



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

(Coram: A. C. Mrima, J)

CRIMINAL CASE NO. 25 OF 2017

REPUBLIC.....PROSECUTOR

-versus-

1. MILKA ATIENO KIDAGA

2. LUCAS KIDAGA

3. JAMES KIDAGA BAIKA.....ACCUSED

JUDGMENT

1. *Michael Oyoo Weche* (hereinafter referred to as **'the deceased'**) was a Lecturer at the Embu University. He hailed from Stella village within Migori County. He was married to *Lilian Anyango Ochieng*. The couple enjoyed a robust life. They lived in Nairobi.

2. The night of 06th and 07th August 2017 marked the end of the life of the deceased. The lifeless body of the deceased was found lying in a farm near his farm in Marindi village within Migori County in the morning of 07/08/2017. The family of the deceased was utterly devastated.

3. When the matter was reported to the police, investigations were commenced which culminated with the arraignment of the accused persons in this matter before Court. They were *Milka Atieno Kidaga* (the first accused person), *Lucas Kidaga* (the second accused person) and *James Kidaga Baika* (the third accused person). The accused persons were jointly charged with the murder of the deceased. That was on 09/11/2017.

4. The accused persons denied the information of murder and the case was set for hearing. Ten witnesses testified in support of the information facing the accused persons. The wife of the deceased testified as **PW1**. A nephew to the deceased testified as **PW2**. He was one *James Okore Yeri*. An elder brother of the deceased one *Alfred Oyoo Okech* testified as **PW3**. **PW4** was one *Albert Okumu Mudeyi*, an Advocate of the High Court of Kenya. A Teacher at the Bishop Okinda High Scghool in Migori town one *Michael Vincent Oduor Odhiambo* testified as **PW5**. *Alfred Shuyanguya Lipeya* was employed by the deceased as a farm hand at the deceased's farm in Marindi village. He was engaged a day before the deceased died. He testified as **PW6**. *Dr. Sylvester Ochieng Olang'o* testified as **PW7**. *MAW* was a student at the Bishop Okinda High Scghool and testified as **PW8**. **PW9** was one *EOB*. The investigating officer was *No. 236200 Insp. Morris Amwayi* then attached at the DCI Migori as the Deputy DCIO. He testified as **PW10**.

5. For purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

6. The prosecution's case was mainly centered on circumstantial evidence. I will therefore revisit the evidence. According to **PW1**, the deceased left Nairobi on 04/07/2017 for Migori. The deceased arrived in Migori on the same day at around 09:00pm. He then called **PW1** to confirm such. **PW1** was aware that the deceased was to undertake some construction at their farm in Marindi village. She was further aware that the deceased and **PW2** were in the process of setting up a hotel business at Stella stage.

7. **PW2** and the deceased had previously met, discussed and agreed to set up a joint hotel business at Stella. They both contributed Kshs. 25,000/= each towards the rentals after they had settled for the premises. The deceased left Migori on 30/07/2017 for Nairobi and promised **PW2** that he will soon return so as to complete the business deal.

8. The deceased truly returned to Migori. That was in the night of 04/08/2017. **PW2** was called by the deceased on 05/08/2017 and they met at Blue Inn Restaurant in Migori town. They later left to Sagitarius Pub which was still within Migori town. **PW2** testified that after a while the deceased left him for his farm in Marindi. The deceased wanted some sand to be delivered to his farm. **PW2** readily organized for a sand

dealer who met the deceased at the bar. The sand dealer and the deceased discussed and agreed on the supply of the sand. The dealer was accompanied by someone who was a friend to PW2. The deceased and the dealer then left behind PW2 and the person who had come with the dealer as the two proceeded to deliver the sand at the deceased's farm. PW2 and his friend continued drinking.

9. The deceased then returned to the bar after a while. He joined PW2 and his friend and they continued drinking until around 07:30pm when the deceased left for Sirare. The deceased informed PW2 that he was going to see his colleague Lecturer one *Dr. Muhochi* who lived in Sirare. The deceased and PW2 agreed to meet on the following day. The deceased left PW2 and his friend in the bar.

10. Come 06/08/2017 PW2 went to Migori town to meet the deceased. He called the deceased severally in vain. PW2 remained in town until around 07:00pm and returned home without meeting the deceased.

11. It was PW6 who called PW1 on 07/08/2017 at around 07:40 am. Although PW1 had not met PW6, she was aware that the deceased had a new employee at their farm. PW6 had been given PW1's phone number by the deceased. PW6 conveyed the unpleasant news. PW6 told PW1 that some people had gone to the farm and told him that the body of the deceased had been found *albeit* lifeless.

12. PW1 immediately called PW3 and her other relatives at their home in Stella and asked them to rush to the farm and find out if what PW6 had told her was true. PW1 had called and talked to the deceased on 06/08/2017 between 07:00pm and 08:00pm shortly before the deceased began his journey back to Nairobi. PW1 was however disturbed in that she could not reach the deceased thereafter. She called severally in vain. She then retired to bed. PW1 woke up at 04:00am on 07/08/2017 and again called the deceased. He could not be reached. PW1 then received the news of the death of the deceased in the morning.

13. PW3 was accompanied by PW2 and other family members as they rushed to the farm. On arrival they found many people gathered at a scene in a farm which was about 300 metres from the farm of the deceased. They also found the police at the scene. They confirmed the ugly news. The deceased was dead. They saw the bag which the deceased carried. They observed the body of the deceased as well as the scene. They noticed some wheel marks on the ground. The marks passed where the body was. The body was later removed by the police to Migori County Referral Hospital mortuary.

14. PW3 then called and confirmed to PW1 that indeed the deceased was dead. PW1 travelled to Migori. She proceeded to the Migori County Referral Hospital mortuary and viewed the body of the deceased. PW1 observed that the body was only dressed in a vest without a shirt.

15. PW4 testified that he received a call from his friend that the deceased was dead. PW4 knew the deceased in 2014 and they were both in pig farming. PW4 was a friend to the deceased and they helped each other in their farming activities. PW4 rushed to the scene only to find that the body of the deceased had already been placed inside the police vehicle.

16. It was the further testimony of PW4 that there was a home near where the body of the deceased was found which was notorious in *chang'aa* brewing and selling. It was the home of Kidaga and they were Maragolis. The home was around 100 metres from the scene. That was the home where the accused persons hailed from.

17. PW10 was called by the then DCIO in the morning of 07/08/2017 and informed of the death of a man in Marindi village. PW10 accompanied the DCIO, the OCPD and other officers to the scene. On arrival PW10 saw the deceased lying dead on the ground in a potato farm. The deceased had raised his right hand and was lying on his left hand. The police held the head of the deceased and suspected that the deceased might have been strangled from the neck. PW10 also saw some wheel marks on the ground which according to him they must have been wheel marks of a wheel barrow or a vehicle.

18. A rough sketch map of the scene was drawn by PW10. The police interrogated several people at the scene. They then collected the body of the deceased and left.

19. PW10 was formally directed to investigate the case. He revisited the scene. At the scene he found PW9 whom he interrogated and recorded his statement. He continued with the investigations which investigations moved at a snail pace as PW10 endeavoured to unravel the cause of the death of the deceased and those culpable.

20. PW10 organized for the post mortem examination on the body of the deceased. The examination was conducted by PW7 on 10/08/2017 at the Migori County Referral Hospital Mortuary. The body of the deceased was identified by PW3 and one *Nopad Oyoo*. The autopsy was conducted in the presence of a police officer one *PC Henry Kirui*.

21. PW7 noted some skin peeling from the both arms and there was cyanosis on both limbs. Internally, air was trapped within the larynx with patcha under the neck. The neck vessels were disintended with clotted blood. PW7 formed the opinion that the cause of the death of the deceased was asphyxia secondary to strangulation.

22. PW7 explained that the deceased was strangled at the neck. He ruled out the use of a rope and instead settled for human hands as having been likely used in the strangulation. He filled in a Post Mortem Form and signed it. PW7 produced the form as an exhibit.

23. The statement which PW10 recorded from PW9 gave him a pointer towards the likely culprits. PW9 was related to the accused persons. The third accused person was a step brother to PW9. The mother of PW9 was the second wife while the mother of the third accused person was the first wife of their father. Their father was a brother to the second accused person. The second accused person was hence an uncle to PW9. The first accused person was a wife to the second accused person.

24. PW9 narrated that the second and third accused persons had not been happy with him in the family. The reason being that PW9 was born elsewhere and came into the family with his mother. The second and third accused persons had constantly nagged PW9 to go back to his father's home. PW9 however stated that he had long forgiven them and clarified that the family feud was not the basis of his testimony.

25. It was PW9's testimony that in the night of 06/08/2017 at around 09:00pm he left his home to get some alcohol from the homestead of one Mama Toto. He walked to that home.

26. As he approached the home of a police officer which was adjacent to the road PW9 used and which home was well lit with security lights powered by electricity PW9 realized that there were three people ahead of him walking towards him. As PW9 approached them, the people gave him way. They were two men and a woman. PW9 testified that the place he met the people was well lit by the security lights from the home of the police officer. He estimated the distance the lights were from the road as 15 metres. PW9 reiterated that he was able to clearly see everything.

27. PW9 did not recognize the two men. One had a cap that covered his face and the other man carried a wheel barrow on his head. The one in a cap wore a yellow jacket and had wrapped a kitenge cloth around his waist. This man was the one at the front followed by the woman and the other man was at the rear. The man at the rear wore a red T-Shirt and a black coat.

28. The woman talked to PW9. She asked PW9 where he was going to in Dholuo language. PW9 responded that he was going to get a drink. PW9 passed them and went his way. PW9 firmly asserted that he recognized the voice of the woman as that of the first accused person. PW9 unfortunately found Mama Toto's place already closed and he returned home.

29. On the following morning PW9 went to nearby shop. He learnt that someone had been killed. He rushed to the scene and saw the body of a man he did not know lying in a potato farm. The body was bleeding from the nose and mouth. PW9 approached the Chairman of Nyumba Kumi Initiative and informed him what he had witnessed the night before. The Chairman passed the information to the police when the police visited the scene. PW9 was interrogated and later recorded a statement.

30. PW10 had his informers on the ground. One of the informers told PW10 that PW8 was heard saying that he had the phone of the deceased. PW10 was accompanied by officers including a female police officer to Bishop Okinda High School where PW10 was a student.

31. On reaching at the school, PW10 explained to the Principal why they were there. They were eventually allowed to take PW8 to her home. PW5 who was the Class Teacher to PW8 accompanied the police and PW8 to the home of PW8.

32. PW8 testified. She stated that in the morning of 09/10/2017 at around 04:00am she was studying in a house where the first and second accused person slept. Suddenly some people who introduced themselves as police officers knocked the door. The first accused person opened the door. The police stated that they were searching for a phone. PW8 gave out her phone. It was a Nokia phone.

33. The three occupants in the house were ordered to get out of the house. They obliged. The second accused person was arrested and put in a waiting police vehicle. The first accused person was then asked to get into the house with one police officer. The first accused person then asked the officer for a moment to wear her shoes. The first accused person bent over as if she was really putting on her shoes as the officer went inside. The first accused person then hurriedly removed a Samsung phone from her underpant and threw it to PW8. She quietly instructed PW8 to lock it inside her metallic box and proceed to school.

34. The police conducted the search. They left with PW8's phone. They also arrested the first accused person. PW8 truly and as directed locked the phone inside the metallic box and went to school.

35. While at school, PW8 was shocked to see police officers who asked her to accompany them to her home and give them the phone which the first accused person had given her. That was around 10:00 am. PW8 obliged. That is how the police and PW5 accompanied PW8 to her home.

36. When they arrived at the home PW8 opened the metallic box and handed over the Samsung phone to the police. An inventory was prepared and signed by all present. They all returned to the school where PW8 and PW5 recorded their statements.

37. PW8 described the phone as black in colour. PW8 had previously seen the first accused person with the Samsung phone. When she asked her where she got the phone from the first accused person told PW8 that it had been surrendered to her as security by a client who consumed some alcohol but did not have the money to settle his bill of Kshs. 500/=. PW8 was aware that the first accused person wanted to sell the phone to recover her money.

38. PW8 identified the phone in Court.

39. PW5 confirmed that he accompanied the police and PW8 to the home of PW8. He witnessed PW8 open a metallic box with a padlock and removed a phone. It was a Samsung Duos phone. PW5 also identified the phone in Court.

40. PW10 then called PW1, PW2 and PW3. He showed them the Samsung phone and each stated that it was the phone which was owned and used by the deceased. PW1 confirmed that the phone had two sim cards. However, since none of them knew the security password they could not activate the phone. PW10 had wanted to confirm if the messages which PW1 allegedly sent to the deceased's phone were contained in the recovered phone.

41. To that end, PW10 prepared an Exhibit Memo Form and forwarded the phone which was recovered from PW8 to the Cyber Crime Unit at the DCI Headquarters in Nairobi. PW10 requested for the analysis and retrieval of the messages.

42. The Cyber Crime Unit thereafter prepared a report 22/03/2019 which PW10 produced in evidence. The report indicated that the messages were not able to be retrieved since the phone and the two sim cards were protected by password and the Forensic mobile examination tool used at the Cybercrime Laboratory could not bypass the password security protection.

43. On 06/11/2017 PW10 accompanied the accused persons to Migori County Referral Hospital for mental assessment. They were all found fit to stand trial.

44. PW10 charged the accused persons accordingly. He also produced their respective Mental Assessment Forms as exhibits as well as the phone, the inventory, the rough sketch plan and the Exhibit Memo Form.

45. According to PW10, PW9 had identified the accused persons as the assailants who carried a wheel barrow. PW10 was therefore satisfied that the marks of the tyre seen at the scene were those of the wheel of the wheel barrow which the accused persons carried in the night the deceased was killed. PW10 ruled out the possibility of the deceased using his phone as security for alcohol consumed since the deceased was a man of means.

46. The prosecution then closed its case.

47. By a ruling of this Court rendered on 19/12/2019 the accused persons were placed on their respective defences. They all opted for and gave unsworn testimonies. They variously denied killing the deceased whom none knew.

48. At the close of the defense case the matter was left for judgment.

49. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether the accused persons are guilty as charged.

50. As the accused persons are charged with the offence of murder, the prosecution must prove the following three ingredients: -

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 persons which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

51. I will now consider the foregone ingredients in light of the evidence in this case.

52. On the first ingredient, there is no doubt that the deceased died. All the witnesses except PW5 and PW8 so confirmed. As to the cause of death, PW7 took this Court through the Post Mortem Report which he prepared after conducting the autopsy. The cause of death was opined as asphyxia secondary to strangulation. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical opinion.

53. The second ingredient focuses on whether the accused persons and/or any of them unlawfully caused the death of the deceased. Since there is no eye-witness account on what caused the injuries that led to the death of the deceased, reliance is now on circumstantial evidence. In such a scenario, 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.

54. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (1949) 16 EACA 135** and also in **Simon Musoke v. Republic (1958) EA 715**. The principles have repeatedly been used in subsequent cases including the Court of Appeal case of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

55. 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:

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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.

56. Having set out the prevailing law on circumstantial evidence, there is need to deal with evidence of PW9. The reason thereof is that PW9 testified that he identified the first accused person among two men who had a wheel barrow in the night the deceased was killed. Further, PW10 fully relied on the evidence of PW9 in arriving at the decision to charge the accused persons.

57. PW9 was clear that he saw the first accused person with two men in the night the deceased was killed. One of the men carried a wheelbarrow which was suspected to have been used in the killing of the deceased thereby leaving the wheel marks at the scene. PW9 testified that the place he met the three people was well lit by a security light which was just nearby. PW9 even described how the three people were dressed including mentioning the colour of the clothes they wore.

58. PW9 was a close family member to all the accused persons. He knew all of them very well. He would therefore be expected to physically identify all or any of the accused persons so easily especially under good lighting. However, that was not the case. PW9 instead stated that he did not recognize any of the three people physically.

59. It was PW9's further testimony that he only recognized the first accused persons through her voice when the first accused person asked him where he was going to.

60. The conditions to be satisfied for the credibility of voice recognition evidence were discussed by the Court of Appeal in **Malindi Criminal Appeal No. 27 of 2016 Safari Yaa Baya vs. Republic (2017) eKLR** as follows, that: -

a. It was the accused person's voice;

b. The witness was familiar with it and recognized it;

c. The conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

61. The Court of Appeal had also previously held in **Karani vs. R (1985) KLR 290** and **Choge vs. R (1985) KLR 1** that just few words like 'break her legs' sufficed.

62. In this case the first accused person was the wife of the second accused person. The second accused person was a brother to the father of PW9. According to PW9 he had known the accused persons since his birth in 1982 and that they were his neighbours. PW9 had previously differed with the second and third accused persons who insisted that PW9 should instead return to his father instead of living with his mother in the home where she was remarried.

63. I have carefully considered the evidence of PW9. PW9 did not state that he was familiar with and could recognize the voice of the first accused person. On cross-examination PW9 admitted that voices could resemble. It was imperative that PW9 confirmed how he had been interacting with the first accused person and to have demonstrated how he would easily recognize the voice of the first accused person with a higher degree of certainty. That evidence on the part of PW9 was so crucial and it could not be left to the Court to presume that since PW9 was related to the first accused person then he must have been well conversant with her voice.

64. The evidence of PW9 did not therefore satisfy the conditions enumerated in **Safari Yaa Baya vs. Republic** (supra). I am hence unable to agree with PW9 that the woman he met in the night as he went to look for a drink was the first accused person.

65. There was also the evidence of the phone that allegedly belonged to the deceased. PW5, PW8 and PW10 testified on how the phone was recovered. PW1, PW2, PW3 and PW4 attempted to demonstrate that the black Samsung phone which was recovered from PW8 belonged to the deceased. The witnesses were however unconvincing since not even the wife of the deceased knew the security PIN of the phone.

66. With such state of affairs PW10 decided to take the phone to Cyber security experts at the DCI Headquarters for analysis. PW10 wanted the phone messages to be retrieved so that he could confirm if the messages PW1 sent to the deceased were in the recovered phone. With that evidence PW10 would have ably proved that the recovered phone was the one the deceased used.

67. PW10's intentions were however curtailed when the Cyber security experts reported their inability to recover the messages from the phone since the phone and sim cards were protected with passwords and the equipment they used could not bypass the password security protection.

68. The prosecution did not hence confirm that the phone recovered from PW8 belonged to the deceased. Therefore, the narration by the first accused person on how she had possession of the phone went uncontroverted.

69. The issue of wheel marks at the scene also arose during the trial. According to PW10 the marks at the scene of the crime were caused by a wheel barrow and that the wheel barrow was the one PW9 saw one of the men who were with the first accused person carrying it. Having found that the woman PW9 met on the road in the night the deceased was killed was not proved to be the first accused person, then the implication by PW10 had no legal leg to stand on.

70. PW10 must also have been greatly influenced by the evidence of PW4 who was an Advocate. PW4 stated that he was aware that the deceased used to visit the home of Kidaga to drink alcohol. That was the home where the accused persons hailed from. The home was known for brewing and selling alcohol and PW4 described it as 'a notorious home'.

71. The foregone analysis presents several loose-ends which negate the application of the doctrine of circumstantial evidence in this case. The evidence did not reach the required legal bar that the circumstances taken cumulatively formed a chain so complete that there was no

escape from the conclusion that within all human probability the crime was committed by the accused persons and none else. The various doubts must be resolved in favour of the accused persons.

72. There was however profound suspicion on the possible involvement of the accused persons in the killing of the deceased. That aside, suspicion alone cannot be a basis of convicting an accused person. The Court of appeal in **Sawe vs. Republic (2003) KLR 364** stated that:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

73. In **Mary Wanjiku Gichira vs Republic Criminal Appeal No. 17 of 1998** the Court of Appeal held that: -

Suspicion, however strong, cannot provide a basis of inferring guilt which must be proved by evidence Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.

74. Alluding to the issue, the Court of Appeal in Tanzania in **R vs. Ally (Criminal Appeal No. 73 of 2002 (2006) TZCA 71** held that: -

Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.

75. The upshot is that the prosecution failed to prove the second ingredient of the offence of murder.

76. The information cannot therefore be sustained against the accused persons. The matter must come to an end. The accused persons are hence found **NOT GUILTY** of the murder of **Michael Oyoo Weche** and they are all set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Agure Odera, Counsel instructed by Messrs. Agure Odera & Company Advocates for the Accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant