



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 39 OF 2014

*(Consolidated with Migori HCC Criminal Case No. 116 of 2014 and
formerly Kisii High Court Criminal Case No. 21 of 2013 and
Kisii High Court Criminal Case No. 121 of 2013)*

REPUBLIC.....PROSECUTOR

-versus-

1. SAMUEL OTIENO ODHIAMBO
2. ZEDEKIAH OCHIENG ADHIAMBO
3. BENARD OPIYO AUKA..... ACCUSED

JUDGMENT

The Background:

1. The accused persons herein, **Samuel Otieno Odhiambo**, **Zedekiah Ochieng Adhiambo** and **Benard Opiyo Auka**, were jointly charged with the murder of **David Okinyi Akumu**. It was alleged that between the night of 25th day of February 2013 and the morning of 26th day of February 2013 at Siruti Village of West Sakwa Location, Migori District within Migori County in the Republic of Kenya murdered David Okinyi Akumu. I will refer to **Samuel Otieno Odhiambo** as '**the first accused person**', **Zedekiah Ochieng Adhiambo** as '**the second accused person**', **Benard Opiyo Auka** as '**the third accused person**' and **David Okinyi Akumu** as '**the deceased**'.

2. The first and second accused persons initially pleaded to the information in the High Court at Kisii in Criminal Case No. 21 of 2013. The third accused person was separately charged in Kisii Criminal Case No. 121 of 2013. The accused persons denied the offence and trials were ordered. Before the commencement of the trials, both cases were transferred to this Court upon the establishment of a High Court station.

3. The cases were registered as Migori High Court Criminal Case No. 39 of 2014 and No. 116 of 2014 respectively. The two cases were however consolidated and the accused persons pleaded to the consolidated information on 22/06/2015 with Criminal Case No. 39 of 2014 being the lead file. The accused persons denied the information a trial was ordered.

4. In a bid to prove the information, the prosecution called a total of seven witnesses. **PW1** was **George Owuor Aloyo**, a member of the security initiative known as '**Nyumba Kumi**' in Siruti village and a brother to the father of the deceased. The deceased was hence a nephew to **PW1**. **Paul Odero Opuch** testified as **PW2** and he was a cousin and a neighbor to **PW1**. He lived within the same village with **PW1** as well as the deceased. The deceased was also a nephew to one **Pius Akumu Orero** who testified as **PW3** and who also lived in the same Siruti village. The wife of the deceased testified as **PW4**. She was one **Josinter Atieno Owala**. A lady from Siruti village who had lost her husband prior to the occurrences in this matter also testified as **PW6**. She was **Mary Achieng Owuor**. **Dr. Emmanuel Oyier** testified as **PW5** and the Investigating Officer **No. 70937 PC Benard Mikaye** testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

The Evidence:

5. The wife of the deceased who testified as **PW4** stated that the deceased left their home in the night of 25/02/2013 at around 10:00pm in the company of one **Opiya Ouka** (not a witness) and went to a funeral in the neighbouring village. The deceased did not return home that night and on the following day in the morning at around 06:00am the said **Opiya Ouka** went back to the home of the deceased and asked **PW4** if

the deceased had returned. He left on learning that the deceased was yet to return to his home.

6. Shortly thereafter, one **Linnet Odundo** (not a witness) went to the home of PW4 and informed her that her husband (the deceased) was lying on the ground near the local dispensary and it appeared that he was injured. PW4 rushed there and truly found her husband lying down and in great pain such that he could not even put on clothes. People gathered including PW3 who had also been informed by one **David Odhiambo** (not a witness) and who was a watchman at the said dispensary. PW3 talked to the deceased and asked him what had happened. The deceased told him that he had been injured at a funeral by Mbogo Odhiambo, Otieno Adhiambo and his brother-in-law. PW3 knew the said three people as they all hailed from the same Siruti village. According to PW3 the deceased had serious pains on his chest and stomach and that he was lying on his stomach facing downwards. PW3 called his brother who took the deceased and PW4 to Awendo Sub-County Hospital for treatment using PW3's motor cycle.

7. PW1 and PW2 visited the deceased at the said hospital. PW1 learnt of the deceased's injuries from a grandfather to the deceased one **Mzee Owala Akumu** (not a witness) who went to PW1's home to report the incident concerning his grandson. When PW1 visited the deceased at the said hospital on 26/03/2013 he found him still alive contrary to what Mzee Owala Akumu had told him. PW1 asked the deceased what had happened and the deceased told him that he had been assaulted at a funeral by the three accused persons herein and one **Isaiah Otieno Abisa** for reasons that he was making noise. That, he had been hit using a stool on the chest. That, he had a lot of pains in the chest and could not stand. PW1 later reported the issue to the Assistant Chief who advised him to await the discharge of the deceased before they could take any substantive action. It was PW1's further testimony that in the evening of 26/03/2013 the first accused person reported to him that he and others had beaten the deceased at the funeral as he was making noise and that the deceased had thereafter left.

8. PW2 also visited the deceased in hospital where he found him admitted and in a drip. He also asked him what had happened and the deceased told him that he had been beaten in a funeral by the accused persons. The deceased could not however sustain any further discussion with PW2 as he was very tired. PW1 then left to look for money as the attending Doctor had proposed that the deceased be taken to Migori County Referral Hospital for an X-Ray examination.

9. The deceased was transferred to Migori County Referral Hospital the following day (27/02/2014) but the intended X-Ray examination could not be undertaken as the machine had broken down. The deceased was on doctor's advice referred to Kisii County Referral Hospital on that very day but passed on while on the way at around 03:00pm. The body was taken to Rapcom Mortuary in Awendo for preservation and post mortem examination. PW5 conducted a post mortem examination on 02/03/2013 on the body of the deceased and filled in a Post Mortem Form which he produced in Court as an exhibit. PW5 formed an opinion that the cause of death was severe haemorrhage and an infection caused by the perforated colon secondary to physical assault by a blunt object.

10. When the Siruti villagers learnt of the death of the deceased they pursued the first accused person who ran to the Assistant Chief's office and since the Assistant Chief had already been informed of the incident by PW1 he arrested him and took him to Awendo Police Station. PW1 arrested the second accused person at Siruti Centre on 26/03/2013 at around 05:00pm and led him to the police. The third accused disappeared from Siruti village and after a while he differed with a certain woman and he was taken to Awendo Police Station. On learning so, PW1 went and informed the police of the third accused person's involvement in the death of the deceased and he was also charged. The accused persons were all mentally-assessed and found fit to stand trial. Their respective P3 Forms were produced in evidence.

11. The prosecution then rested its case with the foregone evidence and on consideration of the evidence this Court placed the accused persons on their defenses. The accused persons opted for and gave sworn testimonies. The accused persons took a common defense. In denying the charge, they contended that they were all so busy at the funeral of their kinsman as they had been tasked with different duties and never witnessed any fight during the night which is alleged that the deceased was attacked. The accused persons called a joint witness, **Judith Atieno, (DW1)** who buttressed their testimonies before they closed their respective cases.

The submissions:

12. This Court directed the three Counsels who were appearing for the accused persons to file written submissions. It was only **Mr. Abisai** Counsel for the first accused person who complied with the directions and filed the submissions. He submitted that the evidence was unsafe to be relied on to prove the alleged dying declarations. Counsel referred to the decisions in the Court of Appeal cases of **David Agwata Achira vs. Republic (2014) eKLR**, **Sawe vs. Republic (2003) KLR 364** and that of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990** (unreported) as well the High Court case of **Republic vs. Michael Muriuki Munyuri (2014) eKLR** in support of his submissions. He prayed that the first accused person be found not guilty as charged and be released.

Analysis and Determinations:

13. As the accused persons were charged with the offence of murder the following three ingredients must be proved to uphold a conviction: -

(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.

14. The said ingredients will be considered singly hereunder.

(a) **Proof of the fact and cause of death of the deceased:**

15. It is not in dispute that the deceased person in this matter died. That position was confirmed by PW1, PW2, PW3, PW4 and PW5. The first limb is hence answered in the affirmative.

16. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which he prepared upon conducting a post mortem examination on the deceased. The said report gave the possible cause of death as severe haemorrhage and an infection caused by the perforated colon secondary to physical assault by a blunt object. Since there is no any other evidence contradicting that of PW5 on the cause of death of the deceased, this Court so concurs with that medical finding. The second limb of the ingredient is hence proved.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons:

17. The evidence on record yields that the prosecution's case was centered on circumstantial evidence since none of the witnesses was an eye-witness. The nature of the circumstantial evidence herein rested on the dying declarations by the deceased on which the evidence of PW1, PW2 and PW3 is anchored.

18. Before I deal with the dying declarations, I will first revisit the settled law on circumstantial evidence. A lot has been said by Courts and there is settled precedence on the subject. In view of the numerous decisions on the subject I will only refer to that **Solomon Karimi -vs- Republic (2014) eKLR** where the Court of Appeal in considering the issue 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."

19. 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.**)

20. With that background, I will now deal with the dying declarations. **Section 33(a)** of the **Evidence Act**, Chapter 80 of the Laws of Kenya provides as follows: -

"33. Statements, written or oral or of electronically recorded of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:

(a) Relating to cause of death:

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

21. Further, Courts have had several occasions and interrogated the above provisions. In **Pius Jasunga s/o Akumu vs= R (1954) 21 EACA 333** the predecessor of the present Court of Appeal had the following to say:-

*"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.....It is a rule of law that in order to support a conviction there must be corroboration of a dying declaration (**R -v- Eligu s/o Odel & Another (1943) 10 EACA 9**) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused ,,,,,," But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration."*

22. The Court of Appeal in a later case of **Stephen Muturia Kinganga v. Republic (2013) eKLR** reiterated the foregone.

23. In dealing with this issue therefore, this Court remains cautious of the danger of receiving dying declarations without the necessary corroboration as so laid down in the foregone binding judicial precedents. I will now intently look at the evidence of PW1, PW2 and PW3 with a view to first ascertain whether it discloses dying declarations and if so whether there was adequate corroboration.

24. In respect to PW1, when he visited the deceased at the Awendo Sub-County Hospital he stated as follows:

".... I went to Awendo Sub-County Hospital and found David Okinyi Akumu was infact not dead but critically wounded. I asked

him what had happened, and he told me that he had been beaten by four people who were the accused persons and one Isaiah Otieno Abisa. He said he had been assaulted that he was making noise at the funeral. They used a stool to hit him on the chest. He had a lot of pain on the abdomen and he could not stand. I then reported the matter to the Assistant Chief....” (emphasis added).

25. PW2 testified as follows: -

“... I then went to Awendo Sub-County Hospital and I met David Okinyi there. He was on a drip and I asked him what happened. He told me that he had been beaten at the funeral of Akumu Omolo by Otieno Adhiambo Samuel, Zedekia Ochieng and Bernard Opiyo. I asked him what he had done that led to the fight and he said he had done nothing and since he was very tired I left him...”

And, PW3, told the Court that: -

“...I then left with him to the gate of the Siruti Dispensary and I saw David Okinyi lying down. I asked him what had happened, and he told me that he had been injured at a funeral by Mbogo Adhiambo, Otieno Adhiambo and his brother-in-law. I knew these people as they are all from the community. He was lying facing down and he was crying that his chest and stomach were aching. I called the deceased’s family members but...”

26. There was also the evidence of PW4, the wife of the deceased. In her testimony she stated that: -

‘....I then rushed to the scene and I saw my husband. He was lying on the ground and could not even put on clothes. We took him to hospital. He complained of pains in the stomach. He had human waste oozing from the mouth and the doctor used a pipe to assist him...’

On cross-examination, PW4 stated that: -

‘...My husband could not talk at the hospital....’

...I was with my husband at the scene. I was at the hospital when Paul Odero Opuch (PW2) came to the hospital...’

27. The evidence of PW4 that the deceased could not talk at the hospital therefore disqualifies the evidence of PW1 and PW2. It can not be possible that the wife to the deceased saw her husband unable to talk at the hospital as human waste was oozing from the mouth and he had some pipes inserted to assist him on one hand and on the other hand PW1 and PW2 talked with the deceased at the same hospital. It was also PW1 who described the deceased as ‘critically wounded’ when he saw him in hospital. PW1 however did not elaborate on the extent of the said injuries and why he described them as critical. I now find and hold that going by the evidence on record it remains highly doubtful that the deceased was in a position and indeed uttered the alleged words to PW1 and PW2.

28. There was also PW3 who was at the scene where the deceased lay down and who also allegedly talked to the deceased. PW4 stated that the deceased was so much in pain at the scene that he could not even put on clothes. He also had waste oozing from his mouth. One inevitable question is whether it is possible for a person in such a state as the deceased to be able to talk to someone and explain the occurrence of some event? I highly doubt. When human waste oozes from someone’s mouth then that is a serious indication that all is not well in the inside of that person. The waste must no doubt have travelled all through from the rectum and/or the large intestine to the food pipe and eventually to the mouth. Such a state of a reversed system cannot be easily said to accord the comfort to that person to freely talk. I am hence forced to find, which I hereby do, that the deceased was not in a state of speaking to PW3 and explain the cause of the injuries he had sustained.

29. There is no doubt that PW4 was the closest person to the deceased throughout. If PW4 did not hear the deceased say anything about who had injured him at any time, then it creates a scenario with many questions than answers. I must also pose and ask why the said Opiya Ouka who had left with the deceased in the night the deceased was injured and who went to find out if the deceased had returned to his home in the morning of the following day was not interrogated by the police during the investigations neither did he testify. That was one person who stood in a position to shed more light to what exactly caused the injuries to the deceased. The doubt is glaring.

30. There is also the issue raised by PW1 that the first accused person went to him and told him that he, among others, had assaulted the deceased in the funeral as he was making noise. I see that statement as an alleged admission. My quick response to it is that the PW1’s statement fell short of complying with the law to be treated as a holding admission.

31. This Court therefore finds and hold that the alleged statements by the deceased to PW1, PW2 and PW3 were not proved and as such they do not amount to dying declarations under **Section 33(a)** of the **Evidence Act**. Having therefore found that there were no dying declarations am afraid that the remainder of the evidence on record falls short of connecting any of the accused persons with the injuries sustained by the deceased.

32. This Court is hence unable to certainly say that the unfolding events and circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability it is only the accused persons and each of them who occasioned the injuries on the deceased and no one else. I am equally alive to the holding by the Court of Appeal in the case of **Sawe v. Republic (2003) KLR 364** that despite the strength of suspicion against an accused person, the guilt of that person cannot be proved on the strength of that suspicion but by evidence beyond any reasonable doubt.

Disposition:

33. In view of the foregone, the consideration of the third ingredient of the offence of murder will be of no value in this matter.

34. Consequently, this Court finds each of the accused persons herein namely, **SAMUEL OTIENO ODHIAMBO, ZEDEKIAH OCHIENG ADHIAMBO** and **BENARD OPIYO AUKA NOT GUILTY** of the murder of **DAVID OKINYI AKUMU**. Each of the accused persons is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

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

A. C. MRIMA

JUDGE

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

Mr. Abisai Counsel for the first accused person.

Mr. Sam Onyango Counsel for the second accused person.

Mr. Kisia 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