



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 3 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**GEORGE AUGO ODHOCH.....ACCUSED**

**JUDGMENT**

**GEORGE AUGO ODHOCH**, the accused person herein, was charged with the murder of his friend one **GADAFI OPIYO OKONGO** (hereinafter referred to as **'the deceased'**) before this Court on 02/03/2015. The particulars of the information were that: -

***“On the 5<sup>th</sup> day of January 2015 at Kuna village in Uriri Sub-County within Migori County in the Republic of Kenya jointly with others not before court murdered GADAFI OPIYO OKONGO.”***

2. The accused person denied committing the offence and the case was set for hearing. A total of nine witnesses testified in support of the information facing the accused person. **PW1** was one **JOHN OKOMO AGIN**. **PW2** was **JULIUS OTIENO AGIN**. **PW3** was **JAMES OGOLA ABONDO**. **MERRAB AKINYI ONDITI** testified as **PW4**. **JOHN OTIENO SANDE** testified as **PW5**. **TOBIAS ONYANGO OTIENO** testified as **PW6**. The investigating officer **No. 73671 Cpl. WALTER CHEPKWONY** attached to the DCIO offices in Migori town testified as **PW7**. **PW8** was the Migori County Criminal investigating Officer **No. 230638 SSP. BENEDICT KIGEN** whereas **Dr. KIBIRA MICHAEL KIBISU** testified as **PW9**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. According to Luo customs when one intends to put up a new home, villagers and especially age-mates are called to undertake the construction which is usually in one day or so. That is what the accused person did when he intended to put up his new home. Among the many friends and villagers he called included **PW1**, **PW2**, **PW3**, **PW5**, **PW6** and the deceased. The construction was on 04/01/2015 and at the end of the day's work the accused person availed some food and traditional liquor commonly known as *chang'aa* and all those who had taken part in that day's work partook of it. People then left at their own pleasure.

4. **PW6** was among the last ones to leave the homestead of the accused person. He left at around 08:00pm leaving behind the deceased who was very drunk and heavily asleep on a chair. The deceased was the last person among all those who had taken part in the day's work who was left at the homestead of the accused person. **PW6** left behind the deceased and the family of the accused person.

5. At around 09:00pm the accused person rushed to the homestead of **PW5** and sought for some assistance. He informed **PW5** that one of those who had assisted him in the construction of his house was unwell. **PW5** accompanied the accused person as they rushed back to the homestead of the accused person. They were followed by **PW1** from a short distance. **PW1** was then at the homestead of **PW5** and was alarmed by what the accused person told **PW5**. As they were on the way to the homestead of the accused person the accused person led **PW5** to where two women were pushing a bicycle with a man seating on top. **PW5** observed the person who was carried on the bicycle and noted that the person was lifeless. He declined to offer any assistance and returned to his home leaving behind the accused person and the women together with the one who was carried on the bicycle. **PW5** did not recognize who the one on the bicycle was.

6. According to **PW1**, he did not go near where **PW5** and the accused person were but overheard them saying that since the one on the bicycle was drunk then it would be better he be taken to a nearby home to sleep rather than carrying him on the bicycle. **PW1** also saw the two women who were with the person on the bicycle but did not recognize them.

7. In the morning of 05/01/2015, the body of the deceased was found by the roadside and the police were informed. A contingent of police officers from Uriri Police Station alongside **PW7** and **PW8** from the DCIO's office in Migori visited the scene. They interrogated several people at the scene as they commenced joint investigations. **PW7** was eventually assigned to investigate the matter. The body was taken to Migori Migori County Referral Hospital Mortuary for preservation and autopsy.

8. **PW7** recorded statements from many witnesses and at one point he arrested all those who had taken part in the construction of the house of the accused person and interrogated them. According to **PW8** there was one person whom the police cited as **Jangulo** who was at large and

was highly suspected to be behind the death of the deceased.

9. On 16/01/2015 PW7 accompanied the family members of the deceased to Migori County Referral Hospital Mortuary where he witnessed the post mortem examination on the body of the deceased conducted by a Dr. Ndege. The body was identified by **Erick Okongo** and **Daniel Ooko Demba**. PW7 also witnessed Dr. Ndege fill in the Post Mortem Report which he signed in his presence and he collected it. It was dated 16/01/2015. Dr. Ndege also observed the body and saw blood clots around the eyes, ears and the mouth. There were bruises on the left upper arm. When Dr. Ndege opened the body, he noted a fracture at the base of the skull and that there had been internal bleeding. The Doctor opined that the death of the deceased was caused by the fracture of the skull. The Post Mortem Report was produced in evidence by PW9 on behalf of Dr. Ndege who had proceeded for further studies out of the country. PW9 stated that the exact point of impact on the head was not indicated in the Report by Dr. Ndege but he did not rule out a fall as one of the possible causes of the injury.

10. The deceased was laid to rest and on completion of investigations PW7 led the accused person to Migori County Referral Hospital where he was examined and certified mentally fit to stand trial. The accused person was then charged.

11. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony. The accused person reiterated what the prosecution witnesses stated in respect to the construction of his new house but denied ever moving out of his house that night as customs would not allow him to do so. He wondered why he would call someone to his home and kill him there. He stated that indeed the deceased was his friend having been in school together and were the incumbent officials of a local youth club known as Sokata Soli Youth Group which dealt with social and welfare issues. He prayed that the charge be dropped. The accused person closed his case without calling any witness.

12. At the close of the defence case, Learned Counsel for the accused person left the matter for judgment. The prosecution relied on the evidence as tendered on the record.

13. 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.

14. 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.*

15. 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.

16. 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:***

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*'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.'*

17. This Court is to evaluate the evidence aforesaid alongside a consideration of the 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 aforethought which constitutes the 'mens rea' of the offence.*

18. There is no doubt that the deceased died. All the witnesses so confirmed. As to the cause of death, PW9 took this Court through the Post Mortem Report prepared by Dr. Ndege. It was opined that the cause of death was a fracture at the base of the skull. The report did not however indicate exactly where the point of impact was. According to PW9 that kind of fracture could be caused by any force including a fall. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

19. On the second ingredient as to whether it was the accused person who caused the death of the deceased, the prosecution, as stated above, relied on circumstantial evidence to the extent that the accused person was the last person to be seen with the deceased. The chain of events

leading to the arrest and arraignment of the accused person before this Court came mainly from PW1, PW5 and PW6. There is no doubt that PW6 left the deceased heavily drunk and asleep on a chair as he left the home of the accused person. I also find the evidence of PW5 credible and believable. That is to say, it was the accused person who went and sought for help from PW5 regarding one person among those who had assisted him in constructing his house who was reportedly unwell. The accused person was also seen by PW1 who was by then with PW5. PW5 did not recognize who the person on the bicycle was. Likewise PW1 did not recognize the person on the bicycle but overheard PW5 and the accused person talking about taking the deceased to a nearby home to sleep as he was very drunk. Both PW1 and PW5 did not also recognize who the two women were.

20. From the evidence of PW5 it seems that the person who was on the bicycle was already dead when PW5 reached where that person was. PW1 did not go near the person. It would appear that the person who was on the bicycle was the one the accused person referred to when he sought the assistance of PW5 since they did not proceed further from there. Infact they parted ways.

21. Given that the deceased was the last person, among those who took part in the construction of the house for the accused person, who was left at the home of the accused person and when the accused person rushed to seek assistance from PW5 referred to one of those people who had taken part in the construction and did not take PW5 to that person after coming across the one who was on the bicycle, I find that the person the accused person referred to and who was on the bicycle was the deceased. But the person was already dead when PW5 saw him.

22. The investigations did not reveal who the two women who were with the deceased were. It was also not unveiled how the deceased sustained the injuries. The accused person denies any knowledge of how the deceased was injured. From the evidence, I find that the accused person was in a position to give an explanation on what happened to the deceased. However, if it is to be taken that it was the accused person who injured the deceased one wonders why the accused person would seek help from PW5 since it would have been so easy for him to conceal all that by dumping the deceased and claiming that the deceased left his home and he was not aware of what befell him on the way. That would have been a reasonable explanation in the circumstances of this case. But the accused person opted not to take that route. He sought the assistance of his neighbour PW5.

23. It would appear that when the accused person realized that the deceased was injured that is when he sought for the intervention of PW5. The accused person had placed the deceased on a bicycle in the company of two unknown women and were on their way to the main road probably to seek medical intervention. The accused person more likely developed fear when PW5 informed him that the deceased was dead and he abandoned the deceased by the roadside.

24. Be that as it may, there is the evidence of PW9 which introduces another angle into the matter. According to PW9 the nature of injuries sustained by the deceased could also have been caused by a fall. PW6 testified that when he left the home of the accused person the deceased was very drunk and was sleeping on a chair. It may be that the deceased fell down from the chair and got injured. It may also be that the deceased was attacked. Being on such crossroads one cannot find without any peradventure that the accused person attacked and injured the deceased. The converse may also be true. I however need to clarify that had PW9 indicated that the nature of injuries sustained by the deceased could not be caused by a fall, I would definitely have found otherwise.

25. I find that the events in the circumstances of this case do not 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. The inference of guilt in this case is not congenitally and firmly established. The prosecution cannot therefore benefit from the nature of the circumstantial evidence on record and I return the verdict that the second ingredient is not proved.

26. I must add that there is strong suspicion that the accused person was behind the death of the deceased but suspicion alone however strong cannot be basis of a conviction. The Court of Appeal in the case of James Tinega Omwenga v. Republic (2014) eKLR clearly stated 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.”***

27. Having failed to prove that it is the accused person who caused the death of the deceased by an unlawful act, there is no point of dealing with the third ingredient as that will not serve any purpose at all.

28. It is now the finding of this Court that the prosecution has failed to establish the ingredients of the offence of murder as required in law. I come to the conclusion that the information of murder facing the accused person has not been proved. The accused person, **GEORGE AUGO ODHOCH**, is hereby found **NOT GUILTY** of the murder of **GADAFI OPIYO OKONGO** and he is hereby set at liberty unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MIGORI this 31<sup>st</sup> day of July 2017**

**A. C. MRIMA**

**JUDGE**