



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 49 OF 2014**

**REPUBLIC.....PROSECUTOR**

**-versus-**

**1. RONALD OPIYO AYODO alias RONNY**

**2. DISMAS WASONGA MITA alias ODODA**

**3. STEPHEN OKUMU AYODO.....ACCUSED**

**JUDGMENT**

1. Three brothers namely **Ronald Opiyo Ayodo alias Ronny**, **Dismas Wasonga Mita alias Ododa** and **Stephen Okumu Ayodo** were jointly charged with the murder of one **Mwita Mosoba Samson**. I will hereafter refer to the three brothers as ‘**the first, second and third accused persons** respectively’ and to **Mwita Mosoba Samson** as ‘**the deceased**’.

2. The particulars of the information facing the accused persons were that “*Between the 25<sup>th</sup> day of November 2013 and 7<sup>th</sup> day of December 2013 at Palweny village within Migori County in the Republic of Kenya murdered Mwita Mosoba Samson*”.

3. The accused persons denied committing the offence and the case was set for hearing. A total of nine witnesses testified in support of the information. **PW1** was a brother to the deceased one **Mwita Alfonse Monanka**. **PW2** was one **Robinson Awino King’wara**. The wife of the deceased testified as **PW3** and she was **Evaline Nyaihembe Mosoba**. The Senior Chief of Suna-Ragana Location one **John Okombo** testified as **PW4**. A village elder in Ragana/Palweny village one **John Aoko Adiang** testified as **PW5** whereas a neighbour to the deceased one **Mwikwabe Nashon Getara** testified as **PW6**. Another brother to the deceased one **Joseph Mwita Monanka** testified as **PW7** and **Dr. K’ogutu Vitalis Owuor** who produced a Post Mortem Report which had been prepared by **Dr. Ndege** testified as **PW8. No. 232417 C.I.** **David Kemboi** testified as **PW9** and he was the investigating officer then attached to Migori Police Station. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. The prosecution's case was based on circumstantial evidence for the reason that there was no one who witnessed how the deceased met his death but that the accused persons were alleged to have dealt with the body of the deceased in some way hence the culpability. The deceased left his home in Ngisitu village within Kuria East of Migori County on 25/11/2013 when he had been called by one **John Nyamohanga Gisinge** (not a witness). The deceased was then with **PW3**. The said John was drinking the local alcohol (chang’aa) in the home of **PW6**. The deceased arrived at the home of **PW6** with one **Walter Nyamohanga** (not a witness) at around 03:00pm and joined the said John. They all drank upto 06:00pm and left together. John had pledged his phone to **PW6** in return for the alcohol as he had finished the money he had. At an earlier time the deceased wanted to leave **PW6**’s place but the two companions prevailed upon him to wait so that they could leave together.

5. **PW6** did not see the three people again that day. The following morning John returned to **PW6**’s home for his phone and informed **PW6** that the mother of the deceased had asked him of the whereabouts of the deceased who was alleged not to have returned home the night before. John wanted his phone to call and find out where the deceased was before he could comprehensively answer the mother of the deceased. **PW6** released the phone to John.

6. The deceased was nowhere. His family then began looking for him. They traced any possible leads and also reported the disappearance of the deceased at Isebania Police Station. **PW1** interrogated **PW6** accordingly who narrated the events as they unfolded on the 25/11/2013 when John, Walter and the deceased went to his home for a drink upto when John returned the following day. Another lead came from **PW7** who had been called by the deceased on 25/11/2013 at around 09:30pm but his phone went off as its battery had no power, but after the deceased had told him that he was in Luoland. As a grandfather to the deceased and **PW7** had bought a parcel of land in Rongabi in Luoland, **PW7** knew that the deceased must have been there. However, the deceased was not there as well.

7. The family of the deceased escalated the search for the deceased but in vain. It was **PW2** who unravelled the mystery. The first accused person ran a local drinking place in Ragana near Migori town. He sold chang’aa. On 25/11/2013 **PW2** had passed by the first accused

person's place for drink when he saw three men walk in. He quickly noted that they were of Kuria origin. PW2 left the three men behind at around 09:30pm. The following day PW2 heard from PW5 that there was a Kuria man who had disappeared.

8. PW2 returned to the first accused person's place for a drink on 06/12/2013. As he continued with his drink he saw two men walk into the place. PW2 readily recalled them as among the three people whom he had left behind at the same place in the night of 25/11/2013 as he left. PW2 knew one of the two men as John Gisinge. The two men called the first accused person outside the house they were drinking in. On return, the first accused person who was in the company of the two men informed all the people who were inside the drinking place that there was some work to be done at a cost of Kshs. 10,000/= which amount the two men gave the first accused person in full glare of every one. The work entailed carrying a dead body for burial at some place. Some people left but PW2 and the three accused persons remained among others.

9. The two Kuria men then led those who had remained behind into a maize farm where they saw a dead body of a man. PW2 recognized the dead man as the third person who was with the two Kuria men at the drinking place on 25/11/2013. The body was still intact. PW2 asked the first accused person if that was the case but the first accused person kept quiet. They all returned to the drinking place and the two men left. PW2 advised the first accused person to report the matter to the village elder, PW5.

10. When PW2 left the drinking place, he decided to report the matter to PW5. That was however in the evening and PW5 promised to deal with the issue the following day. PW2 went home. On his way PW2 decided to and told some motor cycle riders from Kurialand to go and tell the Kuria people to go and collect the body of one of their own which was rotting in a certain farm. PW2 also met a certain woman who hailed from the border of Kurias and the Luos and again he informed her to pass information to the Kurias about the deceased.

11. On 07/12/2013 the motor cycle rider truly called one of the family members of the deceased and passed the information he had received from PW2. The family members rushed to Ragana area and continued with the search. They came to a place inside a maize farm which had been disturbed as a sign of a serious struggle. They saw some dry blood, uprooted human nails, a human thigh bone, a green hand-kerchief, a pair of grey socks and another pair of black socks. Among the people thereat were PW3, a tailor one **Rhoda Magacha** (not a witness) and PW4. The tailor identified the green hand-kerchief as the one she had made for the deceased. PW3 also confirmed so. PW3 also recognized the two pairs of socks as those which the deceased had left with from home on the 25/11/2013.

12. PW4 called PW9 who visited the scene alongside other police officers. They collected the human body parts together with items and took them to the Migori County Referral Hospital Mortuary. The police also photographed the scene. PW9 commenced investigations.

13. The search continued the following day around the other farms in that vicinity. As the search team approached a certain farm they saw five people who told them to look for the deceased elsewhere but not in that farm as he was not there. PW7 recognized the accused persons as among the said five people. They however continued with the search around the said farm.

14. Tension had then mounted between the Kurias and the Luos as the Kurias wanted an explanation why the Luos had killed their person. The Kurias were armed that day and anything could have happened. One clan elder, **Michael Okinyi** (not a witness) who was at the scene with some other clan elders called and informed PW4 of the near-breakdown situation and also informed him that the Kurias had told him that the accused persons were involved in the death of the deceased. As PW4 went to the scene he called the second accused person, whom he knew too well, and asked him to avail himself at the scene. The second accused person obliged and on being interrogated by PW4 at the scene the second accused person said that he was not ready to die alone and mentioned the other accused persons and one **Kennedy Owino**.

15. PW4 asked the villagers who had gathered in large numbers to look for those mentioned. After a while the villagers availed the first accused person and Kennedy Owino. PW4 interrogated them and they led him to a nearby farm where they found a sack hidden in some sisal plants. The sack contained some clothes; a green long sleeved shirt, a greenish long trouser, a black belt and a pair of black shoes. The sack also contained some human ribs and a human back. Just beside the sack was a human skull whose jaws had been dismembered and two teeth removed. As the people were busy inspecting the sack, the two accused persons and Kennedy escaped. On realizing that the three were not there PW4 asked the villagers to search for them. It was only the first accused person who was found, arrested and taken back to the scene. PW4 called the police and when PW9 turned up he handed over the first accused person to him.

16. PW9 collected the items and the other body parts and took them to the mortuary. Dr. Ndege conducted a post mortem examination on the body parts (head, ribs and thigh bone) and prepared a Report which was produced by PW8. Dr. Ndege had advised the family to conduct a DNA examination to confirm the identity and sex of the body parts but that did not happen as the family decried high costs of the exercise. According to Dr. Ndege the body had been mutilated hence the death. PW8 as well confirmed the medical position taken by Dr. Ndege that it was possible from examination of the parts especially the skull and how the teeth had been removed therefrom and the way the parts were dismembered to know that the body must have been mutilated. A Post Mortem Report was produced as an exhibit.

17. PW9 arrested the second accused person at the Migori Police Station and took the two for mental assessment and on confirmation that they were fit to stand trial he charged them. PW9 arrested the third accused person at this Law Courts later on when he had attended the hearing of the case against the first two accused persons and also charged him. The cases were consolidated. PW9 did not produce the items recovered as they had been wrongly disposed off by the Mortuary attendants and the photographs were missing.

18. It was PW9 who explained that he initially arrested the said John Nyamohanga Gisinge and Walter Nyamohanga and charged them with the murder of the deceased at the High Court in Kisii but the case was withdrawn on the instructions of the Office of the Director of Public Prosecution for allegedly lack of sufficient evidence against the two.

19. At the close of the prosecution's case, the accused persons were placed on their defence and all opted to give unsworn testimonies. The accused persons in denying the charge briefly narrated how they were arrested and their grudge with PW4 out of a land dispute which issue they had examined PW4 on at length. They only saw the prosecution as a vendetta by PW4. They closed their cases without calling any witness.

20. At the close of the defence cases, all Learned Counsels relied on their submissions on a no-case to answer they had made at the close of the prosecution's case.

21. It is now on the basis of the foregone circumstantial evidence that this Court is called upon to decide on whether or not the accused persons are guilty of the offence of murder.

22. 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.**

23. 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.

24. 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.'*

25. The chain of events leading to the arrest and arraignment of the accused persons before this Court came from the nine witnesses who testified in this case. There was clear evidence that two people closely dealt with the deceased immediately before and soon after his death. They were John Nyamohanga Gisinge and Walter Nyamohanga. John Nyamohanga Gisinge had called the deceased to a drinking place at PW6's home. When the deceased arrived, he was accompanied by Walter Nyamohanga. The three took alcohol and as the deceased wanted to leave early the two prevailed upon him to remain behind so that they would leave together. They all left at 06:00pm. At around 09:30pm the deceased called PW7 and told him that he was in Luoland but the conversation was cut when PW7's phone went off. It was still the very same night that PW2 saw the three people at the first accused person's drinking den in Ragana/Palweny in Migori. They took alcohol and PW2 left them behind at around 09:00pm when he retired to his home.

26. As PW2 was drinking at the first accused person's drinking den on 06/12/2013 he again met the two people he had met with the deceased thereat on 25/11/2013 but the deceased was not with them. The two called the first accused person outside and had a discussion before returning inside the drinking place and through the first accused person offered money for disposal of a dead body. PW2 among others accompanied the two people who led them into a maize farm where the body of the deceased was lying but still intact. PW2 readily recognized the body as that of the third person who was with the two men in the night of 25/11/2013 at the first accused person's drinking place. By that time PW2 was with all the accused persons and others. They all returned to the drinking place and PW2 advised the first accused person to report the matter to PW5. PW2 thereafter left reported the matter accordingly which report led to the discovery of the body parts.

27. In the foregone circumstances John Nyamohanga Gisinge and Walter Nyamohanga were arrested and charged but later on the charges were withdrawn on the advise of the the Office of the Director of Public Prosecutions that there was no sufficient evidence against them. The police then arrested and charged the accused persons herein whose names had been given to PW4 through a clan elder as those culpable. The clan elder, Michael Okinyi, did not testify to shed light on how those who gave him the names of the accused persons knew of their involvement in the death of the deceased.

28. The only evidence therefore which tends to link the accused persons with the events in this case is that of PW2. However, PW2 did not testify that the accused persons or any of them were at the first accused person's drinking place that night of 25/11/2013 when he left behind the three people drinking. Although the place belonged to the first accused person PW2 did not clarify whether the first accused person was there or there was someone else managing the place that night unlike how he was clear that all the accused persons were thereat on 06/12/2013.

29. That aside, when the people went to see the body on 06/12/2013 it was already dead, but still intact. There is no evidence on what happened to the body thereafter. Apart from the allegation by PW2 that the first accused person received some Kshs. 10,000/= to organize for the burial of the body of the deceased, there is nothing touching on the second and third accused persons in their possible involvement in the death of the deceased rather than being among those many other people who went to the maize farm and saw the dead body. But it must as well be noted that the evidence of PW2 was uncorroborated hence it turns out to be of no probative value at all in view of the provisions of **Section 124 of the Evidence Act**. The position is further compounded by the fact that the body of the deceased was not found the next day but some parts and items which were said to belong to the deceased. Further no DNA examination was conducted as advised by Dr. Ndege who conducted the post mortem examination. Legally, there is no evidence that the body parts which were recovered alongside the items said to be of the deceased indeed were parts of the body of the deceased. That aspect was to be settled by the DNA examination.

30. With the evidence of PW2 having not met the required legal bar, there is therefore no evidence that the deceased died in the first instance. What now remains is pure heresy on both the death of the deceased as well as the possible involvement of the accused persons in the imagined death of Samson Mwita Masoba. Since the prosecution did not avail adequate evidence to prove the charge and the absence thereof duly justified, the remainder of the body of evidence clearly rests on rumour and strong suspicion on the culpability of the accused persons in the death of the deceased. That being so, suspicion alone however strong cannot be a basis of finding a conviction; the circumstantial evidence relied upon must meet the required legal standard.

31. In this case that legal standard has not been reached, but for only the suspicion. There are many unresolved glaring gaps in the evidence which make the circumstantial evidence unreliable.

32. As was stated by the Court of Appeal in the case of **James Tinaga Omwenga v. Republic (2014) eKLR**: -

*“ 20 Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion.....”*

*It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic -Criminal Appeal No. 17 of 1998, the court held,*

*'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'*

*See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.”*

33. As I come to the end of this judgment I must point out that the decision to charge the accused persons herein and the earlier decision to withdraw similar charges preferred against the said John Nyamohanga Gisinge and Walter Nyamohanga are still disturbing to this Court. If there were any persons to face any charges then they were the said John Nyamohanga Gisinge and Walter Nyamohanga and not the accused persons herein. This Court does not still understand the basis of the twin decisions in the clear circumstances of this case. Certainly, having made the decision not to proceed on with the prosecution of the said John Nyamohanga Gisinge and Walter Nyamohanga for lack of evidence then the decision to charge the accused persons herein must have been based on some other reasons and possibly not on the basis of the evidence. I say so because there was more incriminating evidence against the said John Nyamohanga Gisinge and Walter Nyamohanga than against the accused persons herein. The prosecution of the accused persons was purely unwarranted and the accused persons went through the rigors of trial for no reason at all.

34. I once again call upon all State organs, State officers, public officers and all of us to come to terms with the existence of the Constitution. The Constitution is not just any other document; it is one which Kenyans gave unto themselves and which recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Decisions made must conform to *inter alia* **Article 10** of the **Constitution**. With what was laid before this Court in this matter I am yet to be persuaded that the twin decisions met the expectation of **Article 10** of the **Constitution**.

35. For emphasis, I reiterate what I stated in the case of **Josiah Onyango Okello t/a Cargo Secured Services -versus- Migori County Government and Minister for Transport, Migori County Government, Migori High Court Civil Case No. 1 of 2017** (unreported) thus:

*‘100. Infact the dictates of the Constitution especially under Articles 10, 73 and 75 coupled with several other laws have the effect of lifting the veil on public officers to the extent of requiring personal responsibility in the manner an officer discharges public duty. It is high time that public officers be held personally responsible for actions they commit or omit way out of any legal justification since such officers end up hiding under the corporate entity thereby loading their institutions with unnecessary liabilities. Aggrieved parties should in addition consider suing such officers in their personal capacities as well.....’*

36. Having said so, it is the finding of this Court that the prosecution has failed to establish that the deceased died and even if the death of the deceased is to be presumed, the prosecution has further failed to prove that the accused persons or any of them caused the death of the deceased. I now come to the conclusion that the information of murder facing the accused persons has not been proved. The accused persons herein, **Ronald Opiyo Ayodo alias Ronny, Dismas Wasonga Mita alias Ododa** and **Stephen Okumu Ayodo** are hereby found **NOT GUILTY** of the murder of **Mwita Mosoba Samson** and that each of them is hereby set at liberty unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MIGORI this 19<sup>th</sup> day of April 2018**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Sam Onyango**, Counsel for the third Accused person and **Mr. Moseti** Counsel for the first and second Accused persons.

**Monica Owenga**, Senior Principal State Counsel.

**Evelyne Nyauke** – Court Assistant