



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 58 OF 2014

(Consolidated with Migori High Court Criminal Case No. 100 of 2014

and formerly Kisii High Court Criminal Case No. 67 of 2014)

REPUBLIC.....PROSECUTOR

-VERSUS-

JAMES OCHIENG OWUONDA

TONY BLAIR AROGO

GEOFFREY ONYANGO ADEK.....ACCUSED

RULING

1. Resulting from the disappearance and subsequent death of one **Peter Ochieng Wango** (hereinafter referred to as '**the deceased**') the three accused persons herein were jointly charged with the murder of the deceased. It was alleged that between the night of 29th day of May 2014 and the morning of 30th day of May 2014 at Osir Trading Centre Mikei Location in Nyatike District within Migori County in the Republic of Kenya **James Ochieng Owuonda**, **Tony Blair Arogo** and **Geoffrey Onyango Adek** murdered the deceased. I will refer to three accused persons as the first accused person, the second accused person and the third accused person respectively.
2. The first and second accused persons initially pleaded to the information in the High Court at Kisii where they denied the offence and a trial was ordered. Before the commencement of the trial, the case was transferred to this Court upon the establishment of a High Court station.
3. The case was registered as Migori High Court Criminal Case No. 58 of 2014 and later on the third accused person was charged in Migori High Court Criminal Case No. 100 of 2014. The two cases were however consolidated and the accused persons pleaded to the consolidated information on 11/11/2014 with Criminal Case No. 58 of 2014 being the lead file. The accused persons denied the information a trial was ordered.
4. The evidence of PW1, PW2 and PW3 was taken before **Hon. D.S. Majanja, J.** who left this Court station before completion of the trial. Upon compliance with **Section 200** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya**, parties agreed and indeed proceeded with the hearing from where it had reached. This Court therefore took the evidence of the rest of the witnesses.
5. The prosecution called a total of six witnesses in proof of a *prima facie* case against the accused persons. **PW1** was **David Ochieng Wango**, a brother to the deceased. **Julius Ouma Wango** testified as **PW2** and he was also a brother to the deceased. The owner of a building wherein he had rented part of it to the first accused person who operated a business in the name of Siwata Bar testified as **PW3**. He was one **Peter Ouma Ogola**. The deceased was also a nephew to one **Paul Ochola Dakiro** who testified as **PW4**. A mason who had been contracted by the first accused person to carry out some works one **Ochieng Moses Ogweo** testified as **PW5** and a lady called **Elizabeth Anyango Juma** testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.
6. The deceased was a teacher at Ogaka Primary School. PW2 called the deceased in the evening of 29/05/2014 with a view of having a drink with him but found out that the deceased was still at school. They however met and had drinks in a bar at Osir centre known as Siwata Bar. The bar was full of revelers as there was some music. PW2 left the deceased still drinking at the bar shortly before 11:00pm as he retired home. PW2 called the deceased the following day but his phone was off. He thought the deceased must have been in school.

7. Five days later, PW2's wife was called by a neighbor to the deceased who enquired the whereabouts of the deceased. The wife of PW2 later shared with PW2 but they did not take the issue serious. The following day the wife of PW2 met the neighbor to the deceased who had called her the previous day and again asked if they knew where the deceased was. The wife to PW2 again raised the matter with PW2 at home in the night. PW2 was then disturbed.

8. Early in the morning of the following day, which was a Thursday, PW2 went to where the deceased used to live and saw the house locked from outside using a padlock. On enquiry PW2 was informed by the neighbors that the deceased had left several days ago and had not returned. No one seemed to know his whereabouts. PW2 then proceeded to the school where the deceased used to work and enquired the whereabouts of the deceased from the Headteacher. PW2 learnt that the deceased had been processing a loan and he had left the school for Migori town on Thursday of the previous week and had not reported back to work. He also learnt that the Headteacher was frantically looking for him as he had also sent him to Migori. PW2 was advised by the Headteacher to report the matter to the Area Chief.

9. PW2 obliged and reported the matter to the Area Chief one **David Oula** (not a witness). The Chief took up the matter with the seriousness it deserved and accompanied PW2 to one of the surrounding villages known as Matanda and began enquiring about the deceased. They learnt from a boy called **Odongo** (not a witness) that the boy had drunk with the deceased in the night of 29/05/2014 together with one Tony and Ngoroko. PW2 also called and informed his family members who joined him including PW1 and PW4 among many others. The Chief advised them to report the matter to the Nyatike Police Station and indeed accompanied them there and a report was made. The police advised them to continue with the search, but since it was late, and they were so tired they agreed to go home and rest and to resume the search the next day.

10. The members met as agreed in the morning of the next day at Siwata Bar and divided themselves into several search groups. One of the group proceeded to and broke into the house of the deceased but in vain. Later one group informed the others that they suspected that there might be a decomposing body inside a pit latrine which was behind the Siwata Bar which had been recently covered using a concrete slab as there was a strange and foul odor that emanated therefrom. All the people gathered there and decided to break the concrete slab. The Chef was also present. After the slab was broken they found some water in the pit and a body which was immersed. It was the body of the deceased. The Chief called the police and updated them of the development.

11. The police did not take long before they arrived at the scene. They took photographs and organized for the successful retrieval of the body. The body had begun decaying and it was then taken to Migori County Referral Hospital Mortuary for preservation and post mortem examination. It was PW4 who identified the body of the deceased before the autopsy was conducted.

12. The police commenced investigations and recorded statements from various people. Among those who recorded statements were PW3, PW5 and PW6. PW3 testified that he had let one of his shops at Osir Trading Centre sometimes in April 2014 to the first accused person who operated the Siwata Bar. That, the first accused person later asked PW3 to dig a latrine in view of the nature of his business. PW3 truly dug a pit which remained open as he had run out of funds. That, the first accused person later approached PW3 and informed him that he had been given 7 days by the health officials to put up a latrine or close the business. Since PW3 did not have the funds he allowed the first accused person to undertake the works and thereafter they would reconcile their accounts.

13. It was PW5 who was contracted by the first accused person to construct the concrete slab for the pit latrine. He successfully did so on 30/05/2014 and was paid for the job. He testified that he only saw water and an empty bottle inside the pit but did not observe anything abnormal.

14. PW6 testified that she spent the night of 29/05/2014 in her boyfriend's room at Osir village. That, she had lived at the said village about two years back when she used to work in the gold mines but had relocated to Migori town. She had however visited his boyfriend that day. That, during the night PW6 was woken up by the sound of a stone which was thrown on the iron sheets which covered the house they were inside. That, the house comprised of several rental rooms and that they occupied one of them. PW6 woke up and sat pensively waiting to see what would follow next. That was between 01:00a and 02:00am. Although she had previously lived in that area, PW6 had never witnessed such an occurrence. She tried to wake up her boyfriend, but he was too drunk to wake up. At one time PW6 opened a window and found that it was very dark outside and being fearful she closed it.

15. PW6 heard the voice of one Tony saying '*ndio huyu*'. She then had someone running away while crying saying that he was Mwalimu Peter and wondered why Oliech, Ngoroko and Tony were beating him up. PW6 then heard Ngoroko telling Tony to leave the man alone. She then slept, and, in the morning, she asked the neighbors if they heard what had happened the night before. Some had heard and others not. At around 07:00pm a group of angry villagers went to see PW6 and asked her what she had heard and PW6 explained. PW6 was accompanied by the people to the Nyatike Police Station where she recorded a statement. PW6 later returned to Migori town. PW6 identified the second accused person and the third accused person before Court as Tony and Oliech whom she used to work with in the gold mines and knew them well.

16. The police then arrested the first and second accused persons and charged them before the High Court in Kisii. The third accused person was arrested long after the matter had been transferred to the High Court at Migori and he was separately charged. A consolidation of the cases followed.

17. PW1, PW2, PW3 and PW4 identified several photographs before Court. At one time during the hearing the prosecution applied to withdraw the information under **Section 87** of the **Criminal Procedure Code** and by a ruling of this Court delivered on 27/07/2017 the request was declined. Several adjournments were later granted to the prosecution until they closed their case on 17/04/2018.

18. At the close of the prosecution's case, directions were given for Counsels to file written submissions. It was only **Mr. Abisai** Counsel for the second accused person who complied. Counsel submitted that no *prima facie* case had been established and as such there was no need of placing the second accused person on his defence. Counsel referred to several judicial decisions in buttressing the submission.

19. At this point in time this Court is called upon to weigh the prosecution evidence on record and ascertain whether it establishes a *prima-*

facie case (See the case of **Ramanlal Trambaklal Bhatt v. R (1957) E.A. 332**). In doing so this Court must have an eye on the ingredients of the offence of murder. There are three ingredients of the offence of murder which are: -

(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; and*

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

20. With those ingredients in mind this Court must remain alive to the fact that the prosecution relied on circumstantial evidence based on a dying declaration and that the Court must further satisfy itself that the evidence attained the required legal bar. In the case of **Solomon Karimi -vs- Republic (2014) eKLR** the Court of Appeal in considering instances where a Court relies on circumstantial evidence expressed itself as under: -

“7. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy the tests that:

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 the 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.”

21. Further in the case of **Ndurya v R (2008) KLR 135** the Court of Appeal held that before convicting someone based on circumstantial evidence, the Court has to be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt. (See also **Sawe v. Republic (2003) KLR 364** and **R v. Kipkering arap Koske and Another 16 EACA 135.**)

22. In arriving at a finding as to whether the prosecution has established a *prima facie* case for the accused persons to be placed on their defenses, this Court is not only called upon to look at whether some evidence was adduced but the Court must go further to look at the credibility, the weight and the sufficiency of that evidence vis-à-vis the ingredients of the charge and whether such evidence can hold a conviction even in the absence of any explanation from the accused person before deciding to call upon the accused person to render a defense. As said in the case of **Ramanlal Trambaklal Bhatt** (supra) ‘*a mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence...*’

23. By applying the legal principles to the evidence in this case several issues come to the fore. **One**, although the fact of the death of the deceased was proved by several witnesses, there was no proof of the cause of death. It is on record that the pit was left dangerously open and as such the possibility that one could fall in that pit and drown is not remote just like the possibility that the deceased might have been forced into the pit whether dead or alive. **Two**, PW6 did not state whether she recognized the voice of the person who was crying and saying he was Mwalimu Peter as that of the deceased neither did she state whether she knew the deceased and could recognize his voice.

24. **Three**, PW6 had left Osir village around two years prior to her return to her boyfriend. Even if it is to be taken that PW6 used to work with Tony and Oliech, the possibility of people with similar voices cannot be overruled. The position is aggravated when a period of two years lapses without someone hearing the voice of a person(s) he/she used to frequently hear. In such a situation it was imperative that a voice identification parade be conducted and in such a manner that PW6 would not have seen the identities of the people but only hear their voices.

25. **Four**, one wonders why the police did not endeavor to get at least another person who was familiar with the voices of Tony, Oliech, Ngoroko and the deceased and who heard the alleged commotion to corroborate the statement of PW6 since PW6 had left the area two years prior to the incident. This observation is made on the presumption that even if the statement of PW6 is to be treated as a dying declaration, which is not, still there was need for corroboration. (See the Court of Appeal decisions in **Pius Jasunga s/o Akumu vs= R (1954) 21 EACA 333** and **Stephen Muturia Kinganga v. Republic (2013) eKLR** among many others).

26. **Five**, there was one person who was referred to by PW2 as Odongo who allegedly told him that he had taken drinks with one Tony and Ngoroko the night the deceased disappeared. The said Odongo was not interrogated by the police neither did he testify. We are now left to guess where Odongo drunk with the said people given that PW2 confirmed that there were several drinking places within Osir Centre. We are further at a loss as to which Tony and Ngoroko the said Odongo referred to. Needless to say, the evidence on Odongo turned out to purely hearsay hence without any probative value.

27. **Six**, the prosecution did not disprove the statement by the first accused person as made to and by PW3 that the first accused person, who was running a bar business in PW3’s premises, had been given a seven-day notice to build a latrine or to have his business closed down by the health officials. As such, nothing sinister turns from the fact that the first accused person contracted PW5 who covered the pit latrine with a concrete slab. Infact PW3 did not complain that the work undertaken by PW5 and the first accused person was suspect in any way.

28. I believe I have said enough. With such foregone evidence, I do not see how this Court is likely to find the accused persons or any of them guilty of murder in the event the accused persons are placed on their defenses and maybe opt to keep quiet or to give unsworn testimonies and make general denials. The prosecution’s evidence has a lot of gaps and loose ends which cannot be hoped to be filled by the defence.

29. I therefore find and hold that the prosecution has failed to establish any *prima-facie* case against the accused persons and/or any of them. Consequently, none of the accused persons has a case to answer. Pursuant to **Section 306(1)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya, I find that the accused persons herein **JAMES OCHIENG OWUONDA, TONY BLAIR AROGO** and **GEOFFREY ONYANGO ADEK** are **NOT GUILTY** of the murder of **PETER OCHIENG WANGO** and each of them is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of June 2018.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Kisia Counsel for the first accused person.

Mr. Abisai Counsel for the second accused person.

Mr. Evans Odero Counsel for the third accused person.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant