



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 74 OF 2014

(Formerly Kisii High Court Criminal Case No. 27 of 2013)

REPUBLIC..... PROSECUTOR

VERSUS

MARY AKINYI NGESA

STEPHEN ODHIAMBO OBONYO.....ACCUSED

JUDGMENT

1. **MARY AKINYI NGESA** and **STEPHEN ODHIAMBO OBONYO** were arraigned before the High Court of Kenya at Kisii on 28/03/2013 and faced an information on the murder of one **ORORE CHALA** (hereinafter referred to as '**the deceased**'). The particulars of the offence were as follows;-

“On the 10th day of March 2013 at Sori Trading Centre in Nyatike District within Migori County in the Republic of Kenya jointly murdered ORORE CHALA.

2. The accused persons denied committing the offence and the case was set for hearing. Before the trial began the case was transferred to this Court. **Hon. Majanja, J.** recorded the evidence of two prosecution witnesses before the hearing was ordered to start *de novo* on an application by the Defence Counsel under **Section 200** of the **Criminal Procedure Code**.

3. Four witnesses testified in support of the information facing the accused persons. **PW1** was **DR. GORDON OKONG’O** who conducted the post mortem examination on the body of the deceased. The investigating officer **No. 32924 SGT. DANIEL BARAZA** attached to Nyatike CID offices testified as **PW2**. **PW3** was a co-wife to the first accused person herein. She was called **ANGELINE ANYANGO**. **PW4** was the arresting officer one **No. 2008117657 APC GEORGE WEKESA** then attached to Rembe AP Post in Mbita District. The statement of one **WILIAM OKECH CHALA**, who was a brother to the deceased and who identified the body of the deceased for purposes of conducting the post mortem examination, was produced as an exhibit by the consent of the parties. Thereafter the prosecution closed its case.

4. The prosecution's case was based on circumstantial evidence. It was alleged that the accused persons were lovers. It was likewise alleged that the deceased was a lover to the first accused person. The first accused person lived within the populated Sori Trading Centre. It was also alleged that the second accused person lived not far from the house of the first accused person.

5. The body of the deceased was found lying outside the house of the first accused person in the morning of 10/03/2013. The house was locked from outside using a padlock and the first accused person had left.

PW2 who visited the scene in the company of his fellow officers observed the body intently. It had serious burns on the chest and arms. PW2 peeped through a glass window of the first accused house and noted that the inside of that house was seriously disturbed. He broke into the house and so confirmed. To him there seemed to have been a struggle therein. The body was collected to St. Camillas Hospital Mortuary where a post mortem examination conducted by PW1 confirmed that indeed the body had 85% serious burns further to a head injury. PW1 opined that the probable cause of the death was shock due to the burns and the injury. The Post Mortem Report was produced as an exhibit.

6. PW3 had been with the first accused person the day before the body was found dead in front of the house. She however went back to her home in the evening and was only taken to the scene by a neighbour to the first accused person and truly confirmed that the deceased, whom he knew as the first accused person's lover, had died. It was PW4 who arrested the first accused person in Remba Islands and took her to Nyatike whereas the second accused person was arrested by PW2 at Sori Trading Centre after the arrest of the first accused person.

7. At the close of the prosecution's case, the accused persons were placed on their defences where they opted to give unsworn testimonies. They both denied committing the alleged offence. The first accused person stated that she was a fish monger and that she had left her house at the Sori Trading Centre on 07/03/2013 to the Remba Islands to collect fish and that she was arrested on 14/03/2013. She denied that she had any relationship with the second accused person. The second accused person explained how he was arrested on 15/03/2013. The accused persons closed their cases without calling any witnesses.

8. At the close of the defence cases Counsel for the accused persons Mr. Nyagesoa relied on the submissions he had made at no-case to answer that there was no sufficient evidence to prove the information. The prosecution through Learned State Counsel Miss. Owenga relied on the evidence as tendered on the record.

9. 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 person is guilty of the offence of murder.

10. 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.

11. 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.

12. 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.'

13. The chain of events leading to the arrest and arraignment of the accused persons before this Court came from the the four witnesses who testified in this case. The body of the deceased was found lying outside the house of the first accused person in the mornong of 10/03/2013. The house was locked from outside with a padlock and the first accused person was not around. The owner of the house who described herself as a fish monger who collected fish from Remba islands and supplied to Sori and other places, stated that she had left her house on 07/03/2013 to the Remba islands in her usual duties. However PW3 stated that she was with her the day before the body of the deceased was found lying outside the first accused person's house. That PW3 was called by the first accused person and prepared the local brew called 'chang'aa' from the morning upto 04:00pm when she left and returned to her home.

14. PW3 was a co-wife to the first acused person. She was the younger wife to their husband who passed on long ago. They both lived separately but within Sori Trading Centre. I have noted the consistency of PW3 in her testimony from the time she first testified and even when she was recalled. I find that the first accused person and PW3 were both at the first accused person's house in Sori Trading Centre on 10/03/2013 and not as alleged by the first accused person.

15. It was the testimony of PW3 that she left the first accused person's house at 04:00pm on 10/03/2013 and only returned the following day at around 11:00am. There was no any evidence tendered as to what could have happened between those times. Sori Trading Centre is a fairly busy and populated place. The residential houses are close enough that one can know of what is happening in the neighbourhood. The sketch maps alluded to that.

16. When PW2 visited the scene he broke into the house and found that the inside of the house was so disturbed as a sign of a fight. But the body had seroius burns and a head injury. The burns were the principal cause of the death. Whereas one can easily equate the head injury to the fight, the presence of the burns really raises many questions. PW1 did not indicate what could have caused the burns; whether it was by fire, water or chemicals. PW2 did not testify that when he entered into the house he saw anything that could have been used to heat water or found any liquid or container that could have a pointer to the burns. No probable weapon was also recovered. There was a footpath adjacent to the house of the first accused person that led to a wider feeder road. If it is true that the first accused person used to sell 'chang'aa' which PW3 even prepared for her, then the possibilty of the presence of customers in that home cannot be said to be far-fetched. Anything could have happened that night. The events are not well knit as to sustain the inference of guilty on the first accused person.

17. The most likely reason the first accused person was arrested and charged was that the body of the deceased was found lying utside her house and that the first accused person had left. That raises a strong suspicion on her possible involvement, knowledge or culpability of what ranspired. On the other hand, the second accused person was arrested still on the suspicion that since he was an alleged lover to the first accused person then he must have had a hand in the death of the deceased who was considered as his rival.

18. There is no doubt that there were strong suspicions on theculpability of the accused persons in the death of the deceased. However that strong suspicion alone cannot be a basis of finding a conviction; the circumstantial evidence relied upon must meet the required legal standard. That was the finding in the Court of Appeal case of ***James Tinega Omwenga v. Republic (2014) eKLR*** where it held that: -

“ 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.

19. It is therefore the finding of this Court that the prosecution has failed to establish that the accused persons 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 are hereby found not guilty of the murder of **ORORE CHALA** and they are hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of April 2017

A. C. MRIMA

JUDGE