



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 18 OF 2013

BETWEEN

REPUBLIC.....PROSECUTOR

AND

DIANA ACHIENG MINYONI 1ST ACCUSED

JAVAN OKAL ONYANGO.....2ND ACCUSED

JUDGMENT

1. **DIANA ACHIENG MINYONI (DW 1)** and **JAVAN OKAL ONYANGO (DW 2)** are accused, with others not before the court, of murdering **ALFRED ODIRA** (“the deceased”) on 3rd March 2013 at Milimani area, Kisumu East District, Kisumu County. They pleaded not guilty and prosecution marshalled 7 witnesses while the accused gave unsworn statements in their defence.

2. The prosecution case was based purely on circumstantial evidence and was as follows. The deceased was a taxi operator within Kisumu. On 3rd March 2013, he went missing. According to his son Dante Ochieng’ (PW 1), the deceased left home on that day and told him that he was going to visit a friend. Tobias Ouma Olielo (PW 2), a friend of the deceased, was informed that the deceased had been missing. He tried to call him on his phone but he did not go through. He later met DW 1 who told him that she had been called and went to the deceased’s home to stay with her son, PW 1. The deceased never came back home and PW 2 was only informed after the deceased’s body had been recovered and he was called to identify it.

3. One of the people who started looking for the deceased was Ambrose Dende Odero (PW 4). When he learnt the deceased was missing, he started looking for the deceased’s motor vehicle, a Toyota registration number KBR 488C. He was later informed that the vehicle was in the possession of the DW 2. Fredrick Oduor Yamo (PW 5), also joined the search for the deceased and on 6th March 2013, he was able to locate the deceased’s car near Baryani Primary School. He approached the driver whom he did not know. One of the people outside the car told him that the car was being sold by one Diana who worked at KBC. Abdul Khan (PW 6) was present at that time when the car was parked. He recalled he was informed by a friend that the car was being sold. While he was checking the car, PW 5 arrived on a motorbike and commotion ensued. It is at this point that DW 1 was arrested and taken to the police station.

4. According to the investigating officer, PC Allan Yumbi (PW 7), DW 1, who was the deceased’s former wife, was suspected of having been involved in his disappearance. The deceased body was found floating in Kibos River by the Commanding Officer of Kondele Police Station on 6th March 2013. Dr Dixon Mchana conducted the post mortem on the deceased body on 7th March 2013. He estimated that the

deceased had been dead for at least four days. He observed severe peripheral cyanosis, a subcutaneous hematoma on the left forearm which he interpreted as a defensive wound. There were abrasions on the posterior aspect of the left shoulder. There were no fractures of the limbs or neck. Internal examination of the head revealed bleeding into the right temporal muscle. He concluded that the cause of death was respiratory failure with evidence of blunt force trauma.

5. Both accused elected to make unsworn statements. DW 1 told the court that the deceased was her husband and that they were staying together at Arina Estate. She last saw him on 3rd March 2013 and did not see him again. DW 2 stated that in March 2013, a friend of his by the name Caroline asked him for assistance as she needed a driver to assist her to move from Milimani Estate to Corner Legio. He accepted the request and drove the vehicle to her new place. After two days, Caroline called and informed him she was looking for a buyer. He again assisted her in looking for a buyer. He found a prospective buyer at Bayani, Kisumu where he took the car to be viewed. While there, people came and arrested him. He denied that he knew the deceased and told the police that the car belonged to Caroline.

6. The prosecution case is that the accused conspired to murder the deceased. The only evidence connecting DW 1 and DW 2 was the hearsay evidence of PW 5 that someone told him that the vehicle which was in possession of DW 2. The prosecution did not prove how the vehicle came into possession of DW 1 to enable her give it to DW 2.

7. The case against DW 2 is based on the doctrine of recent possession. In *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic*, Nyeri Criminal Appeal No. 272 of 2005 [2006] eKLR the Court of Appeal stated that:

It is trite that before a court of law can rely on the doctrine of recent possession as a basis of 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; that 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.

8. The prosecution did not prove positively that the motor vehicle belonged to the deceased beyond the evidence of general notoriety that it was stolen from the deceased. In these circumstances, I cannot state that the elements of the doctrine of recent possession were satisfied. The prosecution is weak tea. There is no evidence placing the accused at the scene of the incident on the date of the alleged murder. As the case is grounded on circumstantial evidence, the lack of a motive weakens the prosecution case.

9. I have no option but to acquit the accused, **DIANA ACHIENG MINYONI** and **JAVAN OKAL ONYANGO**. The sureties are hereby discharged.

DATED and DELIVERED at KISUMU this 21st day of September 2017.

D.S. MAJANJA

JUDGE

Mr Nyamweya, Advocate for the 1st accused.

Mr Onsongo, Advocate for the 2nd accused.

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