



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 9 OF 2015**

**REPUBLIC..... PROSECUTOR**

**-VERSUS-**

**1. GEORGE MUGUNDA MALEYE**

**2. DAVID AMADI KIGODE.....ACCUSED**

**JUDGMENT**

1. The village of Oyuma in Uriri Sub-county within Migori County woke up in the morning of 21/02/2015 with the sad news of the death of one of its villagers **Benard Aruda** (hereinafter referred to as '**the deceased**') whose body was found in River Aram which river was within the neighbourhood of the deceased's homestead. Out of police investigations **George Mugunda Maleye**, the first accused person herein and **David Amadi Kigode**, the second accused person were arrested and charged with the death of the deceased.

2. The accused persons denied committing the offence and the case was set for hearing. Six witnesses testified in support of the information facing the accused persons. **PW1** was one **George O. Okoth** who was the Chief of Central Kanyamkago Location within Uriri Sub-County. **Mary Atieno** testified as **PW2**. **Collins Odowuor Aseto** testified as **PW3**. **PW4** was the Deputy OCPD of Uriri Police Division **No. 219294 C.I. Raphael Kiprotich Rono** who was one of the investigators. **Dr. Vitalis K'Ogutu** was **PW5** and **No. 233199 C.I. Evans Sang** the Deputy OCPD Migori Police Division was **PW6**. He was also one of the investigators in this case. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was based on circumstantial evidence. **PW1** testified that the first accused person came to his homestead in the evening of 20/02/2015 to see him as **PW1** wanted the first accused person to cultivate a garden for him. As **PW1** arrived home that evening he saw the first accused person talking to one of **PW1**'s brothers. The first accused person and **PW1** agreed that the works were to be undertaken early the following morning. It was **PW1**'s further testimony that the first accused person pulled him aside and told him that the deceased had a problem, which he did not disclose, and was intending to see **PW1**. The first accused person requested **PW1** to assist the deceased in the event he called on him for such assistance. The first accused person was very drunk and left **PW1**'s homestead thereafter.

4. The first accused person went to work at the **PW1**'s garden as agreed at 05:00am the following morning. He was accompanied by his undisclosed friend. At around 07:30am **PW1** received a call from one **Ouma Nyapara** (not a witness) that there was a body at the River Aram and it was suspected to be of one woman who was mentally-challenged in the village called Mama E. **PW1** called the family members of Mama E and accompanied them to the river only to find that indeed it was not Mama E but the deceased who was dead. **PW1** called the OCS Uriri Police Sytation and reported the incident. **PW1** then returned to his home with the Assistant Chief of the Sub-Location and one of his brothers. On reaching home, **PW1** called the first accused person who was still working on the garden and interrogated him in the presence of the Assistant Chief and his brother. The first accused person denied any involvement in the death of the deceased although he admitted having taken the traditional local brew called *chang'aa* with the deceased the day before at the home of **PW2**.

5. As **PW1** was still interrogating the first accused person **PW4** came to his home in the company of the OCPD Uriri Police Division, OCS Uriri Police Station and other officers and they left to the river with the first accused person. **PW1** observed the body of the deceased carefully and saw bruises on the knees and the shoulders and the neck was swollen. The police recovered a pair of trousers which had a wallet containing a Voters Card of the deceased and noted a place which had been disturbed as a sign that there had been a struggle. **PW1** also saw the second accused person at the river whom he was aware had a dispute with the deceased on some maize but which issue was settled by the OCS Uriri Police Station. The second accused person was arrested at the river as a suspect as well as the first accused person. The police collected the body of the deceased and took it to the Migori County Refferal Hospital Mortuary for preservation and autopsy. **PW1** recorded his statement with the police later. He described the first accused person as a hardworking young man. To **PW1**, the deceased used to drink *chang'aa* and at times he over did it.

6. **PW2** was referred to by the police as the one who used to sell *chang'aa* and in whose house several people including the deceased and the first accused person had drunk the day before the deceased was found dead. **PW2** however denied that and testified that the deceased and the accused person among other people had gone into her house to shelter themselves from a heavy downpour but not to drink *chang'aa*. That after the rains had stopped, the deceased and the first accused person left. That the deceased was the first to leave and the first accused person

followed about a minute later. PW1 did not witness any signs of animosity between the two or at all. PW2 was surprised to hear of the death of the deceased the following day. She later recorded her statement with the police.

7. PW3 also confirmed having been one of those who took shelter from PW2's house. He was the first one to leave and did not know what happened thereafter.

8. PW4 visited the scene in the company of other police officers and PW1 among others. He recovered the trousers which had a wallet and a Voter's Card of the deceased. After viewing the body and noting the place which had some disturbances, he was led to the houses of the accused persons which were not far from the river. PW4 recovered a broken club outside the house of the first accused person and some wet and muddy clothes inside. The clothes were a light cream jacket, a black trouser and a grey T-Shirt. From the house of the second accused person PW4 picked a green trousers which was wet and muddy as well together with a T-Shirt. The police collected the body and left the scene with the two suspects. PW4 recorded statements from several witnesses at Uriri Police Station. The evidence of PW4 was corroborated by PW6. It was the further testimony of PW6 that he later on took over the investigations from PW4 and interrogated several other people including those who refused to testify. Upon conclusion of the investigations PW6 escorted the accused persons to hospital for mental examinations and charged them accordingly. He produced the recovered clothes as exhibits together with the club.

9. It was PW5 who conducted the autopsy on the body of the deceased on request from the CID officers at Migori. The body was identified by Thomas Angondi and Leonard Angala. The autopsy was conducted at the Migori County Referral Hospital Mortuary on 26/02/2015 at around 03:30pm. PW5 observed lacerations on the right cheek, right shoulders joint, both legs, around the knees, at the back and on the hands. The hands were soiled with sand and the feet had red soil which according to PW5 was a sign of drag marks. On opening the body, PW5 noted that the lungs were full of air with very little water, the trachea was broken at the base of the neck and there was blood in the skull. He opined that the cause of death was asphyxia due to strangulation. PW5 filled in and signed the Post Mortem Report which he produced it in evidence. He also examined the accused persons and certified them to be mentally fit to stand trial. He also produced the P3 Forms he filled in as exhibits.

10. At the close of the prosecution's case, the accused persons were placed on their defences and both opted to give unsworn testimonies. The first accused person confirmed to have sheltered himself from the rain in the house of PW2 on 20/02/2015 and at around 06:00pm he left to see PW2 on some work. He thereafter went home. Later in the night he escorted one **Wilson Obege Abuga** (not a witness) to see Wilson's girlfriend one Vidah Ojwando. That as they at Vidah Ojwando's house they heard someone wading through the sugar cane near the homestead and the person fell down. The said Wilson went to see who he was and on returning he told them that it was the deceased who was very drunk and that he had escorted him towards the main road leading to the home of the deceased. The first accused person then left Wilson at Vidah's place at around 09:00pm and went home and slept. He woke up early in the morning and went to work at PW1's place where he was later on arrested and subsequently charged. He denied the offence and explained that the clothes were muddy and wet as he used them in brick-making and that he used the club in grazing.

11. The second accused person testified that in the evening of 20/02/2015 he had just returned to his home from hospital where her wife was admitted after giving birth so as to get some money from his in-laws for his wife's release. Before he returned to the hospital the following morning he heard that the deceased had died at the river. He decided to pass by there before rushing to the hospital. He was however arrested as a suspect and eventually charged. The accused persons prayed that the charge be dropped and closed their cases without calling any witness.

12. At the close of the defence case, Learned Counsel for the accused person indicated his intention to file written submissions which he failed to do. 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 persons are 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 cogently 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:***

*'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 afterthought which constitutes the 'mens rea' of the offence.**

18. There is no doubt that the deceased died. PW1, PW4, PW5 and PW6 so confirmed. As to the cause of death, PW5 took this Court through the Post Mortem Report he prepared and opined that the cause of death was asphyxia due to strangulation. 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 the accused persons caused the death of the deceased, the second accused person was arrested on suspicion in that he had had a dispute with the deceased which he had reported to the police. The dispute was however settled at the police station. Apart from that unrelated issue there was nothing at all to connect the second accused person with the death of the deceased. As suspicion alone cannot be a basis of conviction in criminal cases I hereby find that the second accused person is not in any way connected with the death of the deceased.

20. The first accused person is alleged to have been the last person to be seen with the deceased. The first accused person and the deceased met at PW2's house on 20/02/2015 at around 06:00pm. According to PW2 there were several people who had gone into her house to shelter themselves from the rain. They included PW3, the deceased and the first accused person and many others. The deceased was the first one to leave and the first accused person followed a minute later. PW3 indicated that he was the first one to leave PW2's house leaving behind the rest. The first accused person testified that he passed the deceased on the way as he rushed to see PW1 on account of some work. PW1 confirmed that when he reached his home he found the first accused person waiting for him. According to PW1, it was the first accused person who told him that the deceased had a problem and would see PW1. The nature of the problem was not disclosed. The first accused person was however drunk.

21. The first accused person did not meet the deceased again that night. He however explained how he had been told by one Wilson Obege Abuga that the deceased had been so drunk and had no shirt. That the deceased had fallen down in the sugar cane farm next to Vidah's house and that Wilson led the deceased to the main road so as to go to his home. When the first accused person left Vidah's home for his home to sleep, he never met the deceased on the way. The first accused person was interrogated by the police and disclosed his whereabouts on the 20/02/2015. The said Wilson Obege Abuga recorded a statement with the police but did not testify. The police alleged that Wilson had refused to testify and had relocated to Muhuru Bay. I however note that no summons were applied for his Court attendance. The first accused person also gave an explanation of the clothes and the club. It is not in doubt that he used to do manual jobs including cultivation. He also stated that he used to make bricks. Given that it had heavily rained in the evening of 20/02/2015 it was not unusual to find wet and muddy clothes in someone's house. I say so since there was no evidence at all connecting the wet and muddy clothes or the club with what was found on the deceased or at the scene. It was also not unusual for the first accused person to tell PW1 that the deceased had a problem and would seek his assistance. These are people from the same village and used to drink chang'aa in the same places. The first accused person could easily have known what the deceased went through and what he intended to do thereby hinting it to PW1.

22. Given that the deceased was last with the first accused person at PW2's house at around 06:00pm and that there is no other evidence that the two met thereafter and since the deceased was found dead the following morning, I find that the intervening period to be too long to create a possibility of other people dealing with the deceased. I therefore 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 first accused person 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 as against all the accused persons.

23. I must add that there may be some suspicion that the accused persons were 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."***

24. Having failed to prove that it is the accused persons 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.

25. 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 persons has not been proved. The accused persons herein, **GEORGE MUGUNDA MALEYE** and **DAVID AMADI KIGODE** are hereby found **NOT GUILTY** of the murder of **BENARD ARUDA** and each of them is hereby set at liberty unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MIGORI this 24<sup>th</sup> day of July 2017**

**A. C. MRIMA**

**JUDGE**