



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 10 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

RAPHAEL OOKO PAULUS.....ACCUSED

JUDGMENT

1. **Viron Odhiambo Onyango** (hereinafter referred to as '**the deceased**') died suddenly in the morning of 01/03/2016 at their home in Saria village in Dedee Division within Migori County. Following police investigations, **Raphael Ooko Paulus**, the accused person herein, was arrested and charged with the murder of the deceased. He denied the information and a trial was ordered.

2. The prosecution availed ten witnesses in a bid to prove the charge. **PW1** was **Dr. Sammy Ruwa Mwatela** who conducted the post mortem examination for the deceased. The Assistant Chief of North Kamagambo Sub-Location one **Agnes Atieno Juma** testified as **PW2**. **No. 229617 APC Harrison Mnyalla** then attached at Dedee AP Post and who rescued the accused person from the wrath of members of public testified as **PW3**. He was in the company of **No. 235980 APC Simon Karanja** who testified as **PW6**. A cousin to the deceased who identified the body of the deceased prior to the post mortem examination testified as **PW5**. He was one **John Odhiambo Gondi**. Two sisters-in-law to the accused person testified as **PW7** and **PW9** respectively. They were **Morine Awuor Ouma** and **Magret Achieng Jowi** and the immediate elder brother of the accused person one **John Ouma Onyango** who was the husband to **PW7** testified as **PW8**. A Safety Engineer with Kenya Power and Lighting Company Limited one **Solomon Wambua Kilonzo** testified as **PW10**. The investigating officer was **No. 59809 PC Simon Mwangangi** attached at Awendo Police Station who testified as **PW4**. In this judgment I will refer to the witnesses in respect to the numbers in which they testified.

3. Since the prosecution's case was centered on circumstantial evidence I will reproduce the evidence of the witnesses for ease of analysis. I will begin with the category of the witnesses who were at the scene. That was only **PW7**. **PW7** testified in-chief before this Courtroom and was cross-examined and re-examined at the scene during the Court's visit. **PW7** testified in her evidence-in-chief that she was married to **PW8** and lived within the same homestead with the accused person in Saria village in Dedee. That, **PW7's** house was close to and faced that of the accused person. That in the morning of 01/03/2016 she was outside her house preparing porridge when she saw the accused person at the door of his house. The accused person then left towards the road and shortly she saw the deceased, then aged around 4 years old, near the door of the house of the accused person which door was made of an iron sheet. That, the accused person then returned with a motor cycle and its rider. The accused person gave the rider a sack of maize and lifted the deceased who lay aside. **PW7** asked the accused person if there was anything wrong with the deceased and the accused person responded that the deceased was unwell but asleep. By that time **PW7** was about 10 metres from where the accused person was with the deceased and further asked him why he did not call her to take the deceased who was unwell, but the accused person insisted that the deceased will be well. The accused person and the rider left shortly afterwards and **PW7** approached the deceased and observed some injuries on the cheeks and the stomach and that the deceased was not breathing. She called the accused person but the accused person did not return. **PW7** screamed and it was **PW9** who was the first person to respond and run to the scene.

4. In cross-examination, **PW7** stated that the incident occurred at around 09:00am as she was outside her house preparing porridge. The door to her house was made of an iron sheet and that the house was connected to electricity from the main pole within the homestead which also connected other houses including that of the accused person. That, the main pole was later removed by personnel from Kenya Power and Lighting Company Limited (hereinafter referred to as '**the KPLC**'). She also stated that her house and that of the accused persons were demolished and both put up new houses and clarified that the new houses were not in existence when **PW10** visited the homestead. **PW7** however stated that when the KPLC personnel later visited their village and disconnected the power supply to various homes including their homestead, her new house was then connected to power and that it was as well disconnected and was yet to be reconnected although wiring is in place.

5. Whereas she admitted that there was a metallic seat with cushions in her house she insisted that the deceased was laid on a wooden chair which was still in the new house of the accused person. **PW7** further stated that it was the father of the deceased one **Onyango** (not a witness) whose house was across the road and who was at home during the incident who placed the deceased inside the house of the accused person. **PW7** recalled seeing **PW2** but she could not tell who between **PW2** and **Onyango** arrived first. As to where the deceased actually

died, PW7 vehemently denied that the deceased died inside her house and that she then carried the body elsewhere and insisted that the deceased died at the door of the old house of the accused person. She further explained that it was one Mama Felly who removed the body and took it to his father (Onyango) and that it was Onyango who brought the body back into and placed it inside the house of the accused person.

6. On her relationship with the accused person, PW7 stated that she had no grudge with him, but narrated a previous incident that really pained her for long although it was later sorted out. She recalled that there was a time when the family accused her of killing her child using hot water and that all members were against her. That, the issue was investigated by PW2 and settled and although she intended to sue the family her elder brother-in-law sought for forgiveness and she let it go. She denied that she was hitting back on the family through the accused person. PW7 stated that she only knew that the accused person was a casual labourer within the village and was not aware if he was a Mason and worked in Rongo.

7. In re-examination, PW7 confirmed that she had no grudge against the accused person whom they had lived in the homestead for 11 years. She clarified that she was not charged with killing her child and further stated that the deceased did not die inside her house. She recalled seeing a pole within the homestead which was erected by the accused person near his old house and it was that pole which the accused person used to connect power to all the houses in the homestead. PW7 clarified that when the deceased was removed to his father's house the intention was to rush him to hospital but that did not materialize when they realized at the house of Onyango that the deceased had long died. She reiterated that her old house and the old house of the accused person were near and that they were both demolished and denied that she did not have any other former house than the current one.

8. The second category of witnesses are those who went to the scene before the body of the deceased was removed by the police. They included PW9, PW2, PW3, PW6 and PW8. PW9 was an immediate neighbour to the accused person and PW7. She was married to a brother to the accused person and that the accused person was her in-law. In the morning of 01/03/2016 as PW9 was tethering her cows she heard PW9 calling the accused person who was walking towards the main road to return home in vain. After a short while PW7 screamed and PW9 was the first one to arrive at the homestead of PW7. She saw the deceased lying with scars on the stomach and not breathing under a tree near the house of the accused person. She confirmed that the door of the house of the accused person was made of iron-sheet. PW9 also screamed and went back to her home.

9. Immediately the father of the deceased realized that the deceased was dead and that the accused person had left home he called PW8 who was by then at Rongo and informed him of what had happened and requested him to ask the accused person to return home. Other family members rushed to and reported the matter to the Dedee AP Post where the In-Charge called and informed PW2 of the occurrence. PW2 went to the Camp and was accompanied by some police officers and headed to the scene. As they were at the scene the accused person was brought by PW8.

10. PW2 testified that she found many people at the scene and that the deceased, who was a boy aged around 4 years old, was lying on a seat inside a house. That, the deceased seemed dead. She also saw barbed and electricity wires in the house and heard that the deceased had been electrocuted. PW2 called the OCS Awendo Police Station who dispatched police officers to the scene and the deceased was taken away.

11. In cross-examination, PW2 stated that it seemed the electricity wires inside the house had been disconnected from the mains (socket), but they were still inside the house. She however could not confirm whether the wires she saw had in the first instance been connected to the mains (socket). PW2 as well did not know who was behind the connections and did not witness the removal of the wires from the house. When the Court visited the scene PW2 was further cross-examined. She stated that the body of the deceased was not inside the house of PW7 but that of the accused person and that the houses of the accused person and PW7 were close to one another and were both demolished.

12. PW2 clarified that she was not related to PW7 but was only the area administrator who was aware of the numerous disputes between PW7 and her in-laws and that as an administrator she was not happy with such status. She further stated that she was generally unhappy with the behavior of the accused person and had severally talked to him in vain. PW2 was aware of a longstanding dispute between the accused person and PW7 which was still unresolved. PW2 however clarified that despite the foregone she had no grudge with the accused person.

13. PW8 narrated that when he received the call from home he looked for the accused person and they met at Rongo where PW8 explained what he had been informed. That, the accused person denied knowledge of any wrong doing and accompanied PW8 back home. That, on arrival they met the AP police officers and many people at home and learnt of the death of the deceased. The deceased lay on a seat inside the house of the accused person. PW8 clarified that his house was just next to that of the accused person and that the door to the house of the accused person was made of an iron sheet.

14. PW3 and PW6 were dispatched by their in-charge from Dedee AP Post to the home of the accused person to rescue him from the angry members of public. That, they rushed and managed to rescue the accused person who was already bruised on the cheeks and took him to Awendo Police Station.

15. As PW2 had informed the OCS Awendo Police Station of the incident the police moved to the scene. According to PW4 the police surveyed the homestead and interviewed several people at the scene. They learnt that the accused person had differed with his wife who had left with the children and that the accused person had illegally connected the door to his house to the socket inside his house and left the house through the window in the hope that his wife will be electrocuted on return, but instead it was the deceased who was among the little children in the home who became the victim. The police further learnt that when the accused person returned to his house he found the deceased electrocuted and that he disconnected the illegal connection before he left.

16. The police entered into the house of the accused person and saw power connections and the body of the deceased lying on a seat. They took several photographs showing the connections inside the house and the deceased out of which 9 photographs were marked for identification but not produced as exhibits. PW4 also stated that the police received a Report from KPLC on the illegal connection which was also marked for identification but was not produced as an exhibit. PW4 produced the Statement of the initial investigating officer as an

exhibit. The officer, **Sgt. Stephen Makukua**, had visited the scene but was later transferred and the case was handled by another officer before he was also transferred and PW4 took over. The body of the deceased was removed to Rapcom Medical Centre Mortuary for further police action.

17. The last category of the witnesses dealt with post-removal of the body of the deceased from the scene. They include PW1, PW5, PW10 and the police.

18. PW10 was a Safety Engineer with KPLC and he was in-charge of the South Nyanza region. That, on 01/03/2016 at around 11:00am while on duty around Homa Bay he was called by their Migori office and informed of the incident at Dedee. That, he visited the scene which was a homestead on the same day at around noon. He did not find the body of the deceased as it had allegedly been removed by the police. PW10 showed the Court where the house where the deceased was allegedly electrocuted stood. He saw a pole next to that house which pole was supplied by power from the KPLC mains lines and the house was connected with electricity but without a meter. On entering inside the house PW10 saw an illegal connection from a socket running to the door knob which door was made of iron sheet, but there was no power flowing as the connection had been disconnected. The extension was by a barbed wire.

19. On cross-examination PW10 stated that he ordered for recovery of the illegal connections in the homestead and the entire village and prepared a comprehensive report to that end. He also prepared a Report to the Energy Regulatory Commission, but did not also produce a copy in Court. He also admitted that he did not have evidence of the houses legally connected to electricity within Dedee area and a Report on those found illegally connected although the information was in the data base of KPLC. PW10 also clarified that the connection from the pole into the house was underground, that he did not take any photographs at the scene and that he did not prepare any Sketch Map. PW10 denied that he handled the matter carelessly.

20. The police organized for and a post mortem examination was conducted by PW1 after the body of the deceased was identified by PW5. PW1 conducted the autopsy at Rapcom Medical Centre Mortuary on 03/03/2016. The body had fisting of the hands and tensing of the muscles and the upper limbs. There were abrasions on the head with expoliation of the skin. There were further abrasion marks on the lumbar region and abdomen with expoliation of the skin as well. Whereas the heart was normal, there was a decreased intra-cardiac residual volume of blood and the spleen was enlarged. PW1 formed an opinion that the cause of death was cardiac arrest due to high voltage electrocution. PW1 produced the Post Mortem Form as an exhibit.

21. The then investigating officer processed the accused person by escorting him for a mental checkup where he was found to be mentally-fit to stand trial. The accused person was then formally charged with the murder of the deceased.

22. At the close of the prosecution's case, this Court found that the prosecution had established a *prima-facie* case and placed the accused person on his defence. The accused person elected to give sworn evidence and although he intended to call witnesses he later changed and called none.

23. The accused person denied committing the offence. He testified that on the material day he was truly at their home in Dedee where he had gone the previous night to collect maize. In the morning he left using a motor cycle and left PW7, who was the only older person, at home with children including the deceased and that all was well. That, he was suprised on reaching Rongo where he saw PW2 in the company of some youths who attacked him and injured him on the head. That, PW8 intervened and talked to PW2 where they agreed to leave for home first before the accused person was taken to hospital. That, the accused person shortly lay unconcious and regained conciousness while in police cells the next day after the incident.

24. The accused person vehemently denied that he had connected his house to electricity and contends that it was instead PW7 whose house was connected to electricity. He further contends that the door to his house was made of wood and not an iron sheet. He also took issue with PW7 who, according to him, lied to the Court by alleging that her house was demolished, a fact she knew was untrue as she had all along since marriage into the family stayed in the house which she showed this Court during the visit.

25. The accused person further testified that PW2 and PW7 were sisters and that PW2 would always cover all the wrongs committed by PW7. He stated that his relationship with PW7 was at its lowest and he recalled an incident where PW7 had intentionally burnt her son to death using boiling water and when the family wanted PW7 charged PW2 intervened and ensured that the matter did not find its way to Court. The accused person further lamented that as a result of the immense protection PW7 enjoyed from PW2 she would at times harvest the cane for the accused person and nothing would happen to PW7 even when the accused person pursued the matter. He also relates their bitter relationship from the time when the family of the accused person declined to sell part of their land to PW2.

26. On cross-examination the accused person stated that his house was demolished when he was in custody and learnt that it was by the father to the deceased. The accused person reiterated that he had not connected any electricity to his house and that the testimony by PW10 was only untrue at its best. He poised that the case was instituted against him to settle family scores which have by now been longstanding given that the role played by PW7 who had been left behind with the deceased was not investigated.

27. At the close of the defence case the Defence Counsel, **Mr. Sam Onyango**, filed written submissions in urging this Court to find that the accused person had no hand in the death of the deceased as the circumstantial evidence did not meet the legal threshold to sustain a conviction of any offence relating to the demise of the deceased. The State urged this Court to find that the charge had been proved and to convict the accused person.

28. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether the accused person is guilty as charged.

29. As the accused is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

30. There is no doubt that the deceased died. All the witnesses (except PW4 and PW10) so confirmed. As to the cause of death, the PW1 took this Court through the Post Mortem Report he had personally prepared and opined that the cause of death was cardiac arrest due to high voltage electrocution. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

31. On the second ingredient as to whether the accused caused the death of the deceased, since there is no eye-witness account on what exactly happened until the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(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.

32. The foregone principles were set out in the *locus classicus* case of R -vs- Kipkering arap Koske & Another (supra) and have repeatedly been used in subsequent cases including the Court of Appeal cases of GMI -vs- Republic (2013) eKLR, Musii Tulo vs. Republic (2014) eKLR among many others.

33. The Court of Appeal in the case of Musii Tulo (supra) in expounding the above principles expressed itself as follows:-

4. 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 guilty, 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 guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

34. Having found that the cause of death was cardiac arrest due to high voltage electrocution it was incumbent upon the prosecution to build its case to sustain the inference that there are no other co-existing circumstances which would weaken or destroy the inference that it was the accused person who caused the death of the deceased and no one else.

35. There was a serious denial by the accused person that his house was connected to electricity power. Several witnesses testified to that end. They included PW2, PW4, PW7, PW8 and PW10. I have carefully considered their cumulative evidence on the issue against the position taken by the accused person and I am satisfied that indeed the house of the accused person in their homestead at Dedee village was connected to electricity.

36. That being so, it is not the said connection that allegedly caused the death of the deceased; the prosecution led evidence of an illegal connection from a socket inside the house to the door knob as the cause of the electrocution. That evidence was mainly led by PW4 and PW10. PW4 referred to photographs which were taken during the police visit to the scene which photographs captured *inter alia* the illegal connection inside the house. However, those photographs were not produced as exhibits. PW10 testified of two illegal connections. The first one was from the pole which was outside the house into the house which connection had no KPLC Meter and the other connection was inside the house; from the socket to the door knob. PW10 did not adduce any evidence that the connection from the pole to the house was not metered. There is no doubt that PW10 commissioned a clean-up exercise on illegal connections within Dedee village and the exercise was undertaken. Again, the resultant report was not produced in Court. On the second illegal connection inside the house from the socket to the door knob PW10 stated that by the time he entered into the house the illegal connection from the socket to the door knob was long disconnected. He also testified of a Report he prepared and sent to the Electricity Regulatory Commission on the incident which no copy was produced in evidence.

37. The other witnesses who mainly testified on the issue of connection led evidence to the effect that the house of the accused person was connected to electricity from the pole. They did not testify on the connection inside the house from the socket to the door knob. The allegation by PW4 that the accused person erected the illegal connection and left the house through a window was but hearsay.

38. A close scrutiny of the evidence as a whole reveals a case where the alleged illegal connection from the socket to the door knob inside the house of the accused person was not proved. That evidence was *inter alia* to be led by the photographs taken at the scene, the Reports prepared by PW10 and the witnesses who entered into the house before the disconnection since PW7 did not state that the accused person entered into the house when he returned with the motor cycle rider to carry his stuff away. It now turns out that the prosecution left out such

crucial evidence thereby rendering the evidence not reach the required legal bar that the circumstances taken cumulatively formed a chain so complete that there was no escape from the conclusion that within all human probability the crime was committed by the accused person and none else. The doubt must be resolved in favour of the accused person.

39. I must however state that save for the foregone lacuna there is very strong suspicion of the possible involvement of the accused person in the death of the deceased. Regardless thereof I must remain alive to the truism that suspicion however strong cannot be a basis of a conviction in a criminal case. The second ingredient of the offence is hence not proved.

40. The upshot is that the accused person is hence found **NOT GUILTY** of the murder of **Viron Odhiambo Onyango**. The accused person shall be forthwith set at liberty unless otherwise lawfully held.

41. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of June 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Sam Onyango, Counsel instructed by Messrs. Sam Onyango & Company Advocates for the Accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant