



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL DIVISION
CRIMINAL CASE NO. 97 OF 2010

REPUBLIC.....RESPONDENT

VERSUS

EVANS OKETCH MAWERE.....ACCUSED

JUDGMENT

1. The accused **EVANS OKETCH MAWERE** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on the 2nd day of June, 2010 at Ngai II Estate in Huruma within Nairobi Area jointly with others not before court murdered **ALPHONCE NGUI MATIVO**.
2. He pleaded not guilty on 14th December, 2010 before Justice Ombija (as he then was) and on 25th May, 2011 his trial commenced before the said Judge who heard the evidence of eleven (11) prosecution witnesses and partly heard and recorded the evidence of PW12 before retiring from the Judiciary.
3. On 21st June, 2016 Justice Lesiit issued directions under **Section 201 (1)** and **Section 200 of CPC** for the typing of the proceedings and that the matter to proceed for hearing before me from where it had reached and on 7th March, 2017 I continued with the hearing of the evidence of PW12 and upon the conclusion thereof based on evidence on record put the accused on his defence who tendered in unsworn evidence and called no witness.
4. For record purposes it must be stated that I did not have the advantage of hearing and seeing all the prosecution witnesses save for one and is therefore not in a position to comment on their demeanor but has had the advantage of reading and analyzing the recorded proceedings for the purposes of this judgment.

PROSECUTION CASE

5. The prosecution case was that the deceased who was working with the Armed forces and living in Huruma was on 2nd June, 2011 called by his wife **PW5 PENINA NGINA KINYUNGU** on his cell phone number 0724731170 to meet her at Kauma Flats stages in Huruma as she was feeling unwell and had done some shopping which she wanted him to help her carry home. It was her evidence that when she got to their agreed meeting point she called him and he told her that he was taking a bottle of soda near Miama Bar so she proceeded home.

6. She stated that the deceased followed her home thereafter and their child started to play with his mobile phone which rang and the deceased left the house while talking on phone. When she asked him where he was going, he told her that he was going to see someone and that was the last time she saw him until at midnight when **PW4 FRANCIS MURIGI** a watchman at their flat came to inquire whether the deceased was at home since he had seen police stopping motor vehicle along the road and she proceeded to the scene with PW4 and confirmed that it was her husband the deceased which was lying on the ground dead. She then decided to call PW6 her brother in law.

7. **PW6 ALFRED KIUNDI MATIVO** testified and confirmed having been called by PW5 to the scene and identified the body of the deceased both at the scene and to **PW3 DR SILAS KISINGO** who performed post mortem examination on the body of the deceased and confirmed that the cause of death was due to penetrating stab wound into the heart. It was PW6's further evidence that he talked with PW1 and PW2 who confirmed that they were with the deceased on the fateful day and that the deceased according to PW2 left with PW1. He further stated that he received information from one **WILFRED MUTISYA** that the deceased was murdered by guards of Mbuthia Bar & Restaurant.

8. **PW1 RWADHUA FESTUS MUSYOKA** confirmed having met the deceased on 2nd June, 2010 at Mbuthia Bar at 8.00 p.m. before they moved to Valley View Bar & Restaurant where they met with **PW2 JOSEPH KIMEU NDEMANGE** and that at about 9.00 p.m. he went to the urinal and when he came back did not find the deceased. PW2 confirmed that he is the one who had called the deceased on the fateful night to meet him at Mbuthia Bar which was about fifty (50) meters from his house. It was PW2's evidence that the deceased left with PW1. This evidence was corroborated by **PW8 CAROLINE KANINA MUSYOKA** the bar maid who served the deceased together with PW1 and PW2 that the deceased left with PW1 leaving PW2 at the bar.

9. **PW9 PC PETER MUGI** testified that on 3rd June, 2010 at midnight while on patrol found the body of the deceased lying in the grass road about 100 meters from Valley view lodge and through his identity confirmed that he was a senior private with Kenya Air Force. **PW7 PASTOR BENARD OTIENO** stated that he was arrested since his sim card had been used in the handset that belonged to the deceased which he confirmed having used on 5th June, 2010 but stated that he got the said phone from one **JOSEPH AWAL MBOYA** who was in the business of selling phone in Dandora who referred him to the accused who also had a phone shop nearby.

10. **PW10 SGT. MUTUMA SARGUTA** attached to Safaricom obtained the data in respect of the mobile hand set of the deceased and confirmed that the accused sim card was paired with the said handset. Under cross examination he confirmed that they did not supply incoming and outgoing call records of the deceased between 15th May, 2010 to 15th July, 2010 same as Mpesa transactions. **PW12 CPL COSMAS KATINDI** received the data from Safaricom and confirmed that it did not include the 2nd of June, 2010 when the victim died though the data confirmed that subscriber No. 0722-660173 had used the handset from 3rd July, 2010 to 28th August, 2010 and when they tracked the person they found out that he was called Edwin Ingosi who recorded his statement but disappeared upon being released on police bond. It was his evidence that he arrested and charged the accused because he inserted his sim card for mobile No. 0726 ***** one day after his death on 4th June, 2010. He confirmed that the data of 2nd and 3rd June, 2010 was available to confirm that the phone was used.

11. It was PW12's further evidence that the accused first used the phone on 4th June, 2010 at 16.19 hrs then at 16.21 and 16.22 and on 5th June, 2010 at 9.45 hours before PW7 inserted his sim card therein. It was his evidence that an informer asked PW7 to buy the said hand set and that the hand set was recovered from one James Alukaya Matenge who was not called as a witness. He confirmed that **PW1 FESTUS M. MUSYOKA** and two others were the last persons to had been seen with the deceased. Under cross examination he confirmed that he recorded a statement from a witness who stated that the deceased was murdered by one Borana man and two other men one who comes from Kiambu. He confirmed that the phone was used by several persons but that the accused is the first to had used the phone.

DEFENCE CASE

12. When put on his defence the accused gave unsworn statement and stated that before the date of his arrest, he was operating an electronic and accessories business and that on the material date he boarded a matatu to town and saw a Nokia phone on the floor of the said Matatu which he picked up and put in his pocket. He later realized that it did not have a sim card so he inserted his sim card therein and used it until PW7 went to him and said his phone had network problems so he removed his sim card and gave the phone to PW7 who went away with it. After five months he was arrested by police officers who told him that the owner of that phone was killed and they were under a lot of pressure so he was charged with the offence.

ANALYSIS AND DETERMINATION

13. At the close of the defence case both the prosecution and the defence opted not to make final submissions and left it to the court to make a determination based on the evidence tendered and submissions made at the stage of no case to answer.

14. To sustain a conviction on a charge of murder the prosecution is required to prove beyond any reasonable doubt the following ingredients of the offence:-

a) The fact and cause of death.

b) That the said death was caused by an unlawful act of omission or commission on the part of the accused person.

c) That the said unlawful act of commission or omission was caused by malice aforethought.

15. The fact and cause of death of the deceased is not in dispute. The fact of death was proved by the evidence of **PW4 FRANCIS MURIGI** a watchman at the plot wherein the deceased lived, **PW5 PENINA NGINA KINYUNGU** his wife, **PW6 ALFRED KIUNDI MATIVO** his brother and **PW9 PC PETER MUGI** who recovered the body of the deceased. The cause of death was proved beyond any reasonable doubt through the evidence of **PW3 DR SILAS KISINGO SILA** who performed post mortem on the body of the deceased and formed an opinion that the cause of death was penetrating stab wound into the heart.

16. On whether the said death was caused by unlawful act of commission or omission on the part of the accused person, the prosecution evidence tendered against the accused person is purely circumstantial. There is no material eye witness who saw the accused kill the deceased and the same was only linked to the death herein on the basis that his sim card was inserted into the handset of the deceased on the 4th of June, 2010 two days after the death of the deceased. The court was therefore invited to apply the doctrine of recent possession to come to conclusion that the possessor of the property had knowledge that the same was obtained in the commission of the offence.

17. In order to apply the doctrine of recent possession the applicable law was stated in the case of **ISAAC NGANGA KAHIGA alias PETER NGANGA KAHIGA CR. APP. NO. 272 OF 2005** as follows:-

“It is trite law 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.

(i) That the property was found with the suspect.

(ii) That the property is positively the property of the complainant.

(iii) That the property was stolen from the complainant.

(iv) 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 others. (emphasis added)

18. In the case of **HASSAN v REPUBLIC [2005] 2KLR II** regarding recently stolen goods the court held:-

“Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or receiver.”

19. In this case the accused was not found in possession of the deceased mobile phone but the records from the mobile phone provider confirmed that he used the said handset on 4th of June 2010 before he gave the same to PW7 who used it from 5th June, 2010. In his defence the accused stated that he collected the said handset from a matatu on his way to town and used the same from 4th June, 2010. As submitted by the defence, the prosecution did not provide the data record in respect of the use of the same handset on the 2nd and 3rd June, 2010 the dates when the accused died and the court takes judicial notice on how fast handsets move in Huruma and the accused explanation on how he came to possess the said handset and the fact that he gave the same to a person who was known to him which would not have been the case had he obtained the same in the course of commission of an offence I am unable to infer the guilt of the accused person herein based on the said data record. There is a missing link on how the said handset was used between 2nd and 3rd June the benefit of which ought to be given to the accused.

20. The prosecution evidence is that the deceased was last seen with PW1 and PW2 and according to PW2 the deceased left together with PW1 whereas PW1 stated that the deceased left him at Valley View Bar and Restaurant. There is further the evidence of PW6 that he received information that the deceased was murdered by guards at Mbutia Bar and noted that the soldier by the name Musau who gave this information to PW6 and one Wilfred Mutisya were never called as witnesses and applying the holding in **BUKENYA v UGANDA** make an inference that the said evidence if called would have been adverse to the prosecution case.

21. There is evidence on record which raised the possibility of the involvement of either PW1 and PW2 in the death of the deceased herein and further there was evidence by the investigating officer that one potential witness who was not called named Shadrack N. Wambua stated that the deceased was killed by one Borana man and two other people one who comes from Kiambu which was not exhaustively investigated and further the prosecution did not establish the motive of the accused killing the deceased since it was in the process of robbing him of the mobile phone, the same would not have readily used the said handset and or handed it to PW7 who knew him very well.

22. Having come to the conclusion that the accused has displaced the doctrine of adverse possession which was the only circumstantial evidence linking him to the case/murder of the deceased, it therefore follows that the prosecution has failed to prove beyond any reasonable doubt that the death of the deceased was caused by unlawful act of commission on the part of the accused person and accordingly find the same not guilty and acquit the same.

23. I must state that this matter was not properly investigated and that the prosecution was too fast in charging the accused person without filling the gaps raised in the investigation herein and might agree with the accused persons contention that he was only charged because the investigators were under pressure since the deceased was an army officer.

24. The accused shall be set free forthwith unless otherwise lawfully held.

25. The state has the right of appeal.

DATED, SIGNED and DELIVERED at Nairobi this 13th day of December, 2017

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Miss Onsongo for Kilonzo for the accused

Accused present

Court clerk Tabitha