



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 85 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

MUSA ADIKA MUDAVILA.....ACCUSED

JUDGEMENT

Background

Musa Adika Mudavila, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 28th December 2012 at Kibera slums within Nairobi County jointly with others not before the court murdered Douglas Oloo Kimonge, the deceased. The case for the prosecution is supported by 12 witnesses. The accused testified as the only defence witness.

Murder

The crime of murder is committed when any person of malice aforethought causes the death of another person by unlawful act or omission. The burden to prove the crime of murder lies with the prosecution who must lead evidence in proof of death of the victim; of the identity of the person who caused that death; and of malice aforethought to cause that death. The proof tendered must be beyond reasonable doubt.

Prosecution case

The case for the prosecution is constructed from the evidence of 12 witnesses. These witnesses include relatives of the deceased: Carole Ogenga the wife of deceased (PW3), Evans Juma Kimonge the brother to the deceased (PW1) and Karen Bochere Kimonge the sister to deceased (PW2); workmates and friends of the deceased: Sylvester Okeya Obonyo (PW6) and John Murira (PW4); Police Officers both in Nairobi and Webuye: PC Kennedy Onyango Otieno (PW5) from CID Nairobi, APC Hilary Arianda (PW7) and APC Geoffrey Kurgat (PW8) both from Nabuyole Administration Police Post Webuye and Hussein Nyongesa Mukongolo (PW9) from Webuye, PC Thomas Simiyu (PW10) from Kilimani Police Station, SP Stephen Kemboi (PW11) from Scenes of Crime Nairobi; and Dr. Oduor Johansen (PW12). From the evidence of these witnesses, this court is able to construct the case for the prosecution as shown below.

The decomposing body of the deceased was discovered on 28th December 2012 in a one roomed “mabati” house situated at a place known as “Kichinjio” near Makina Primary School in Kibera Nairobi. The body was lying on the floor covered with bed sheets and blanket. It had injuries on the head and the

hands and legs were tied together at the back. Police had to break open the door to gain access to the house. The report leading police to the recovery of the body was given to the police by residents of the area. None of these residents was a witness. On receiving the report, the OCS Kilimani Police Station instructed PW10 with CPL Abdullahi Hussein (not a witness) and PC Philip Musyimi (not a witness) to go to the scene. On arrival at the scene and on observing the body, PW10 called scenes of crime to take photographs. PW11 went to the scene and took 6 photographs showing the house where the body was found and the body.

The report of the missing person, namely Douglas Oloo Kimonge, the deceased, had been made to the police at Kilimani Police Station on 27th December 2012. The deceased and the vehicle he was operating as a taxi, KBR 440Z Toyota Succeed, went missing on 24th December 2012. PW3 talked to her husband last on 24th December 2012 around 1.00pm. She could not reach him later that day. She began asking his colleagues about his whereabouts. The deceased's brother PW1 talked to him last on 24th December 2012 around 2.00pm. PW2 his sister also saw him last on the same day. After the family failed to reach him later that day and failed to find him either at any police station, hospitals and mortuaries in Nairobi where they searched on 25th and 26th December 2012, they reported to the police on 27th December 2012. The search went on until 29th December 2012 when the family was called and informed that the body of the deceased had been recovered and taken to City Mortuary. They went to the Mortuary and confirmed the identity of the body as that of their missing kin. The post mortem by PW12 confirmed multiple injuries on the head and death due to asphyxia as a result of manual strangulation.

Investigations into the missing vehicle continued through Flying Squad Nairobi. The vehicle was traced to Webuye on 24th January 2013 one month after it went missing. The circumstances under which the vehicle was recovered were narrated by PW7, PW8 and PW9. PW9 told the court that on 22nd January 2013, a Tuesday, at 4.00pm, a friend of his namely Abubakar called him on telephone and told him that he had a friend who had arrived from Mombasa with a motor vehicle and that he needed a place to park that motor vehicle since Abubakar did not have a place where he could allow his friend to park the motor vehicle. Abubakar asked PW9 if he could allow his visitor to park the vehicle at his (PW9's) home for two days. PW9 allowed Abubakar's visitor to park the vehicle at his homestead. PW9 identified the accused in the dock as the visitor Abubakar introduced him to. He said he could not remember the registration number of the car but said it was a white Toyota Probox.

PW9 became suspicious after the two days elapsed without Abubakar and his friend the accused returning to pick the vehicle. He decided to report to the nearby Nabuyole Administration Police Post on 24th January 2013 a Thursday. On receiving the report, PW7 and PW8, both from Nabuyole Police Post accompanied PW9 back to his homestead. They found Abubakar and the accused having arrived at PW9's homestead and cleaning the car. Police arrested the accused and Abubakar after they failed to show the identification documents of the car. The two officers also informed police at Webuye Police Station who went to PW9's homestead and picked the two suspects and the vehicle.

PW7 and PW8 confirmed receiving a report from PW9 about a suspicious car parked at his homestead and accompanying PW9 back to his compound where the accused and another suspect were found. Both witnesses said they were introduced to one Alexander Lugosi from Webuye and Musa Adika from Mombasa. Both identified the accused in court as the Musa Adika who they had found at PW9's homestead. Both witnesses said they saw motor vehicle number KBR 440Z white Toyota Probox. Both PW7 and PW8 confirmed reporting the matter to the OCS Webuye Police Station and according to the evidence of PW8 the OCS sent PC Mathenge and SGT Kerich (both not witnesses) from Webuye Police Station to go for the vehicle and the suspects.

There is no evidence as to what became of Abubakar after he was taken to Webuye Police Station. Evidence shows that the accused was charged in Webuye Criminal Case No. 59 of 2013 with the offence of being in possession of suspected stolen motor vehicle. After further investigations revealed that the said motor vehicle belonged to the deceased in this case and had gone missing on the same day the deceased went missing, police withdrew the case in Webuye and the accused was brought to Nairobi by PW5 and CPL Macharia (not a witness). The accused is said to have been charged at Kibera law courts

with the offence of robbery with violence but the Director of Public Prosecutions (DPP) directed that he be charged with murder. The robbery with violence case at Kibera was withdrawn.

The defence

The accused testified under oath. He was the only witness for the defence. He denied killing the accused. He testified that he travelled to his home at Kakamega on 23rd December 2012 taking with him doors and windows sent by his father to take home. He said he left Nairobi at 5.30pm on 23rd December 2012 and arrived in Kakamega at 2.30am the following day. He found Kakamega stage deserted. He was approached by four police officers who asked him where he was coming from to which he explained and showed them the bus receipts. He said the police did not believe him and they took his wallet, mobile phone and cash Kshs 35,000. He was handcuffed and the doors and windows loaded onto a police vehicle. He was taken around walking until another police vehicle picked him and took him to Webuye Police Station where he stayed in cells for six days. He said he was taken to court on the 7th day and charged with being in possession of stolen goods, these being the doors and windows; that he was taken to Bungoma Prison where he stayed for two weeks then taken to court where he was discharged; that he was re-arrested because of another case in Nairobi; that he was put in the boot of a Toyota Premier and taken to Nairobi; that he was given only water throughout the journey to Nairobi; that at Nairobi he was handed over to CID officers who took him to a forest and tortured him forcing him to admit he knows someone. He did not identify who the person he was being forced to admit knowing his but said that the person is PW5 in the committal bundles. He said the police implicated him because he was demanding back his Kshs 35,000. He denied knowing the deceased.

Submissions

Counsel for the accused, Ms Celyne Odembo, submitted that the prosecution has failed to prove this case beyond reasonable doubt; that the witnesses save PW9 did not know the accused and that PW9 did not know the accused well; that PW4 was evasive in his answers to questions put to him by the defence; that accused was tortured by the police to admit statements he had not voluntarily recorded. Counsel further submitted that the prosecution case has gaps because the motor vehicle was not produced in court as an exhibit; that the evidence mentions one Nyabuto as the owner of the house in which the body of the deceased was found but was not called to testify; that Abubakar who is said to have taken accused to PW9's homestead was not charged alongside the accused or brought as a witness; the same case with Alexander Lugosi; that the vehicle was not dusted for finger prints and that the Investigating Officer is not disclosed and therefore that this case was not investigated. Counsel urged the court to find that the ingredients for murder have not been proved and acquit the accused.

Counsel submitted **Parvin Singh Dhalay v. Republic [1997] eKLR** to support her point that suspicion, no matter how strong, cannot be relied on to convict an accused person. She cited the case of **Erick Odhiambo Okumu v. Republic [2015] eKLR** on circumstantial evidence and weak evidence on identification of the accused and finally counsel cited **Dickson Mwangi Munene & another v. Republic [2014] eKLR** to emphasize the point the motor vehicle was not dusted for finger prints to determine whether the accused handled it.

Prosecution counsel, Ms Macharia, submitted that the prosecution has proved the case against the accused person beyond reasonable doubt through the evidence of the 12 witnesses. Counsel submitted that death of the deceased has been confirmed by the evidence of the family who identified the body to the doctor who performed the post mortem and that death was confirmed by the doctor; that before he went missing, the deceased was operating a taxi KBR 440Z which went missing on 24th December 2012, the same day the deceased went missing; that this vehicle was traced to Webuye with the accused; that the accused was arrested with the motor vehicle in Webuye by PW7 and PW8 after he failed to prove ownership of that vehicle and that upon being charged with this offence the accused has failed to explain how he came by the deceased's motor vehicle.

Counsel further submitted that the vehicle was released to the family of the deceased after they produced documents to prove that it belonged to the deceased and that police took photographs of the vehicle which

were tendered in court as exhibits; that the defence did not raise any objection and did not request to have the vehicle produced in court. Counsel submitted that the three authorities cited by the defence are not helpful to their case because the accused is not being suspected, he was found in possession of the vehicle and that the second authority is totally different from the one before the court. Counsel urged the court to find that there is sufficient evidence to prove beyond reasonable doubt that the accused is guilty of murder.

Determination

From my understanding of the evidence presented there is no dispute that the deceased went missing on 24th December 2012 and that his decomposing body was found on 29th December 2012. In other words there is no dispute that the deceased died. I find the fact of the unlawful death of the deceased proved beyond reasonable doubt. The cause of death has been confirmed by PW12 as asphyxia due to strangulation. The deceased had also suffered other injuries as testified by PW12.

The issue before the court is whether the accused before this court is connected with that death. There is no direct evidence connecting the accused with the disappearance of the deceased and his eventual death. There is no direct evidence connecting the accused with the disappearance of accused motor vehicle. The case for the prosecution relies entirely on circumstantial evidence, specifically the evidence of recent possession. The accused is connected with this matter because it is alleged that he was found in possession of motor vehicle registration number KBR 440Z Toyota Succeed in Webuye which is said to belong to the deceased. This was one month after the said vehicle and the deceased went missing.

The evidence of recent possession of stolen property has been relied on by courts to convict on various criminal offences including robbery with violence (see **Nyeri Criminal Appeal 4 of 2014 David Mugo Kimunge v. Republic [2015] eKLR**) and murder (see **Criminal Appeal 75 of 2005 Yusuf Rashid Wanasoro alias Toto v. Republic [2007] eKLR**).

The doctrine of recent possession is based on the presumption of facts that a person who is found in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account or explain reasonably how he came to be in possession of them. **Section 119 of the Evidence Act** (Cap. 80 Laws of Kenya) gives this doctrine statutory force. The section states that **“the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

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” (emphasis added).

It is my duty to analyze the evidence before me to determine whether the doctrine is applicable in this case and whether by the application of the doctrine of recent possession, the accused is guilty of the murder of the deceased in this case. I will be examining the following:

- i. **Whether the property, in this case the car registration number KBR 440Z, was found in possession of the accused;**
- ii. **Whether the property is positively the property of the complainant, in this case the property of the deceased;**

- iii. **Whether the property was stolen from the deceased; and**
- iv. **Whether the property was recently stolen from the deceased.**

The first issue is whether the property, Motor Vehicle Registration Number KBR 440Z, was found in possession of the accused. Hussein Nyongesa Mukongolo, PW9, told the court how he was approached by Abubakar, a friend of his and requested to allow a visitor of Abubakar's to park a vehicle at PW9's homestead. PW9 told the court that Abubakar went to his home with the accused who was the visitor referred to. PW9 did not remember the registration number of the vehicle but said it was a white Toyota Probox. PW9 was cross examined at length by the defence counsel. On being cross examined as to whether the vehicle had been taken to his home by the police, PW9 stated that **"It is not true that police came in that vehicle. I can confirm that the accused is the person who was with Abubakar. I saw him when they brought the vehicle to my home. I saw accused when they brought the vehicle to my home. I know him well from that day..... Abubakar told me his visitor is called Musa."**

In re-examination on the same issue, PW9 said that **"Abubakar and accused brought the vehicle. Accused was driving. It is not the police who brought the vehicle. The visitor is the accused in the dock."**

PW7, APC Hilary Arianda and PW8 APC Geoffrey Kurgat, are the officers PW9 reported to about the car parked at his home. He said he went to report after Abubakar and the accused took longer to return to pick the car. PW7 and PW8 referred to PW9 as Joseph Mukongolo which varies with Hussein Nyongesa Mukongolo. No one picked up the issue of these names. I however find that this contradiction in the names is not major and is not prejudicial to the accused and that both names refer to PW9.

PW7 and PW8 went to the home of PW9. They saw the vehicle KBR 440Z parked at PW9's home. They found the accused who told them his name as Musa Adika. They identified the accused in court as the Musa Adika. They said the second person was Alexander Lugosi. This name differs from the name of the person PW9 said had accompanied the accused. PW9 has talked of Abubakar. Again this difference in names was not picked by the prosecution or the defence Since only two people are said to have returned to the car and PW9 said these were Abubakar and the accused this court will take it that the said Abubakar is the same one being referred to as Alexander Lugosi. Even if I were to be wrong on this issue, it is my view that this contradiction in names of the second person with the accused is not prejudicial to the accused's case. Of importance to this court is the presence of KBR 440Z in PW9's compound and the fact that the accused drove that car to PW9's home.

Further evidence by PW5, PC Kennedy Otieno is that when he travelled to Webuye in company of CPL Macharia (not a witness) to pick a suspected stolen car and a suspect they found the motor vehicle KBR 440Z white Toyota Succeed at the police parking yard at Webuye Police Station. They were informed that the suspect Musa Adika Mudavila, whom PW5 identified in court as the accused, had been charged at Webuye Law Courts in Criminal Case No. 59 of 2013 with being in possession of suspected stolen vehicle.

After careful consideration of the evidence of PW5, PW7, PW8 and PW9, I find that I have no reason to doubt that the accused is the person introduced to PW9 as a visitor of Abubakar; that the accused parked the vehicle at PW9 and upon failing to return within two days as promised, PW9 reported to PW7 and PW8. I have no doubt in my mind that this is the vehicle belonging to the deceased and that had gone missing together with the deceased on 24th December 2012. Although the said Abubakar was arrested with the accused, his whereabouts is not known. PW7 and PW8 told the court they handed both suspects to police at Webuye and could not tell what became of Abubakar. This does not affect the case against the accused since evidence on record shows he was the visitor introduced to PW9 as having come from Mombasa with a this vehicle. This is the vehicle that was driven to Nairobi by PW5 and his colleague. It was taken to Kilimani Police Station and later to Nairobi Area. It was identified by the family of the deceased and after documents of ownership were shown to the police the vehicle was released to the family after photographs were taken by scenes of crime officer.

"Possession" is defined in the Penal Code section 2 to include actual or constructive possession. The

section states thus:

(a) “Be in possession of” or “have in possession” includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;”

On the second issue whether the property, vehicle KBR 440Z, is positively the property of the complainant (deceased) I have considered the evidence of PW1. He told the court that one month after his brother the deceased went missing he, PW1, saw the motor vehicle KBR 440Z at Kilimani Police Station and identified it as the belonging to his brother the deceased. PW2 also told the court that she saw her brother's car KBR 440Z Toyota Succeed white in colour at Nairobi Area after it was recovered. PW3 the deceased's wife told the court that after her husband went missing together with the vehicle he was using to operate a taxi, she circulated in various police stations the registration number of her husband's vehicle KBR 440Z. Further evidence from PW10 is that the vehicle was identified as belonging to the deceased after PW3 the wife took documents to the police as proof of ownership. The vehicle in question was not produced in court as an exhibit. Instead, the prosecution produced two photographs in a group of photographs marked Exhibits 1 to Exhibit 8 all inclusive. Two of these photographs which would be Exhibit 7 and 8, in the manner in which they were produced and marked, show the motor vehicle in question. Exhibit 7 shows the front of the vehicle KBR 440Z with full registration numbers plate while Exhibit 8 shows the rear of the same vehicle with part of the registration number plate missing. It shows KBR with 440Z missing from the plate.

I have examined the evidence closely and noted that the defence counsel did not keenly cross examine on the vehicle in respect to its ownership, its recovery, its identification and its release to the family of the deceased. She brought out the issue of the vehicle during her submissions when she told the court that the vehicle was not dusted for fingerprints and that the vehicle was not produced as an exhibit. I noted that the defence did not object to the production of the photographs in respect of the vehicle or make an application for the vehicle to be produced in court especially after it became apparent that the vehicle had been released to the family of the deceased.

With the evidence from the prosecution, I have no reason to doubt that the vehicle registration number KBR 440Z belonged to the deceased. I find nothing wrong with the production of the photographs of the vehicle instead of the vehicle itself especially when there is evidence to show that the brother, sister and wife of the deceased testified to the deceased owning this motor vehicle and operating it as a taxi. I find that the vehicle in issue has been positively identified as belonging to the deceased.

On the third and fourth issue I have no doubt after careful analysis of the evidence that the motor vehicle KBR 440Z was stolen from the deceased. The issue then becomes whether one month is recent for an item like a motor vehicle. How recent is recent is determined by the nature of the item in question; whether it is an item that changes hands quickly or otherwise. In my view a motor vehicle is not an item that changes hands quickly. To dispose of a motor vehicle one would have to dismantle the parts and sell them as spares or sell it whole. In the latter case, one requires identification documents to convince an interested buyer that one owns the vehicle. Further, a motor vehicle is not a cheap item and one requires some substantial amount of money to buy it. In my view one month for a motor vehicle is recent enough.

In my considered view there is sufficient evidence to prove recent possession. I find the prosecution has proved recent possession. The burden shifts to the accused to offer explanation as to how he came by the motor vehicle. The explanation expected from the accused only need to be reasonable and plausible to dislodge recent possession.

The accused has not offered any explanation how he came by this vehicle; not the police and not to this

court. Instead, the accused chose a defence that he was tortured by the police to force him to admit involvement in this case. There is no evidence presented during the trial of any statement taken from the accused, either under inquiry or otherwise. If police took any statement from him this did not form part of the evidence tendered before this court.

The accused gave the issue of the vehicle a black out. He chose to testify on how he was arrested as he took doors and windows home after his father sent him. He testified to how police confiscated his goods and even charged him for being in possession of suspected stolen property: not the vehicle but the doors and windows. He testified to how he was brought to Nairobi and tortured by the police. His counsel brought out during her cross examination and submissions the issue of someone known as Nyabuto who featured in evidence and how this person did not testify, but the accused did not mention this person during his testimony in court. The connection of this person and this case, if at all, did not come out in the defence.

I noted that the accused said that he travelled home by bus on 23rd December 2012 to take doors and windows and arrived on 24th December 2012. This seems like an alibi to me. It removes him from the scene of crime. However, even if this evidence were to be true I find sufficient evidence that he was seen by PW9 on 22th January 2013 driving or parking KBR 440Z at PW9's home. He was seen by PW7, PW8 and PW9 on 24th January 2013 when he had returned to pick the car. It cannot be true that he had been arrested by the police on 24th December 2012 and placed in Prison.

I noted in his defence under oath that he told the court in evidence in chief **"I gave them (police) receipts from the bus but they did not believe me. One of them said I be searched. They took my wallet with money, mobile phone and one of them asked me for the receipts for the doors and windows. I told them I did not have it."** On cross examination by the prosecutor, he said **"In Webuye I was charged with being in possession of doors and windows. I had receipts for the items but police took them."** The accused was talking about the same police officers, those who allegedly arrested him on arrival in Kakamega, and I have a feeling he did not even realize he contradicted himself.

With no explanation at all about how the accused came by the motor vehicle, this court finds that the evidence of recent possession has been firmly established.

Having conclusively determined and satisfied myself that the doctrine of recent possession is applicable in this case, the next issue I wish to determine is whether this evidence, being circumstantial in nature satisfies this court as to the guilt of the accused in this case.

The principles applicable in circumstantial evidence have been enunciated in various decisions. One such case is ***Abanga alias Onyango v Republic Criminal Appeal No.3 2 of 1990*** (UR) where the principles were set out as follows:

- i. **The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- ii. **Those 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;**

A fourth principle is found in the case of ***Musoke v. R [1958] EA 715*** which cited with approval the case of ***Teper v. R [1952] AL 480***. It is as follows:

- iv. **It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.**

Basing my findings in this case on the doctrine of recent possession as shown above in this judgement, it is my view that these principles have been satisfied. I find no other co-existing circumstances which would weaken or destroy the inference of guilt in regard to the accused.

Before concluding this case I wish to state that several witnesses referred to KBR 440Z as a Toyota Probox when in fact it was Toyota Succeed. Despite this inconsistency in describing the vehicle I find that I have no doubt in my mind that they were referring to the vehicle, Toyota Succeed KBR 440Z, belonging to the deceased and which was found in possession by the accused. Since both models of the car, Toyota Probox and Toyota Succeed, bear similarities in appearance, this discrepancy can easily be explained that it is easy to mistake both cars unless one reads the names on the body of the vehicle.

In conclusion, I find that I cannot accept the defence offered by the accused. I hereby reject the same and find that the prosecution has proved the case of murder against the accused person beyond reasonable doubt. I enter conviction against Musa Adika Mudavila for the murder of Douglas Oloo Kimonge. Orders shall issue accordingly.

Dated, signed and delivered this 7th December 2015.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia for the prosecution

Ms Celyne Odembo for the accused

Mr. Musa Adika Mudavila, the accused

Daniel Ngumbi, court clerk