



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO 20 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ISAAC NYAIRO ONDORA Alias KALOKI.....ACCUSED

JUDGMENT

1. **ISAAC NYAIRO ONDORA alias KALOKI** (herein referred to as the accused) faces a charge of murder Contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on 4th March 2018 at Eldoret Polytechnic area within **UASIN GISHU** county, he murdered **JOSEPH KILUNDA** (hereinafter referred to as the deceased).

The accused denied the charge.

2. **RUTH WAMBUI MWAURA** who works at a salon testified that the deceased who was an AP at Eldoret polytechnic was her lover for 2 years. The accused had also been her lover prior to her meeting the deceased. On 3rd March 2018 at about 8.00pm, she was in the company of the deceased who had invited her to join him and his friend Nzioki for a drink. She in turn invited her friend Hellen to join them.

3. PW1 and the deceased later boarded a motorcycle together – chatting as they rode along – having agreed that one they got to **STARBEX** just after going over the first bump, the deceased said to the rider.

“Chunga bwana, huyu mtu anataka kutumaliza.”

4. Suddenly PW1 heard a sound and realised the motor – cycle had staggered and she fell. When she got up, she noticed three people standing next to the deceased who was lying down. She rushed to assist the deceased and noticed that the accused was among the three people present and he was holding a metal bar which he raised towards her head. She raised her hand in defence, and he hit her on the shoulder. She did not recognise the other two. She stated she was able to identify him as there were security lights from **STARBEX** Petrol Station and the **ELDORET POLYTECHNIC**. When she fell off the motor cycle, she screamed and thus attracted the attention of **AP**'s who were guarding the Polytechnic.

5. She landed in a pool of muddy water and lost consciousness – when she woke up, she realised she was inside a motor vehicle which was being driven by accused. The deceased had been placed at the back of that vehicle.

6. The accused took them to **RACECOURSE HOSPITAL** from where they were referred to **MOI TEACHING & REFERRAL HOSPITAL (MTRH)** where she was taken to theatre. Upon coming out of theatre, she was informed that **JOSEPH** had died. PW2 stated:

“I do not know why Nyairo did this to Kilunda (i.e deceased). I had severed relations with Nyairo, the love between us and Nyairo had eroded in a very acrimonious manner and I had moved on. Infact Nyairo had retained my phone and refused to release it to me, even when Jose tried to intervene.”

On cross examination she stated:

“When we got to the bump, I heard a bang and a bright light directed at us from behind, but I did not see the source.”

PW1 denied suggestions that she was drunk, saying that she only consumed one bottle of beer. She further stated that the accused claimed he was following them from the back, and the deceased had sat at the rear while she was sandwiched between the rider and the deceased.

7. **HELLEN CHEPKOECH CHUMO (PW2)** a friend to PW1 confirmed sharing drinks with deceased and PW1 on 03.03.2018, then they escorted her and she went home. She was woken up the next day at about 5.30am, the accused woke her up to say PW1 had been involved in

a road accident and she had sent him to collect her clothes and give to one Ruth to take to her. She also learnt that the deceased's body had been taken to the mortuary.

8. PC PHILEMON KIPTOO (PW3) was among those who rushed to the scene on the night in question only to find boda boda riders and a **VITZ Reg. No. KBY 077** parked nearby, where the deceased lay down on the ground bleeding from the head. He was crying and complaining of pain in the back. He pleaded for help and PW3 loaded the deceased into the **VITZ** whose owner he knew as the accused.

9. The Deceased could not support himself, and was made to lie down on the rear seat of the motor vehicle. There was also an injured female who sat in the front passenger seat. They followed the motor vehicle to Racecourse hospital from where they were referred to **Moi Teaching & Referral Hospital**.

The **VITZ** left ahead of them moving very fast but to their surprise, they arrived at **Moi Teaching & Referral Hospital** before the vehicle with the injured and waited for a long time before it finally arrived.

As they were being taken for X-ray, the deceased kept saying

"I have been killed help me, my back is hurting." It was while at the X-ray unit that PW3 realized that there was a relationship between the injured lady and the **VITZ** driver, as she lay on him for support.

PW3 STATED:

"I knew the lady was a friend to Kilunda and at one time he complained to us that there was a young man who had come in between him and the lady, and that their relations were strained."

On cross examination he clarified that the young man was Kaloki (accused).

10. On cross examination PW3 explained that he was at his house within the polytechnic with a guard at the same institution rang to say "**Your colleague had had an accident.**" Although he got to the scene and found a motor cycle side mirror there, the motor cycle which was involved in the accident was not at the scene. Similar evidence was given by **PC RUTH NTIWENDI (PW7)**.

11. STANLEY KIPKEMEOI KIPROP (PW4) a security guard at **ELDORET POLYTECHNIC** was on night duty on 3.3.2018 when at about 12.00am, he heard a loud bang and realised thereafter that someone was lying on the road. He confirmed that the place was well lit with security lights.

Shortly someone approached and reported that it appeared as though a student had been hit by a motor vehicle on the road. PW4 proceeded to the scene and realized it was **APC JOSEPH KILUNDA** who had injuries and was pleading for help. PW4 also noted that across the road was a lady who had fallen into a muddy pool and whom he recognised as one who used to visit Kilunda at the Polytechnic. After helping to remove the injured man from the road. PW4 called his fellow Administration Police Officers and informed them about the incident.

12. Shortly a Toyota **VITZ** came from town direction and parked by the road. The driver alighted and went to speak to the injured lady but he did not bother with **KILUNDA**. He took the lady (PW1) into his car, but when PW4 requested to take **KILUNDA** as well, he initially resisted. However when he saw the AP's, he agreed to take **KILUNDA** to hospital. PW4 likewise did not find any motor cycle at the scene but saw small parts of a motor cycle.

13. The deceased's wife **NANCY MUENI KILUNDA (PW6)** got learn about the incident on 4.03.2018. She visited the scene on 05.03.2018 but there was no debris or blood.

14. Deceased's close friend (**SGT BENARD OKIRIY IDEWA**) visited the scene and upon assessment that there was nothing to suggest that an accident had occurred. He had doubts that it was purely an accident, and attended the post – mortem and stated:

"... the pathologist said it was not an accident but that there was consistent pressure caused by beatings. He had multiple injuries on his body... the spine was completely injured."

15. GEORGE ICHARI MARAGA (PW9) confirmed that he operates a taxi business using **M/V Reg. KBY 077U Toyota Vitz** which he usually drives. However the accused (who was an acquaintance) approached him and requested to use the motor vehicle to do taxi business at night, as PW1 only operates during the day. Since he knew the accused as well as his parents, he obliged and handed over the motor vehicle to him. He confirmed that the accused booked the motor vehicle on 3.3.18 and returned it on 4.3.18 at about 8.00am – unlike other times when he would return the motor vehicle at 7.00am.

16. The accused explained to him that while driving along the road, he found accident victims near the **Eldoret Polytechnic**. It appeared the victims had been hit by a hit and run motorist. He stopped to help and realized that he knew both victims, so he ferried them to hospital.

17. Upon taking over the motor vehicle PW9 did not use it that day but took it to the car wash. He thereafter got into the motor vehicle and begun using it.

On 10.03.2018 police called PW8 to **Langas Police station**, and they looked at his car and told him it had been involved in ferrying an officer who had been injured. The officer said the motor vehicle had not hit the officer but was used to carry out mischief while ferrying the

victims.

18. DR. KIBET KIMUTAI who conducted the post mortem formed the opinion that the cause of death was as a result of multiple injuries on the head, spine, abdomen and pelvis due to blunt force trauma consistent with a road traffic accident. The post mortem report was produced as Ex.1.

19. CPL DAVID SAKWA (PW10) who was the investigating officer noted that on 04.03.2018a report to him was made by **APC PHILEMON** that a hit and run accident near **Eldoret Polytechnic** along the **Eldoret Kapsabet road**. The case was reported to the base **Commander Eldoret West** to investigate who in the cause of investigations ruled out that a road traffic accident had occurred.

20. On 6th March 2018, another report was made at **Langas Police Station** by 3 police officers that deceased was not involved in a road traffic accident, but had been killed by unknown persons. PW10 was thus assigned to investigate.

21. According to this witness, it was PW1 who told him that they noticed light coming from behind before hearing a loud bang and she fell down. That while lying down, she heard the deceased screaming and upon getting up, saw the accused and another, was armed with a metal bar, hitting the deceased several times. That she tried to intervene but she was hit by the accused using the same metal bar.

That she was able to identify the accused with the aid of security lights and also because he was known to her, having been her former boyfriend. As the accused was leaving the scene but members of the public forced him to take the injured to hospital for treatment.

He stated:

“The incident began as a theory of an accident but investigations emerged to show it was murder.”

22. In his sworn defence the accused admitted being the driver of the Toyota Vitz and that he was along said road and even took the victims to the hospital. He however denied colliding with any motor cycle. He knew both victims. He explained that he decided to give PW1 greater attention because the police officer who came to the scene seemed to ignore her, and were more concerned with the deceased.

23. On cross examination he maintained that PW1 had been his lover for two years, and were still in the relationship. He denied claims that he had joined another in assaulting the deceased nor was he armed with a metal bar. He just happened on the victims because that was his usual route.

He maintained that he arrived at the scene after the accident had occurred, and denied suggestions that he had even disagreed with the deceased, or had any rivalry or hurt feelings because he had wooed away his lover.

24. JOSEPH AKOYA (DW3) a boda boda operator told this court that on the night of 4.3.2018, he was on his way to town from Langas, at about 11.30/12.00am and just as he got near the Eldoret Polytechnic, there was a motor cycle ahead of him moving from Langas to town, and followed by a **PRADO**. DW2 was from opposite direction.

25. The motor-cycle wanted to turn to the Polytechnic without indicating, and was hit from the rear by the **PRADO**. DW2 had a passenger, but he stopped and parked on the side. He saw a watchman at the polytechnic gate, rushing to the scene. He noticed a man lying on the side of the road – meanwhile, the **PRADO** drove away.

They began helping the injured, and tried to stop passing motorists so as to rush them to hospital. Eventually one motor vehicle stopped and they put the injured victims in his car which left for Racecourse Hospital, followed by the APS who were manning the Polytechnic.

26. On cross examination he denied having any relationship with the accused although he knew him as a taxi operator. He denied suggestions that he was a “hired witness, paid to come and coin the evidence.

He did not see the accused assaulting the deceased where he lay.

27. DAVID OTUNGA MOGAKA (DW3) also a boda boda rider had just dropped a passenger at about 11.00pm and was riding on his way back when he found that an accident had occurred near the Polytechnic and the victims lay on the ground – there was an injured man who was lying on the road, so DW3 found other good Samaritans in assisting to remove him from the road.

A vehicle passed, and it was waved down – then some police officers came from the Polytechnic and requested the driver to assist in ferrying the injured man to hospital. He helped carrying the injured man to the rear seat of the vehicle which then left, and he rode away to town.

28. Although he did not witness the accident, it was his evidence that there was a motor cycle lying on the road, which the boda boda rider pushed away.

It is not in dispute that:

a) The deceased and the accused had a common object of amorous interest in the person of RUTH WAMBUI MWAURA (PW1) – each was aware of the shared interest.

b) The deceased and PW1 were riding on a motorcycle and had just got near the polytechnic when they fell victim to an

attack – what is not agreed on is whether the bright light PW1 referred to, were the bright lights of a motor vehicle which was following from the rear

c) The accused arrived at the scene and ferried the injured to hospital

The prosecution had no eye witness to the accident, and based its case on circumstantial evidence – advancing the theory that although PW1 claimed that she had severed her lover relationship with the accused, the accused had not readily let go, and was bitter that the deceased had wooed his lover away.

29. The deceased was aware that the accused had not completely given up his feelings for PW1, and he had even complained to his colleagues that the accused was coming in between them.

30. It would seem that prosecution is not saying accused's motor vehicle is the one that hit the motor cycle – which incidentally was not found at the scene, nor was the rider found, but that the accused was part of a wider scheme. That either he had hired some people to follow the pair as they rode on the motor cycle, attacked them [Oddly enough, just near the deceased's pace of work, which was and is still manned by security guards as well as Administration Police], then the accused joined them to finish the job, under bright lights within the environs.

31. Infact prosecution suggest that there was no accident that it is possible the deceased was either murdered elsewhere, then brought to the scene, where accused and two other men came to beat him up. That this would explain why there was no debris at the scene.

32. The celebrated case of *KIPKERING Arap KOSKEI & ANOR' (1949) 16 EACA pg135* administered the use of circumstantial evidence as follows

“Such evidence is sometimes compared to a chain with its links as a rope with several strands, each link or strand must be carefully tested and if in the end it does not lead to the irresistible conclusion of the accused's guilt, the whole chain or rope must be rejected. If it passes the test however, it be as good as any direct evidence.”

Do the circumstances in this case lead to the irresistible conclusion that accused was behind the attack to the exclusion of any other reasonable hypothesis. Do the circumstances point inculpably to the guilt of the accused and to one else, so as to draw the conclusion that “this was not an accident, but a deliberate scheme by the accused to kill the deceased who was his rival who having taken over the apple of his eye? Was his presence at the scene a coincidence or planned? What was the object that beamed very bright lights behind the motor cycle?

33. The possibility that the accused was in the object which had the bright lights, and that the said object was probably his Toyota Vitz motor vehicle, is deflated by the prosecution's own witness PW4 who arrived at the scene upon hearing a bang followed by screams.

According to PW4 he got the scene and found the victims lying in pain. The accused's motor vehicle arrived from town direction. **AFTER** he had got to the scene and even called the deceased's colleagues. Again both the driver of the motor vehicle (DW2) and even the police did not find anything on the Toyota Vitz (which had not left the scene) that would suggest a collision. So those circumstances removed the accused from the scene immediately the accident happened.

34. It also deflates PW1's claim that when she fell into the pool of muddy water, she saw the accused advancing towards her armed with a metal bar which he used to hit her. When did this happen, yet by the time the accused arrived at the scene PW4, and the deceased's colleagues plus other members of the public were already present.

35. This then gives the possibility of the version given by the defence – that the motor cyclist had begun to turn without indicating, and the motor vehicle behind them was a big car, a **PRADO** with bright lights (which is the bright beam PW1) saw. It moved close to them, hit them and did not stop. The boda boda rider upon realising his mistake, was quickly aided by his fellow boda boda operators who had arrived, and in the melee, assisted him to get away with his motor cycle – after all apart from the injured passengers –who else in the crowd could tell who was the motor cycle rider. It is possible that accused's presence at the scene was a cruel twist of fate which coincided with what had happened.

Then there is the claim by **SGT. BERNARD OKIRIY IDEWA** (PW3) – a very close friend to the deceased – they had joined forces together and worked together. He was overcome with emotion even when he testified in court. He doubted that his friend had died as a result of a road traffic accident – he stated:

“Immediately proceeded to the scene upon receiving the news, but there was nothing to suggest there was an accident. By the time I got to the scene it was not protected – Immediately after post mortem – I made a conclusion that I was not an accident and that there was foul play. I saw the post mortem report and it said the cause of death was consistent pressure due to the beatings.”

The post mortem report was produced by **Dr. KIBET** and it clearly states that the cause of death was multiple injuries to the head, spine, abdomen and pelvis due to **BLUNT FORCE TRAUMA** consistent with **ROAD TRAFFIC ACCIDENT**.

This is why I refer to PW8's emotional statement, so enraged was he at the circumstances of his dear friend's death, and the presence of the accused at the scene blinded him to even decipher the post mortem report said.

There was nothing presented in this court to suggest that the post mortem report had been doctored or that the doctor. who conducted post mortem had been manipulated so as to give findings consistent to an accident and not beatings.

36. Certainly when three people are involved in a love triangle or in a relationship where the object of interest/affection is getting attention from many other sources of opposite gender, human beings have a tendency of reacting violently, and even attempt to eliminate the competitor.

That explains accused's unwillingness to carry the injured Kilunda in his car to hospital. The accused's presence at the scene did not help matters, but his witness (DW2) gave a rational explanation that the accused was a night taxi operator who hired out his vehicle at 1000/- every night.

37. I find that the strands of the chain of events is weak and leaves room for other reasonable hypothesis. The circumstances fall short of the standard of proof required in criminal cases – which is proof beyond reasonable doubt. In this case, there is doubt about the role of the accused in the deceased's death and he tilts the benefit of that doubt, to the accused.

38. Consequently the evidence is not sufficient to sustain a conclusion, and I return a finding of **NOT GUILTY**. He shall be set forth at liberty unless otherwise lawfully held.

DELIVERED, SIGNED AND DATED THIS 5TH DAY OF FEBRUARY 2020 AT ELDORET

H. A. OMONDI

JUDGE