



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO. 32 OF 2010

BETWEEN

REPUBLICPROSECUTOR

AND

ELISHA OKOTH SAIDAACCUSED

RULING

1. **ELISHA OKOTH SAIDA** was accused of murdering **SAMUEL OKOTH OBURA** (“the deceased”) between 15th and 20th July 2010 at Sidho East II Sub-location, Nyangoma Location, Muhoroni District contrary to **section 202** as read with **section 203** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. He pleaded not guilty and the prosecution called 9 witnesses to prove its case.
2. The prosecution case was based on a circumstantial evidence and more particularly the doctrine of recent possession in that it was alleged that he was found in possession of the deceased’s jacket and Nokia 110 cell phone.
3. That the deceased died was not really in dispute. His wife Mary Achieng’ Obura (PW 1) told the court that the deceased, a boda boda rider, left home on 15th July 2010 and did not return. She was only informed that her husband’s body had been recovered in a sugarcane plantation in Chemelil area. Francis Ndiema (PW 6) testified that on 20th July 2010, he was informed that a dead body had been found in the Chemelil Nucleus Estate. When he went to the scene, he observed that the body was that of a male adult whose hands neck and feet were tied with a rubber band. Chief Inspector Doris Chemos (PW 7) from Chemilil Police Post arrived and organized for collection of the body which was taken to Jaramogi Oginga Odinga Teaching and Referral Hospital (“JOOTRH”).
4. The deceased body was identified by Samuel Obura and Charles Ouma (PW 8) before the post mortem was carried out by Dr. Midigo on 29th July 2010 at JOOTRH. After observing the elastic bladder around the neck and multiple injuries on the face and skull, Dr Midigo concluded that the deceased died as a result of asphyxia due to strangulation.
5. After the deceased went missing, his fellow boda boda riders started making inquiries about the whereabouts of the deceased. On 26th July 2010, Charles Raymond Mbogo (PW 3), the Chief, Muhoroni Location, recalled that the accused was brought to his office by one Elisha Otieno and Emmanuel Obiero Oluoch (PW 5). It was alleged that he had been found selling some items at a very low price which they felt was suspicious. Among the items handed over to him were a black jacket, wallet, roll of bhang, shoes, a belt and a Nokia 110 cell phone. He called the police at Muhoroni and the accused was taken to Ahero Police Station.

6. PW 1 was summoned to proceed to Ahero Police Station to identify the items. She positively identified the jacket as the one the deceased owned and the phone. Gordon Kaure Oriaro (PW 2), who used to work with the deceased, also told the court he had been to Muhoroni where he identified the jacket and Nokia phone as belonging to the deceased.

7. PW 5, a boda boda rider, testified that he was called by one Elisha Omondi and informed that someone had been found selling suspicious items. He proceeded to Muhoroni-Koru stage where he met the said Elisha Omondi and the accused. He confirmed that the accused had a jacket and Nokia phone belonging to the deceased. They proceeded to the PW3's office.

8. At this stage of the proceedings I am required to decide whether there is sufficient evidence to put the accused on his defence. What amounts to a *prima facie* case has been set out in several cases among them ***Ramanlal Trambaklal Bhatt v R* [1957]EA 332**, ***Wibiro alias Musa v R* [1960]EA 184** and ***Anthony Njue Njeru v Republic* NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**). It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

9. As I stated earlier, this case is grounded on the doctrine of recent possession which has been explained in several cases. The Court of Appeal for Eastern Africa in ***Rex v Bakari s/o Abdulla* [1949] 16 EACA 84** noted that:

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal.

The passage was quoted with approval by the same Court in the case of ***Andrea Obonyo v R* [1962] EA 592** where it stressed that, *“If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal.”*

10. The ingredients to be established in proving a case based on the doctrine of recent possession were distilled by the Court of Appeal in ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic* Criminal Appeal No. 272 of 2005** as follows;

It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

For the doctrine to stand, the evidence of recovery of the material property must be sufficient and credible. There must also be sufficient and credible evidence for positive identification of the property as belonging to the murder victim.

11. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like this case, the evidential burden shifts to him to explain his possession. That explanation need only be a plausible one but he needs to put it forward for the court's consideration (see ***Malingi v Republic* [1988] KLR 225**. In ***Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008**, the Court of Appeal observed that;

Once an accused person is found in possession of a recently stolen property, facts of how he came

into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.

12. I am satisfied from the testimony of PW 1 and PW 2 that the items produced in evidence, that is the jacket and Nokia Phone 110 belonged to the deceased. PW 1 told the court that the jacket was unique in that it had white stripes. She could also recall the torn spot it had as she had washed it several times. PW 1 told the court that the deceased's cell had a crack on it but she could not recall whether the phone produced in evidence belonged to her. PW 2 however confirmed that the cell phone with the distinctive crack and a loose back cover belonged to the deceased. From the evidence, I am satisfied that the jacket and cell phone belonged to the deceased as they were distinctive items and were recovered together.

13. The question that remains is whether the accused was found with these items. In other words, was possession positively proved? I have carefully scrutinized the evidence and the prosecution case is that the accused was found selling the items. PW 3 told the court that the accused was brought by PW 5 and one Elisha Otieno and on the allegation that he had been found selling the deceased items. PW5 testified that he was called by Elisha Omondi who told him that the accused had been found selling the items.

14. The key takeaway from this evidence is that no-one who saw the accused or found the accused in possession of the items testified. The testimony of PW 3 and PW 5 on this is thin. Elisha Omondi or Elisha Otieno, who was not called as a witness, could have shed light on this issue or say where and under what circumstances that accused was found with the stolen items. Put it another way, if the accused elected remains silent, could the court convict him? The answer is a resounding no as possession was not positively proved. Since the prosecution did not prove possession to raise the presumption of recent possession, the accused cannot be called upon to rebut it.

15. I must now enter a verdict of not guilty in terms of **section 306 (1)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The accused is acquitted and set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 25th day of July 2017

D. S. MAJANJA

JUDGE

Ms Njoga, Advocate for the accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.