



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM OUGO. J**

**CRIMINAL (MURDER) CASE NO. 47 OF 2014**

**REPUBLIC.....PROSECUTOR**

**-VERSUS**

**PETER KERONGO.....1<sup>ST</sup> ACCUSED**

**SHEM ATANDI NYAKINA.....2<sup>ND</sup> ACCUSED**

**GEOFFREY ABUYA OGATI.....3<sup>RD</sup> ACCUSED**

**JOHN OMONYWA MOSE.....4<sup>TH</sup> ACCUSED**

**RULING**

**1. PETER KERONGO** hereinafter referred to as the 1<sup>st</sup> accused person, **HEM ATANDI NYAKINA** hereinafter referred to as the 2<sup>nd</sup> accused, **GEOFFREY ABUYA OGATI**, hereinafter referred to as the 3<sup>rd</sup> accused and **JOHN OMONYWA MOSE** hereinafter referred to as the 4<sup>th</sup> accused by an information dated the 23<sup>rd</sup> September 2014 face a charge of murder contrary to Section 203 as read with Section 204. The particulars of the offence are that, on the 5<sup>th</sup> day of April 2014 at {particulars withheld} village within Kisii South District in Kisii County in the Republic of Kenya jointly with others in court murdered **SILVANUS OMBOGA MAKUNGA**.

**2.** Each accused person pleaded not guilty to the offence and the matter proceeded to hearing. The prosecution called a total of 7 witnesses. I will proceed to summaries the evidence.

**3. PW1 PCGM** testified that the deceased was her husband. In the month of March 2014, 3 people went to my home at about 9 a.m. They were in a vehicle which they left on the way. They came to their home asked her where my husband was. She asked them who they were or if they wanted batter trade goods “mali mali”. They told her that they were looking for land to buy. She welcomed them into the house. A lady had bought a piece of land from us and she did not have enough money. So she asked them to sell it so that they could refund her the cash. The 3 men sat outside the house and she then asked them where they came from and their names. They told her they were from Nyambari Masaba from Prof. Sam Ongeri’s home. She enquired why they came all the way to buy land from them but they said that Maasais had chased them away. They then asked her to go and look for my husband. Her husband returned home and greeted them. He recognized one of the 3 people. She entered the house and her husband followed me and told her that a bad person had come to the home. He repeated the statement 3 times and then he went out to show the 3 men the land. She heard the people talk saying they will give him M7 and my husband said M15. M7 and M15 she did not know what it means but they were talking about money purchase price for the land. She did not know the bad person my husband was talking about but she later learnt that it was the 1<sup>st</sup> accused. On 5/4/2014 my husband told her that he was going to meet the people who had come to see the shamba/land. He left the house at about 7 a.m. He told me he was going to collect the land purchase price/cash from Kisii. He never returned. She do not know if he got the cash. They looked for him for 11 days. The police called her in April 2014 on a date she could remember she went and identified some suspects. She identified one person.

**4. PW 2 Jane Kerubo Ogari** testified that on 26/3/14 she was washing clothes at the home of the deceased (Omboga). She saw visitors coming with the wife of the deceased. The deceased’s a wife asked them what their mission was. They said there was a shamba they heard was being sold and they wanted to buy it. The deceased came and they introduced themselves and where they were coming from. The wife of the deceased asked them why they wanted land in a remote area yet they were coming from town. They said they had problems where they were coming from. They were shown the land and they agreed on the price (purchase) then they left. After several days, the deceased (Omboga) said they had agreed on purchase price and on 3/4/2014 the deceased said he had received a call from the people who wanted the land and he left the home on 5/4/2014 to see the buyers. It was on a Saturday. The deceased did not come back home. She could only identify one of the people who came home on 26/3/2014. He is the 1<sup>st</sup> accused, he said he was a surveyor. An identification parade was conducted but the 1<sup>st</sup> accused was not in it. The deceased was later found dead and his body dumped in a river.

5. **PW 3 Ronald Mesari** testified that in March 2014 he was working at the home of the deceased. Visitors came to the home of the deceased. He knew one of the visitors but he was not here in Court. The visitors came in a car which they left at a distance and they came home walking on foot. He does not know how long the visitors took in the home because soon after they came he left the home to go and graze the cattle. He attended an identification parade in April 2014 and he identified one Cosmas who was not in Court.

6. **PW 4 Silvanus Oroo Omboga** aka Brigadier Retired testified that he was informed that my brother the deceased had disappeared on 5/4/2014. He told his relatives to inform other relatives and if indeed he was missing they inform the police. By the 8<sup>th</sup> day which was on 8/4/2014 he came home to find out how he had disappeared. He is trained on intelligence gathering. He talked to a few people. The wife of the deceased informed him that the last person the deceased was last seen with one Anthony Ndege then living in Mwata. The wife of the deceased told me the deceased was seen walking towards Kisii town with one Anthony Ndege. On 9/4/2014 he followed the route where my late brother was last seen. Near a market called Nyangwe Koba, he talked to some ladies – one Miss Somoli who gave him information on who was seen with the deceased on 5/4/2014 and that he was in a group of about 4 people and that at some function, they stood next to a probox car and talked for about 2 hours. He did not witness the deceased talk to these people. For about one week he worked in conjunction with the investigating officer. On 15/4/2014 the police got information that a body was in River Mwata next to the bridge. They searched and at about 2 p.m they found the body about 100 metres from the bridge. They were not able to retrieve the body till about 4 p.m after the police photographer had taken photographs. He was able to observe the body which he physically assisted in retrieving from the river. The body had a rope around the neck. It was slightly decomposing, naked but he had his shoes on so it was easy to identify it. He attended the post mortem examination and identified the body to the doctor. He knows all the accused persons. He did not know them before the death of my brother. He came to know them after the investigations together with the police after arresting the 1<sup>st</sup> accused on the 9/4/2014. They took him from his house. The first 2 accused were picked by the police. The 3<sup>rd</sup> accused was arrested in Nairobi. He had him locked up at the Buru Buru Police Station and he confessed to the crime.

7. **PW 5 Thomas Mbayi Manta** testified that he repairs punctures of vehicles and motorcycles and bikes. The deceased was known to me. He was a friend and a neighbor. On 5/4/2014 at about 10.30 a.m a white probox car went to my workshop and he was asked to put pressure on its tyres. He did not see the occupants of the probox car – they sat inside. The deceased was inside the probox car, he saw him and he greeted me. He was seated at the back left of the said car. He talked to the deceased and he told me he was going to town. The car then left with the occupants plus the deceased. He does not know the 4 accused persons before the court, but I know 1<sup>st</sup> accused as a person of community policing.

8. **PW 6No. 78257 PC Charles Kitur** attached to Scenes of Crime Gucha testified that on 15/4/2014 at about 3 pm we went to a scene with one PC Kitur CID Police Central. The scene was along Mwata River in Kisii County. At the scene we met C.I Ateya and his team who showed us a body of a deceased floating in the river. The deceased was retrieved from the river and identified to them. He was identified by Retired Brigadier Omboga who was among the members of the public at the scene. The deceased's body had decomposed. He had injuries on the head and the left buttock. He was half naked. He had brown white striped inner pant, green suit with trouser removed to the legs. He had his coat on the hands. He had torn white vest, brown shoes, brown socks and a rope around the neck. He took the following photographs:-

Photo 1 – The general view of Mwata river.

Photo 2 & 3 – Closer view of the body floating in the river.

Photo 4, 5, 6 –General view of the body after being retrieved from the river.

Photo 7 – Closer view of the injured left buttock.

Photo 8 – Closer view of the rope around the neck of the deceased.

Photo 9 – Closer facial view for identification.

He certified that the film was processed under my supervision; the negatives are in his custody and can be produced if required. He produced the photographs as P. Exhibit (a) – (i) and the certificate as P. Exhibit 2.

9. **PW 7No. 63651 Cpl Wilson Kiptum** attached to DCI Kisii Central General Investigations testified that on 10/4/2014, they received a report from Gesonso Police Station that someone had been abducted. They moved to the area. SM is the person who had been abducted. We searched for him within Gesonso area and in the process of searching, we got information that the said deceased was selling a parcel of land and that willing buyers had gone to his home to negotiate the price. On 15/4/2014 at around noon, we got information that the body of the deceased had been found floating in River Mwata. They went to the scene and found the body in the river already decomposed. Later they got information that the very people who had gone to his homestead were the persons who eliminated him on allegations that he was practicing witchcraft. The 1<sup>st</sup> accused was adversely mentioned for being the mastermind of the killing. They arrested 1<sup>st</sup> Accused and 2<sup>nd</sup> Accused. Later, they got information that after the accused committed the offence, they went to celebrate at Bridge Camp and they were able to arrest the 3<sup>rd</sup> accused. Later 4<sup>th</sup> Accused was arrested in Nairobi by police from Buruburu Police. They charged all the accused with the offence of murder. 1<sup>st</sup> Accused and 2<sup>nd</sup> Accused were arrested around 3 to 4 days after the disappearance of the deceased. When they retrieved the body, it was in the process of decomposing and the post mortem report established the cause of death to be strangulation. They got reliable information that accused was the mastermind but due to fear, the witnesses cannot come up to record statements. The deceased was abducted because it was alleged he was to receive money for the parcel of land he was selling and that is why he was lured to his death. They were not able to establish who exactly lured the deceased to his death.

10. **PW8 Dr. Dickson Gichana Mwaludindi** a consultant pathologist currently based at Kakamega County testified that he conducted an autopsy on 16/4/2014 at the invitation of the DCIO Kisii at Bosongo Hospital Mortuary in Kisii. The body was of an elderly African male moderate obesity 5'8" inches long. It was a decomposing body as about one week had elapsed since the time of death. Externally some body

parts had been eaten away i.e at the eyes, ears, fingers and the scalp on the left side to the front. This normally occurs if a body is on a water body. There was a laceration at the back left of the chest 4cm across. There was a ligature mark across the upper neck which was transverse i.e across 8mm wide; there was no knotting. There was no evidence of medical intervention on the body. Internally, there was extensive bruising below the skin of the lower chest – no fracture of the rib. The lungs had collapsed because of decomposition and not much could be said of them. There was a fracture of the arm of a hyoid bone. There was blunt trauma on the large intestine and whatever supports it – there was no fracture of the skull. The brain had decomposed. The spleen had bled due to blunt trauma. He formed the opinion was asphyxia secondary to manual strangulation. There was evidence of blunt force trauma on the chest and the abdomen. He filled a burial permit No. 535065. I did not take any samples. He signed the post mortem form dated 16/4/2014 and produced as P. Exhibit 3.

11. Counsels for the accused persons submitted that the accused persons should be acquitted as there was no evidence adduced implicating any of the accused person to killing of the deceased.

12. At the close of the prosecution case this court is required to make a determination on whether a prima facie case has been established by the prosecution. A prima facie case is one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defense (see Ramanlala Trambaklal Bhatt vs. R [1957]EA 322 and Antony Njue Njeru vs. R Court of Appeal at Nairobi Criminal Appeal No. 77 of 2006.

13. The evidence adduced by the prosecution is that 3 people visited the deceased's home a date before the 5/4/2014. The deceased was selling land. On the 5/4/2014 the deceased left home and was not seen again. He was later found dead, the post mortem report indicated that he was strangled. The deceased informed his wife that he was going to meet the persons who wanted to buy the land. PW5 who saw the deceased last in a probox on the 5/4/2014 could not the persons who were in the probox. It was also the prosecution's evidence that the 1st Accused was amongst the person who visited the deceased at his home inquiring about the land he was selling and that there was information that he was the mastermind of the killing but due to fear the witnesses with information could not testify. The other evidence is that the accused persons were celebrating the death of the deceased. This evidence on its own is inadequate to have the accused persons put on their defense. It does not show that any of them was involved in the death of the deceased. With no eye witnesses or strong circumstantial evidence putting the accused person on their defense would be asking them to fill in the gaps in the prosecution case. The evidence adduced cannot sustain a conviction even if the accused persons were put on their defense. In **R.vs. Wachira [1975] EA262** the court held that "*the sufficiency or otherwise of the evidence at the close of the prosecution case, so as to require an accused to make his defense thereto, is a matter of law. A court is only entitled to acquit at the stage if there is no evidence of a material ingredient of the offence.*" I have analyzed the evidence adduced by the prosecution and I find that the prosecution has failed to establish a prima facie case against the accused persons. Each accused person has no case to answer. This court therefore acquits **Peter Kerongo, Shem Atandi Nyakina, Godfrey Abuya Ogati and John Omonywa**. Each accused person is free to go unless lawfully held. Any surety document or cash bail held shall be released to the depositor.

Dated, signed and delivered at Kisii this 11<sup>th</sup> day of April 2019.

**R.E.OUGO**

**JUDGE**

In the presence of;

**Accused No. 1 Present**

**Accused No. 2 Present**

**Accused No. 3 Present**

**Accused no. 4 Present**

**Mr. Nyangacha for the 1<sup>st</sup> & 2<sup>nd</sup> accused persons & h/b Mr. Bigogo for the 3<sup>rd</sup> accused**

**Mr. Sagwe for the 4<sup>th</sup> accused**

