



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CRIMINAL CASE NO. 2 OF 2015**

**THE REPUBLIC.....PROSECUTOR**

**=VRS=**

**RICHARD ACHOKI NYAIGOTI.....ACCUSED**

**JUDGEMENT**

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars are that between 19<sup>th</sup> May 2011 and 21<sup>st</sup> June 2011 at Kebirigo market in Nyamira District within Nyamira County with others not before court he murdered Irene Kemuma Omwega. The accused pleaded not guilty to the charge.

To prove its case, the prosecution called seven (7) witnesses. The sum total of the evidence for the prosecution witnesses is that on 2<sup>th</sup> May 2011 Stephen Kinyanjui (Pw1), the husband of the deceased, received a call that their child was locked up in their house at Kebirigo market and his wife was not responding to calls made to her phone. He immediately informed his father-in-law (Pw2) who went to Kebirigo and confirmed that the deceased was neither at her house nor at her shop. He reported the matter to Nyamira Police Station. The next day at about 6am Elizabeth Nyambura Mwangi (Pw3), Pw1's mother received a call from someone who identified herself as mama Mwangi, the deceased. She passed this information to the police but according to PC Allen Yumbi (Pw7) when the caller was traced to Siaya, it turned out it was a person who had called a wrong number. Investigations continued and because the deceased's phone was missing, the police concentrated all their efforts in trying to establish whether it was in use. The phone had been switched off and she was "mteja" meaning she could not be reached. James Tali (Pw6), the District Criminal Investigations Officer for Nyamira at the time obtained the box in which the phone had been purchased from the relatives of the deceased. He then gave the deceased's subscriber number to Safaricom and when the call logs came, they confirmed that the deceased's phone was first used on 21<sup>st</sup> May 2011 by a subscriber called Richard Nyaigoti whose number was 0715 485 658. The logs also showed that on 25<sup>th</sup> May 2011 the phone had been used by an unknown subscriber whose number was 0719 224 851. Another unknown subscriber used the phone on 6<sup>th</sup> June and on 16<sup>th</sup> June 2011 it was used to make a call by one Odongo Oyare while on 22<sup>nd</sup> June 2011 it was used by Peter Shem subscriber No. 0701 661 981. Police arrested Odongo Oyare but when he disputed having used the phone he was released. The police then arrested Peter Shem who had used the phone on 22<sup>nd</sup> June 2011. The phone was recovered and was matched to the box received by the investigating officer (Pw7). Peter Shem alleged to have purchased the phone from Richard Ogoti, the accused on 20<sup>th</sup> May 2011. It was then that the accused was tracked and arrested. Initially they were charged with robbery. However, that changed when the body of the deceased was discovered in a well in her compound and a post mortem conducted at the Nyamira District Hospital Mortuary on 26<sup>th</sup> June 2011 revealed the deceased may have been murdered. The doctor who produced the post mortem report testified that at the time of the autopsy the body was decomposed. It had deep cuts over the occipital region with the occipital bone had been cut off. The body also had a cut over the left shoulder, right inguinal region and over the left forearm region. The doctor formed the opinion that the cause of death was severe head injury due to fracture of the skull over the occipital region.

The police were determined to charge the accused and Peter Shem with Murder but on the advice of Prosecution Counsel, the latter was freed and turned into a witness. The said Peter Shem testified as Pw4. He told the court that he was a boda boda rider at a place called Nyaramba near Ekereny, and that on 20<sup>th</sup> May 2011 he was at Nyaramba stage when the accused who was his regular customer offered to sell a phone to him at Kshs. 2,000/=. The accused allegedly told him that he had a financial problem and hence the reason he was selling the phone. He (Pw4) agreed to buy the phone and paid the accused 1,000/= and promised to pay the balance later. Pw4 testified that as they were transacting they were joined by one Samuel Nyamwaro, his fellow boda boda rider. After he gave 1,000/= to the accused, the accused removed his sim card from the phone and gave it to him. Pw4 stated that the next day he paid the accused 300/= whereupon the accused asked him to expedite the payments. The next day he paid him 200/= and after that he left for Kisii where he stayed for a month. Pw4 stated that during that period the accused person went to his home and got his (Pw4) phone from his (Pw4's) mother. The accused called him and when he went to Nyamira District Hospital he found the accused was admitted there with burns. Pw4 claimed that he was with a friend called Job Nyambari when the accused asked for the balance.

When this court put the accused on his defence he elected to make an unsworn statement. He stated that he hails from Nyaikuro and that he is a farmer. He denied the charge and stated that he had no knowledge of the events of 19<sup>th</sup> May 2011. He stated he only knew about what occurred on the day he was arrested. He stated that in April 2011 he was in hospital in critical condition and that he was arraigned in court on a charge of stealing but he was acquitted. After he was released he was charged with this offence. He maintained that he knew nothing about this crime and contended that he did not know the person who was caught with the phone. He wondered why the four people alleged to have witnessed the sale were not called as witnesses. He also wondered why the call logs alluded to by Pw7 were not produced in evidence to prove that he in fact used the deceased's phone shortly after she disappeared. He contended that he was innocent and that the police had set free the culprits, leaving him who was innocent to face the charge.

Mr. Okenye, Learned Advocate for the accused person did his summing up through written submissions. He poked holes into the evidence of the prosecution witnesses and submitted that the prosecution had not proved its case beyond reasonable doubt. He urged this court to give the benefit of doubt created by the many gaps left in the prosecution's case to the accused and acquit him of the offence.

Counsel acting for the prosecution did not submit saying that the prosecution would rely on the evidence adduced.

Having carefully relooked at the evidence of the prosecution witnesses and considered the unsworn statement of the accused and the submissions by Mr. Okenye, Advocate, I am indeed convinced that there are too many gaps in the case for the prosecution that a conviction of the accused cannot stand. The evidence against the accused person is circumstantial. The criteria which such evidence has to satisfy in order to sustain a conviction is well settled. In **Kariuki Karanja Vs. Republic [1986] KLR 190** it was stated: -

***“2. In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”***

In this case the inculpatory facts alleged by the prosecution are that the accused person was the first person to use a phone belonging to the deceased and which was believed to have been stolen from her before she went missing. The other fact was that the accused sold the phone to Pw4 a few days after the deceased went missing. It is my finding that these facts were not proved beyond reasonable doubt. For one although Pw6 and Pw7, the investigating officers in this case, alleged to have deduced the accused's usage of the phones from call logs received from Safaricom, those logs were not produced in evidence. That fact was therefore not proved and the court has no alternative but to believe the accused when he says he did not use the phone. Secondly, although Pw4 alleged to have been in the company of his boda

boda colleagues Job and Samuel on the two occasions when he transacted with the accused person, those two witnesses were not called hence creating a gap in the prosecution's case. It is my finding that their evidence was crucial and that the argument that there is no number of witnesses that the prosecution must call to prove its case, does not suffice in this case. To the contrary I find that this is a case where the court must draw a negative inference from this omission by the prosecution. It may be that the evidence of those witnesses would have been prejudicial to the prosecution's case hence the reason they were not called. Pw4 alleged that the accused went looking for his (Pw4's) number at their home. Again why didn't the prosecution call Pw4's mother to prove this fact? This also creates doubt in the mind of the court. The subscribers of the other numbers that were alleged to have been used to make calls from the deceased's phone should also have been called to testify not to mention the deceased's cousin and neighbours who are alleged to have reported her disappearance. Whereas this court does not doubt that the deceased was murdered and her phone stolen, the prosecution left too many gaps in its case thereby creating doubt as to the accused's involvement in the crime. It is said that it is better to acquit 999 guilty persons than to convict one innocent person. Accordingly, I give the benefit of doubt created by the gaps in the prosecution case to the accused and agree with his Advocate that the case against him was not proved beyond reasonable doubt and he should be acquitted. I find him not guilty of murder and acquit him under Section 322 (1) of the Criminal Procedure Code. He is free to go unless otherwise lawfully held.

**Signed, dated and delivered in open court this 20<sup>th</sup> day of December 2018.**

**E. N. MAINA**

**JUDGE**