payable on 12/9/2017. He stated that he knew the 3rd accused very well as he had prayed for the 3rd accused person's sister when she was sick and they had been engaging and meeting at the market from time to time prior to the incident. He admitted giving the phone to the 1st accused but temporarily as requested as he was to take it to his grandmother. Her called a witness, a neighbour DW5 who witnessed him buy the phone from the 1st accused and another who introduced himself to accused 2 as Evans Odhiambo from Alego. The second accused called DW5 Rose Ayuma Olubayi who was a neighbour and who witnessed the 3rd accused and another sell the recovered mobile phone to the 2nd accused on or about the 19th or 20th August 2017 at about 10.30 am

11. The 3rd accused gave sworn evidence and denied the offence and denied being involved in selling the phone to the 2nd accused person as alleged. He testified that he knew the 2nd accused as the latter prayed for the sick sister of the 3rd accused. He denied ever selling a phone to the 2nd accused or bringing a phone seller to the 2nd accused. He stated that on 18th and 19th August 2017 he stayed at his home in Uyore Village, Ugunja then he went to Ugunja to Collect Orange and returned to his home and that on 22nd August 2017 he was arrested and taken to Ukwala Police station and told to record a statement but on reaching there they told him to avail C. He called his wife as a witness to show that he was at his home on the dates the deceased is alleged to have been murdered. She stated that her husband was arrested on 19/8/2017 while at home and that on 18/8/2017 the 3rd accused stayed at home the whole day and never left home or at all till the night

ACCUSED PERSONS' SUBMISSIONS

12. On behalf of the accused persons, it was submitted by Mr Oduor Advocate that the fact of death and cause of death of the deceased were not in contention but that there was no direct evidence linking the accused persons to the commission of the offence charged and that from the circumstantial evidence adduced, it can hardly be said that the evidence relating to the phone without more conclusively proves that all the accused persons were present at the scene of the offence. It was submitted in contention that there is no evidence tendered that the accused persons were actively communicating with each other and whether the said communication were in relation to the subject matter with which they have been charged. It was further submitted that whilst the prosecution alleges that the phone data shows that the 1st accused used the phone to communicate and send messages, no evidence was adduced to show who she was communicating with.

13. On behalf of the 1st accused, it was further submitted that the 1st accused said in her defence that she used the phone sold to her by the 2nd accused to communicate to her relatives and friends but that the prosecution failed to adduce evidence relating to who she was communicating with hence, her statement ought to be believed.

14. It was also submitted that there is no material availed before the court on any prior agreement between the accused persons that touches on the offence charged. Put simply, no accused person manifested the sharing of common purpose.

15. Further submission was that there is no evidence that the accused persons were accomplices to the killing of the deceased or that any of the accused persons counselled another person or one of the accused persons. Counsel maintained that there is no evidence of any active association or communication relating to the offence, neither of the accused persons can be said to have counselled another to commit the offence.

16. Concerning the doctrine of recent possession, it was submitted that the 1st accused testified that she was given the phone found in her possession by the 2nd accused and narrated how she was given the phone which explanation is plausible. Further, that it was based upon the information that she provided that the police relied upon to arrest the 2nd accused person hence her version is credible and therefore this court should believe her and acquit her.

17. On the part of the second accused, it was submitted that his testimony that the 3rd accused person sold to him the phone whilst the 3rd accused denied selling the phone to the 2nd accused hence the police must have found explanation given by the 2nd accused to be credible

before arresting the 3rd accused. Be that as it may, it was submitted that as PW6 testified that the 2nd accused mentioned the 3rd accused selling to him the phone alongside another person whom he did not know, PW6 never mentioned why it would have been hard tracing the person who was said to have come to the 2nd accused with the 3rd accused.

18. It was submitted that the police never said that they tried tracing the said person, and that even assuming, without deciding that the explanations offered by the accused persons in relation to the phone are not plausible, the issue, without more, cannot form the basis of a conviction for the very serious offence of murder as there was no motive at all attributed to the killing of the deceased and none of the witnesses knew any of the accused persons before the alleged offence.

19. Finally, it was submitted that the investigations done by PW6 in this matter was insufficient in that he appears to have been placing high premium on the phone that was allegedly recovered. That the Scenes of crime produced a report and stated that the deceased was killed at the same place where the body was found. Recalling the evidence of PW1 and PW7, it was submitted that it is not clear who else was at home that particular night and why the decision not to hear whatever they had to say was taken by the police. Further, that PW6 did not say any difficulty he might have faced in getting DNA evidence in relation to the sexual assault committed on the deceased which would have gone a long way in solving the death of the deceased. That he also never went to the places where the accused stayed to find out whether there was any item that connected them to the offence.

20. It was further submitted that the accused persons from the onset gave statements to the police that amounted to alibi evidence but the investigating officer made no attempts at all to verify their authenticity. In relation to the data from Safaricom, it was submitted that no evidence was given as to why PW6 could not ask for more information on who exactly the 1st accused person communicated to.

21. The accused persons' counsel concluded submissions by urging the court to find that no adequate evidence was adduced to warrant or sustain conviction of any of the three accused persons with the offence of murder as charged. Hence they should all be acquitted.

22. The prosecution did not file any submissions.

LEGAL ANALYSIS AND DETERMINATION

23. I have considered the evidence adduced by the prosecution witnesses and the defence and their respective witnesses. I have also considered the written submissions by counsel for the accused persons. The main issue for determination in this case is whether the prosecution has proved beyond reasonable doubt that the three accused persons herein or any one of them committed the offence of murder or unlawfully killed the deceased CAO, with malice aforethought.

24. For the prosecution to found a charge of murder against an accused person, it has to prove three ingredients against the accused persons and prove beyond reasonable doubt.

25. In **Antony Ndegwa Ngari versus Republic** the elements of the offence of murder were stated as follows:

- a. The death of the deceased occurred,*
- b. That the accused committed the unlawful act or omission which caused the death of the deceased,*
- c. That the accused had malice aforethought.*

The death of the deceased

26. On whether the prosecution proved the fact of death of the deceased and the cause thereof, the evidence of PW1 the husband to the deceased and who is MOS was that on the 18th August 2017 the deceased CAO left him at home and proceeded to Segla village Polytechnic to collect her dues from IEBC as she had worked for the latter as a returning Officer during elections in 2017 August but she never returned and on the following day at about 10 am, he heard screams from outside his house. On inquiry, he found people congregating about 50 metres from his house and on checking he found the body of his deceased wife and next to her body were textbooks, a box of Unga Ngano and other amenities, a man's shoes and her open shoes. The body of the deceased had cuts on the ear, jaw broken, her private parts were also cut and so was her shoulder. Her phone was missing. The police arrived and took the body to Segla Mortuary and he was later called to identify the body to the mortician who conducted a post-mortem. PW1 also gave to the police details of the deceased's phone and the receipts for its purchase.

27. PW4 Isaiah Khunyile Nabwayo an IEBC Presiding Officer for Ugenya testified that on learning that an IEBC Official had been found dead went to Segla Mortuary and saw the deceased's body and identified it as that CO whom they had paid dues of Kshs. 2,000/= the previous day at about 2 pm.

28. PW5 PC Simon Lihonyi was briefed to go to the scene of Murder and took photographs of the scene. He found the body of the deceased and took photographs of her and of other items at the scene and produced them as exhibits PEx 10(a-i).

29. PW6 CPL David Warutumo of DCI Kisumu Central but previously based at DCI Ugenya investigated the case. He went to the scene on 19/8/2017 at 11 am and found the body of the deceased with deep cuts all over the body including private parts as she lay in a pool of blood. He supervised the scene of crime, took photographs of the scene and also took the deceased's body to the mortuary.

30. Dr. Allan Rabur a Medical Officer at Siaya County Referral Hospital conducted an autopsy on the deceased's body on 23/8/2017 at

Ukwala sub-county Hospital and formed the opinion that the deceased died due to severe haemorrhage from rupture of blood vessels around the neck secondary to trauma from a sharp penetrating object coupled with haemorrhage around other parts of the body caused by cut wounds. He issued a death certificate.

31. All the above witnesses' testimonies prove beyond reasonable doubt the fact and cause of death of the deceased as opined by PW7 the Doctor who performed an autopsy on her body.

Whether that the death was caused by an unlawful act or omission

32. From the evidence of PW7 who performed the autopsy on the deceased's body showing multiple cut wounds all over the body including a broken jaw, cut across the ear and cuts in her private parts of the left labia majora with lacerations on posterior vaginal opening with white substances on vaginal swab indicating rape, it is clear to this court that such injuries were caused by a third party and were unlawfully caused.

33. In addition, from the appearance of the body of the deceased as shown by the photographs taken at the scene, and the injuries found on her body as per the post-mortem report, no doubt the deceased did not commit suicide and there is no defence of self-defence offered by any of the accused persons. I therefore find that the death of the deceased was caused by an unlawful act.

34. On whether the 3 accused persons were identified to be the perpetrators of the heinous act of unlawfully killing the deceased CAO.

35. It is important to note that there was no eye witness to the unlawful killing of the deceased. The prosecution relied on the fact that the deceased's phone of Imei 866508021409599 was found in possession of 1st accused who mentioned getting the phone from the 2nd accused. The 2nd accused stated that he bought the same from the 3rd accused who was in the company of another whilst the 3rd accused denied selling the phone to the 2nd accused or bringing him the seller. No witness mentioned seeing the deceased with any of the accused persons. Therefore, the prosecution relied on circumstantial evidence of the recovery of the deceased's mobile phone on the 1st accused who led them to the 2nd accused and the latter led the police to the third accused.

36. The Court of Appeal in **Bernard Otieno Okello v Republic [2019] eKLR** restated the tests to be applied in a case determinable on circumstantial evidence and stated as follows:

“[18] The tests to be applied in a case determinable on circumstantial evidence were set out in the case of: Abanga alias Onyango vs. Republic CA CRA No 32 of 1990 (UR) as follows:

“It is settled law that when 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 of a definite tendency unerringly pointing towards guilt of the accused; and

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.”

[19] The central issue falling for our determination is whether the prosecution discharged the burden of proof as required that it was the appellant with his accomplice and none other who killed the deceased. Whether it was him that struck the fatal blow or his accomplice, is immaterial as the law is clear under Section 21 of the Penal Code states that when two or more persons form a common intention to commit a crime in conjunction with one another, criminal liability will be attributed to each person even though only one or some of the parties to the undertaking may have committed the criminal conduct itself. For common intention to apply, the evidence must show that the appellant was present at the scene when the crime was committed; was aware of the assault on the deceased; had manifested common intention with the other perpetrators by himself performing some act of association with their conduct; and had the requisite mens rea. (see S v Mgedezi & others (415/1987) [1998]ZASCA 135).

37. In **Mohammed and 3 others versus the Republic [2005]**, it was held that where reliance on circumstantial evidence is sought, the circumstances must be of conclusive nature and tendency and should be such as to exclude other possible hypothesis by the fact proposed to be proved.

38. In the instant case, since the accused persons have been charged with jointly committing the offence, the provisions of **section 21 of the Penal Code** are relevant. **Section 21 of the Penal Code** provides that:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

39. In the South African case of **S v Mgedezi & others (supra)**, the Constitutional Court observed that the so-called doctrine of common purpose allows a court to regard the conduct of every other person in a common purpose to be the conduct of every other person in that common purpose. The effect is that for any person in a common purpose you need to enter into a common purpose with someone who does the act. This may be through prior agreement or active association. The accused must have been present at the scene of the crime, must have

intended to enter into a common cause with those committing the offence and must have manifested his sharing of a common intention with the perpetrators of the offence.

40. I reiterate that the evidence linking the accused persons to the deceased is circumstantial evidence of a Nokia Phone which was identified by PW1, PW6 and PW8 to belong to the deceased and which was found in possession of the 1st accused. PW8, James Makobi a Safaricom Liaison Officer testified and produced data records of mobile phone number 0721[...] belonging to CO of ID No. [...]. He also gave its IMEI Number as 866508021409599 which was allocated to the stated mobile number. The data records produced by PW8 showed that the said Nokia Phone was active until 5.02 pm and at 7.05 pm on 18/8/2017, a voice mail message came in but the phone had been switched off.

41. The said mobile phone was then used on 22/8/2017 at 9.08 am when a new sim card was inserted in the said handset. The new sim card was for phone number 0797230013 registered in the name of the 1st accused person herein Everlyne Anyango of ID No.[...], who used this phone until 27/8/2017 at 8.08 pm. PW8 produced the mobile data records for the said phone as P.Exhibit 12 and a Certificate of data extraction as PEx 12(a).

42. The Nokia Mobile handset was proved to belong to the deceased. According to the Investigating Officer PW6, who produced the said Nokia Phone as an exhibit, in the course of their investigations, they traced the said mobile phone handset to the 1st accused and on arresting her, she told them that she was given the phone by the 2nd accused Albert Otieno Okwaro. In cross examination, PW6 stated that he believed the story of the 1st accused person.

43. It is thereafter the 1st accused person who led investigators to the 2nd accused person and on being arrested, the 2nd accused person informed the investigators that he bought the said phone – handset from the 3rd accused Peter Otieno Oyugi on or about the 19th or 20th August 2017 when the 3rd accused who was well known to the 2nd accused as 'Jenge', and being in the company of another person went to the house of the 2nd accused and the person he was with introduced himself to Accused 2 as Evans Odhiambo from Alego, intending to sell a phone to the 2nd accused and after negotiations, and the 3rd accused assuring the 2nd accused that the person in his company was a trustworthy person, the 2nd accused bought the phone at Kshs. 1500/=. He paid Kshs. 800/= deposit and was left with a balance of Kshs. 700/= to clear on 12/9/2017 and that on 5/9/2017, the 2nd accused was arrested.

44. The 2nd accused admitted and corroborated the defence of the 1st accused that on 22/8/2017 he gave the subject phone to Everlyne Anyango after the latter's phone malfunctioned so he gave it to her to use temporarily as he intended to take it to his grandmother in the rural home.

45. Both the 1st and 2nd accused persons denied knowing the deceased or her husband, PW1. DW1 stated that on 22/8/2017, she went and borrowed the phone from the 2nd accused to use it and he agreed to give it to her but told her that he wanted to take it to his grandmother. She went with the phone and used it until 5th September 2017 and that on the said latter date, while she was at her MPESA shop at Ugunja at about 11.00 am, she received a phone call and she even directed the caller where she was and the caller traced her and after he had asked for her phone and she gave him both her phones plus the one the 2nd accused had given her is when he introduced himself to her as the OCS Ukwala. She was asked on the whereabouts of Albert and she called him. Albert claimed to be in Bumala and DW1 was led to Bumala where they found DW2 and arrested him.

46. The 1st accused in cross examination maintained that the 2nd accused gave her the phone on 22/8/2017. The 2nd accused also testified that it was him who gave the phone to Accused 1 on 22/8/2017.

47. The 1st and second accused persons vividly narrated where they were on the 18th and 19th August 2017 and how they came into possession of the deceased's mobile phone without knowing that it belonged to the deceased who had been murdered.

48. The 2nd accused was clear that it was the 3rd accused Peter Otieno Oyugi, who brought him one Evans Odhiambo who sold accused 2 the phone and that Accused 3 assured Accused 2 that he (Accused 3) could not bring him a bad person. Accused 2 maintained that he did not know how the phone was obtained.

49. On Accused 3 cross examining the 2nd accused, it emerged that the two had met after a long spell and Accused 2 told Accused 3 that he had lost his phone. Accused 2 maintained that the person brought by Accused 3 said he would bring the receipt on 12/9/2017 when he returns to collect the balance of Kshs. 700/=.

50. Accused 2 maintained that he knew the 3rd Accused very well for between 5- 6 years and that they had never disagreed as Accused 2 even prayed for the sister of Accused 3.

51. The 3rd Accused gave sworn statement in his defence and denied killing the deceased or even bringing to the 2nd accused a person who sold the phone to accused 2. He stated that on 22/8/2017, three people went to his place where he sold Orange- (boiled animal hooves) and asked for Orange and after he served them, they took him on a motorcycle to Ukwala where they told him that they wanted the deceased Ce. He denied knowing anything or anybody with the phone. He admitted knowing Accused 2 for about 7 years. On Accused 2 cross examining the 3rd accused, the latter stated that although he had admitted in his statement at Ukwala Police Station that he had brought to Accused 2 the person who sold him the phone, but that what he was telling the court was the truth as he was confused when he was recording his statement. In re-examination, he denied recording or signing any statement at Ukwala Police Station. On the alleged date when the deceased died, he stated that he was at his home and only went to Ugunja and returned home.

52. DW4 Carolyne Anyango the sister to Accused 1 testified that on 22/8/2017 she went to Accused 2's house and that she witnessed 1 go and borrow a phone from Accused 2.

53. DW5 Rose Ayuma Olubayi from Ugunja a fish monger testified as a witness for the 2nd accused and recalled that on or about 19th or 20th August 2017 at about 10.30 am, two young men went to Albert's(2nd accused) house saying they wanted to sell him a phone and so, Albert called her to go and witness the sale/purchase and she went and saw the touch screen phone.
54. That she witnessed the negotiations between Albert and the two young men, one of whom she knew before as Peter Otieno alias 'Kijana wa Mtaa' and known as "Jenge" whom she identified as the 3rd accused and stated that she did not know the person who was with him when they sold the phone to accused number two.
55. DW5 stated that on that day, they were with Accused 1 and her sister, DW4.
56. DW6 Jacinta Akinyi Odhiambo the wife to Accused 3 testified and stated that on 18/8/2017 and 19/8/2017 her husband of 18 years was at home throughout day and night and that he was a quiet person who does not involve himself in controversies.
57. From the evidence of all the 3 accused persons and their witnesses, I am satisfied that Accused 1 was given the deceased's phone by Accused 2 on 22/8/2017. This evidence is supported by the evidence of the Safaricom Liaison Officer who testified that the deceased's phone was inserted a new SIM card on 22/8/2017 after it had been switched off on 18/8/2017 at about 7 pm and that a new sim card established to belong to DW1 was inserted on 22/8/2017 at about 9.08am. In my humble view, the new SIM card which led Accused 1 to be arrested was inserted in the phone after Accused 2 gave the phone to Accused 1 on 22/8/2017 at or about 9.08am. I can also infer that the deceased was robbed off her phone and killed at or about 7pm on 18/8/2017.
58. I had the opportunity to see and hear Accused 1 and Accused 2 testify and I am satisfied that they were telling the truth and so was the evidence of their respective witnesses in defence. I further believe the evidence of Accused 2 that he received the 3rd accused whom he knew very well for over 7 years as "Jenge" and that accused 3 brought to accused 1 another, to sell the deceased's phone to the 2nd Accused. I further believe the testimony of DW5 that she saw Accused 3 and another man when she was called by Accused 2 to go and see what Accused 3 and his friend wanted to sell him (Accused 2) a phone which she identified in court.
59. The question is, if Accused 3 had nothing to do with the manner in which the deceased's phone was obtained, why did he deny ever coming to Accused 2's house in the company of another person who introduced himself as Evans Odhiambo and whom Accused 2 vividly describes.
60. In my humble view, the 3rd accused who came in the company of another were in possession of the deceased's phone which they negotiated and sold to Accused 2, and unknown to Accused 2 and Accused 1, the phone had been stolen from the deceased.
61. In my humble view, Accused 3 carries the burden of explaining how him and another not before the court, came into possession of the deceased's phone (doctrine of recent possession), which phone they negotiated and sold to accused 2. Failure to explain how accused 3 and his accomplice who is at large came to possess the deceased's phone leaves this court with no alternative but to infer that it was the 3rd Accused and his accomplice who were last in the company of the deceased and that they assaulted and killed the deceased CA and robbed her of her phone.
62. Although the 3rd accused claimed that he was at Ugunja, Uyore Village on 18-19/8/2017 and that he went to Ugunja and returned home and that he was arrested on 22/8/2017 by 3 people who posed as customers on a motorcycle, and albeit his witness DW6 Jacinta Akinyi Odhiambo claimed that on 19/8/2017 at about 3 pm her husband was arrested and that on 18/8/2017 the 3rd Accused was at his home from morning to the night and that he never left home, the 3rd accused himself stated that on that day 18/8/2017 he left for Ugunja to collect Orange and returned home which evidence is contradictory in material fact.
63. Furthermore, the 3rd accused, could not have been arrested on 19/8/2017 the day the deceased's body was found near her home as the investigators traced the deceased's phone to Accused 1 on 5/9/2017, when they arrested her and she then led them to Accused 2 at Bumala where they arrested Accused 2 who gave information that led to the arrest of Accused 3.
64. In my humble view, Accused 3 and his witness DW6 were lying to court when they contradicted each other with DW6 saying on 19/8/2017, Accused 3 was arrested when Accused 3 himself claimed that he was arrested on 22/8/2017, which was the day that the 1st accused testified that the 2nd accused gave her the phone.
65. On the whole, I find that the circumstantial evidence tendered against the 3rd accused person is sufficient to place him at the scene of crime where the deceased was found dead and her phone missing.
66. I do not find any evidence that the 1st and 2nd accused person acted in concert with the 3rd accused to unlawfully kill the deceased. I believe the evidence by the 1st and 2nd accused that the phone in question was sold to Accused 2 by accused 3 and his friend who is at large and that accused 2 gave the said phone to accused 1.

On whether the unlawful killing of the deceased by the 3rd accused and others was occasioned with malice aforethought,

67. From the nature of injuries sustained by the deceased as described by Dr. Rabur and photographs produced in court as exhibits and viewed by this court, I am satisfied that her attackers had the sole intention of causing her grievous harm and killing her. Accordingly, I am satisfied that the Prosecution has proved that the killers of the deceased had malice aforethought.
68. In the end, I find and hold that the Prosecution has established beyond reasonable doubt the guilt of the 3rd accused Peter Otieno Oyugi

that he, with malice aforethought and in the company of others, unlawfully killed the deceased CAO. I find the 3rd accused person Peter Otieno Oyugi GUILTY of the offence of Murder contrary to Section 203 of the Penal Code. I convict him accordingly.

69. I find that the evidence tendered against the 1st and 2nd Accused persons is not sufficient to warrant or sustain a conviction for the murder of the deceased. I return a finding of NOT GUILTY in respect of the 1st and second accused persons. Accordingly, I acquit the 1st and 2nd accused persons of the charge of murder and discharge them from the information of Murder.

70. Therefore, unless otherwise lawfully held, the 1st accused person Everlyne Awino Onyango and the second accused person Albert Otieno Okwaro are hereby set at liberty. Their sureties are accordingly discharged and securities held by the court to be released to the sureties forthwith.

71. Accused 3 to mitigate and the victim's family to give victim impact statement before sentence.

72. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF NOVEMBER, 2020

R.E. ABURILI

JUDGE

In the Presence of:

1st, 2nd and 3rd Accused persons present

Mr. Ooro Advocate h/b for Mr. Oduor Advocate for the accused persons

Mr. Kubebea, Prosecution Counsel for State

Court Assistant: Brenda and Modestar