



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 20 OF 2017**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**WILLIAM MBELISIA ODANDO.....ACCUSED**

**JUDGMENT**

1. **Josephat Aderi Mwere** (hereinafter referred to as **'the deceased'**) died a day after he was found injured on the head and lying beside the GodJoppe – Achuth Road in GodJoppe village within Migori County. Out of police investigations the accused person herein, **William Mbelisia Odando**, was charged with the murder of the deceased.

2. The particulars of the information of murder were that the accused person murdered the deceased on 10/09/2017 along GodJoppe – Achuth Road in GodJoppe village within Migori County in the Republic of Kenya.

3. The accused person denied the offence and a trial was ordered. The prosecution availed nine witnesses in a bid to prove the information. **PW1** was one **Barrack Odhiambo Ochoo** who was a fellow villager to the accused person whereas **PW2** was a brother to **PW1** and also a villager to the accused person. He was one **Jackton Otieno Ochoo**. A step-mother of the deceased one **Mary Mmbone Dedege** testified as **PW3**. The wife of the deceased one **Rose Anzemo Aderi** testified as **PW4** whereas a brother to the deceased one **Jotham Ongonga Mwere** testified as **PW5**. **PW6** was **Dr. Raymond Oigara**, a Consultant Surgeon while **PW7** was **Dr. Evans Omondi** who produced the Post Mortem Report on behalf of **Dr. Sylvester Ochieng** who conducted the post mortem examination on the body of the deceased. A Government Chemist one **Richard Mutai Langat** testified as **PW8** whereas the investigating officer one **No. 85066 PC Allan Mbucho** attached at Migori Police Station testified as **PW9**. I will hereinafter refer to the witnesses in the esquence of numbers as they testified.

4. The prosecution's case was centered on circumstantial evidence. Leading that evidence was **PW1** and **PW2** who were the first people to arrive at the scene and also encountered the accused person. **PW1** testified that as he rested in his house at around 10:30pm on 10/09/2017 he heard someone screamings from outside his homestead and readily recognized the voice as of the accused person whom he knew quite well. The accused person was calling for help that someone had stabbed him with a knife. **PW1** quickly went out of his house unto the homestead as the accused person entered the homestead. Asking him what the matter was the deceased told **PW1** that it was the deceased who had stabbed him. As **PW1** was with the accused person **PW2** joined them since **PW2** had also heard the screams as he was also in his house which neighbours that of **PW1**. The accused person told **PW1** and **PW2** that the deceased who had stabbed him was hiding behind a certain tree and led them there.

5. As they walked **PW1** and **PW2** asked the accused person to show them where he was injured but he declined. They then came across someone lying by the side of the road and **PW1** and **PW2** stopped. The accused person however proceeded on and went away. **PW1** called his wife who brought a D-Light lamp and they found that the person was the deceased who was bleeding profusely from the head. He was however still alive but breathing so faintly. **PW1** and **PW2** hurriedly called the family members of the deceased who readily assembled thereat including **PW3**, **PW4** and **PW5**. The family members hurriedly took the deceased to St. Joseph's Mission Hospital in Migori where he was transferred to Kisii County Referral Hospital, but since there was a Doctor's strike they instead took the deceased to Hema Hospital in Kisii town where he was admitted.

6. The deceased underwent treatment and a CT Scan was done which revealed severe head injury. **PW7** examined the deceased on 11/09/2017 and directed that the deceased be taken to a hospital which had, and that he be placed in, the Intensive Care Unit for appropriate care and management. As the deceased was being prepared for the transfer he passed on. The body was taken to Migori County Referral Hospital Mortuary for preservation.

7. **PW5** reported the matter at Migori Police Station on 12/09/2017 and also availed witnesses whose statements were recorded. On 13/09/2017 **PW5** accompanied the police together with other witnesses and viewed the body of the deceased at the Mortuary. The police photographed the body. Later the team proceeded to the scene where the deceased was found lying and the police photographed it as well. **PW9** inspected the scene and recovered a blood-stained stone. He also prepared a Sketch Map of the scene. The police returned to the station with the witnesses. While at the station the accused person was brought in by police officers from Uriri Police Station where he had allegedly surrendered thereto. **PW9** booked him into police cells.

8. On 15/09/2017 PW5 identified the body of the deceased at the Mortuary and a post mortem examination was conducted and a Report prepared which Report was produced by PW7. The Report opined that the cause of death was intra-cerebral bleeding secondary to severe head injury from a sharp object. During the examination PW9 requested for the deceased person's blood sample to forward to the Government Analyst together with the stone but he was advised that the body had been treated with formalin and had no blood. PW9 however forwarded the stone to the Analyst and on examination PW8 confirmed that the stone was stained with human blood of an unknown male person. PW8 produced the Report as an exhibit.

9. The accused person was mentally examined on 25/09/2017 where he was found to be fit to stand trial and was formally charged on 09/10/2017. The Accused Person's Mental Report was produced as an exhibit by PW9 alongside the stone, the photographs, the Rough Sketch Map and the Exhibit Memo Form. PW6 also produced various medical documents on the deceased as exhibits.

10. 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 without calling any witness.

11. The accused person denied committing the offence. He testified that he is aged 70 years old and married with 10 children. That, on the material day he went to work at Migori during the day and returned to GodJoppe market at around 07:30pm. That, as it was during the General Election period the area which was a strong Orange Democratic Movement (ODM) zone was charged and the ODM supporters had no mercy on any Jubilee sympathizers. The accused person testified that he stayed at the busy market place until around 08:30pm when he walked home which was three and a half kilometres away. On the way, he met the deceased who was chanting pro-Jubilee slogans and the accused person warned him going by how the political environment was and more so that several other people had been killed for failure to support the ODM Party – NASA Coalition. The accused person however passed the deceased who continued chanting the pro-Jubilee slogans. That, he was surprised to learn that he was suspected to be the one who had injured the deceased the following day and went to the Uriri Police Station where he was arrested. He was eventually charged and his home torched and he has by now relocated. The Accused person closed his case and prayed for an acquittal.

12. At the close of the defence case the Defence Counsel, **Mr. Mudeyi**, urged this Court to find that the accused person was not the killer 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 through **Mr. Kimanthi** urged this Court to find that the information had been proved and to convict the accused person.

13. 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.

14. 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.**

15. There is no doubt that the deceased died. All the witnesses except PW8 so confirmed. As to the cause of death, the PW7 took this Court through the Post Mortem Report which was prepared by Dr. Sylvester Ochieng whom they had worked together and was familiar with his hand-writing and practise. The cause of death was opined as intra-cerebral bleeding secondary to severe head injury from a sharp object. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

16. On the second ingredient as to whether the accused caused the death of the deceased, since there is no eye-witness account on what caused the injuries that led to the death of the deceased, 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.**

17. 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.

18. 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.*

19. PW1 and PW2 responded to the screams by the accused person. The accused person alleged that he had been stabbed by the deceased and led PW1 and PW2 to where the deceased was lying. PW1 and PW2 did not believe the accused person's assertion that he had been stabbed by the deceased since the accused person declined to show them where he was injured and that he walked fast as he led them to where the deceased was. The record is silent on whether the accused person was at any time physically examined to ascertain whether he was truly injured. One may be overzealous to assert that whoever is injured cannot walk fast and must show out the injury. That may not always be the case. It all depends on one's preference, the state of the injured person, the magnitude of the injury among other factors.

20. There is also the evidence of PW8 and PW9 on the blood-stained stone allegedly recovered from the scene. The recovery was by PW9. According to PW9 he wanted to ascertain whether the blood on the stone was human blood and if so whether it was that of the deceased. To that end PW9 intended to take blood samples of the deceased during the autopsy and forward them together with the stone to PW8 for analysis. However, PW9 did not get the blood as he was reliably informed by Dr. Sylvester Ochieng who performed the autopsy that the body of the deceased had been treated with formalin and as such no blood was available. Nevertheless, PW9 forwarded the stone to PW8 for analysis. According to the Report by PW8, it was confirmed that the stone had human blood, but the Report fell short of proving that the blood thereon was that of the deceased. Consequently, it cannot be certainly said that the stone was the weapon which occasioned the fatal injuries. Further, there was no nexus between the stone and the accused person. No circumstances were unveiled to suggest that the accused person was at any time in contact with the stone.

21. There is also the evidence of PW4 on the possible assailants. PW4 recorded a statement with the police on 13/09/2017 which statement was produced as a Defence Exhibit. According to PW4's statement PW1 rushed to her home at around 08:00pm on the material day and informed her that '**they have beaten your husband**'. PW4 reiterated that evidence in Court and which evidence was not challenged or clearly explained. PW1 confirmed in his testimony that after seeing the deceased injured he rushed to inform the family members of the deceased. It therefore comes out that PW1 knew more than what he told the police and the trial Court. In essence he was aware that the deceased had been beaten and by who and that is why he told PW4 that '**they have beaten your husband**'.

22. I will hence look at that evidence in line with the defence tendered. According to the accused person he truly met the deceased as the accused person walked home. That, the deceased was chanting pro-Jubilee slogans and due to the then prevailing political atmosphere the accused person warned him against such tendency. PW9 also confirmed that the incident occurred at a time when there was political acrimony and that the area was a strong ODM zone. The other witnesses as well confirmed the then prevailing political status although they qualified that the deceased did not engage in politics.

23. This Court takes judicial notice of how Migori County generally was during the 2017 electioneering period. It is true that the County was highly charged and any one deemed not to be in support of the ODM Party – NASA Coalition could so easily be killed or if lucky then severely injured. The deceased could not therefore be an exception if it is true that he was chanting pro-Jubilee slogans. PW9 confirmed that he interrogated the accused person on arrest who reiterated the foregone. Several questions therefore call for answers including whether the deceased was a victim of political violence, whether PW1 referred to the ODM Party – NASA Coalition supporters or other people when he informed PW4 of the assault on the deceased, why PW4 did not disclose the names, if any, of the assailants as disclosed to her by PW1 or if PW1 did not give the names of the assailants then why PW4 and the police did not pursue that lead among others unanswered questions.

24. The accused person has severally appeared before Court and I confirm that he is in the category of those people defined as '**older members of the society**' in **Article 259** of the **Constitution**. He is elderly and frail-looking. According to PW7 the deceased had bruises on the right parietal region of the head and a depressed fracture of the skull. There is no doubt that the injury is a serious one and requires enormous amount of force to be exerted at once. Without completely ruling out the possibility of the accused person being able to inflict such an injury it will nevertheless require enormous effort on his part to achieve such at ago. I am inclined to find and hold that such a possibility on the part of the accused person remain low.

25. As matters stand now, it cannot be said with certainty that the accused person had a hand in the death of the deceased. There are several lacunas in the prosecution's 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.

26. The upshot is that the prosecution has failed to prove the second ingredient of the offence of murder. The accused person is hence found **NOT GUILTY** of the murder of **Josephat Aderi Mwere**. The accused person shall be forthwith set at liberty unless otherwise lawfully held.

27. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 8<sup>th</sup> day of August, 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Mudeyi, Counsel instructed by Messrs. Mudeyi Okumu & 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.**

