



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL CASE NO.5 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**KEPHA OIRA ABERE ..... 1<sup>ST</sup> ACCUSED**

**ALEX BOSIRE KERANDI *alias* OKIOKI .....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons, **KEPHA OIRA ABERE** and **ALEX BOSIRE *alias* OKIOKI**, are charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence in the information dated 24<sup>th</sup> March 2017 are that the accused persons murdered **TABITHA BARONGO ONDIEKI** on the night of 11<sup>th</sup> and 12<sup>th</sup> March, 2017 at Sensi sub-location in Marani sub-county within Kisii County. The prosecution called seven witnesses to testify in support of its case.
2. The 1<sup>st</sup> accused gave a sworn testimony in his evidence but the 2<sup>nd</sup> accused did not testify as he escaped from custody and was never re-arrested during the course of the trial.
3. The first witness, Irene Mweni Mutia (PW1) told the court that the deceased was her aunt and her neighbour and the 1<sup>st</sup> accused was her cousin. She recalled that she was sleeping on that Saturday night when she heard the voice of the deceased's daughter PW 3 calling out the name of her daughter. PW1 checked the watch realized that it was midnight. She opened the door and on asking PW3 where she was going at night, PW3 began crying and told PW1 and her sister in law that some people had taken away her mother "*kuenda chini*" (going down). PW1 took the child to sleep with her daughter and called the assistant chief PW4 to accompany them.
4. PW1 recalled that they went to the deceased's house together with the PW4 and someone else he had brought along. When they got there PW4 called out the deceased's name but she did not respond. They went inside the house and found the chairs in the sitting room in disarray but did not find the deceased. PW1 testified that the deceased's neighbour Silvia was questioned and she said that she had not heard anything. PW4 decided that they all go back to their homes and see what could be done the following morning.
5. The following day, after church, PW1 went to the deceased's home. While there, PW4 was called and informed him that a woman's body had been found dead. PW1 testified that she went to the scene and found the deceased's body lying next to the road. She testified that it appeared as if someone had slaughtered her.
6. During cross examination, PW1 testified that since Silvia and the deceased were neighbours, it was possible that she could have heard the noise in the deceased's house. She stated that Silvia and the deceased had a dispute but she was not aware whether the deceased had any dispute with the 1<sup>st</sup> accused. She also testified that she had not seen the accused on the night the deceased went missing.
7. The deceased's brother, Samwel Kyara (PW2) stated that he had identified the body of his sister and testified that from his observation, his sister appeared to have been strangled on the neck.
8. In her unsworn testimony, S.K. (PW 3) who was 7 years old at the time of the trial, testified that on the material day she was at home washing her legs while her mother was in the kitchen when two people she did not know came in and strangled her mother with a rope. The two strangers also strangled her on the neck and took her mother away. She hid and when someone came back with a torch, he could not find her. She went to her friend's house and told them that some people had taken her mother.
9. During cross examination, PW3 testified that she did not know the names of the people who came to their home that night. She also testified that she had not identified the accused persons in the parade. She stated that she had not seen the accused person that night but in re-examination, she testified that the 1<sup>st</sup> accused person was one of those who had taken away her mother. She testified that when the incident occurred she had a tin lamp which she had used to see her mother. She also testified that it was at night and she could not see the place her

mother was.

10. Moses Onkware (PW4), the assistant chief of Nyaburoba sub location testified that he knew both the deceased and the accused. He recalled that on 12<sup>th</sup> March 2017, at about 12:30 a.m., he was called by PW1 who told her that a child had run to her place saying people had gone to beat up her mother. He called a member of the *Nyumba Kumi* Initiative and went to the deceased's place with PW1 and her sister in law. The deceased did not respond when they knocked and called out for her. He testified that they went to the adjacent house and asked the deceased's neighbour, Silvia whether she had seen the deceased. Silvia stated that she had seen the deceased at 8:00 p.m. the previous day. They went inside the deceased's house but did not find anyone in any of her rooms. PW4 testified that they thought that the deceased had run away to a neighbour's place and they decided to go home. The following day, he called the chief at about 5:00 a.m. They blew a whistle and asked the deceased's neighbours to look for her in the nearby *shambas*. In the course of searching for the deceased, PW4 testified that the ACC called them and told them that a body had been found in the neighbouring sub location. They sent people to the place called Manyerero where the body of the deceased was identified. When they got to the scene they found that the deceased had been strangled using a rope on the neck. They called the police who took away the body.

11. Inspector Lyrice Lingaka Mukutsi (PW 5) confirmed that in the morning of 21st March 2017, he and PW 7 arrived at the scene of the crime in Sensi area. He took photographs of the roadside where the deceased's body had been found, the deceased's body and her semi-permanent house. He produced the photographs and a certificate that the photographs had been processed under his supervision.

12. PC Quinto Ondeke (PW6) from the DCI headquarters on secondment duties at Safaricom headquarters security department, law and enforcement liaison office explained that his duties entailed cell data and Mpesa data extraction. He testified that on 15<sup>th</sup> March 2017 the DCIO Marani, PW 7 requested information on all incoming and outgoing calls of the period 1<sup>st</sup> March 2017 to 14<sup>th</sup> March 2017 for phone numbers 0722\*\*\*\*\*, 0721\*\*\*\*\*, 0727\*\*\*\*\*, 0718\*\*\*\*\* and 0720\*\*\*\*\*. He testified that phone number 0721\*\*\*\*\* was registered in the name of Victor Abere, phone number 0718\*\*\*\*\* was registered in the name of Esther Getusi, phone number 0720\*\*\*\*\* was registered in the name of Jane Tom, phone number 0722\*\*\*\*\* was registered in the name of the 1<sup>st</sup> accused and phone number 0727\*\*\*\*\* was registered in the name of Tabitha Nyagaka. PW 6 produced the requested data and also produced a certificate dated 5<sup>th</sup> November 2018 prepared in compliance of section 65(8) as read with part (vii) section 106 (a) and 106(b) of the Evidence Act.

13. Inspector Richard Mwololo (PW 7) recalled that on 12<sup>th</sup> March 2017, he received information from the OCS, Inspector Kioo that there had been a murder incident the previous night at Sensi location. He was informed that they had taken the deceased's body to Bonsogo Mortuary. PW 7 took over the investigations from the deputy OCS and tried to trace witnesses from the homestead. Some officers brought in a lady suspect known as Silvia Arosy Mayanya. He interviewed Silvia and she told him that she had not heard any commotion that night despite her house being adjacent to the scene of crime.

14. PW7 testified that when he tried to interview PW 3, who had been brought in by her maternal uncles, she appeared shaken. She told him that her mother was preparing food on the evening of 11<sup>th</sup> March 2017 and she was washing her feet not far from where her mother was when two people attacked her mother and also attacked her. They tried to squeeze her neck and threw her on the sofa set and whilst there she heard her mother struggling with the two people. He testified that PW 3 had identified one of the people as her uncle, the 1<sup>st</sup> accused. She remained where she was until the place was calm then went out but did not find her mother and because she was scared, she ran to a neighbour, PW1.

15. He testified that the next day, he visited the scene to find out what had happened. He tried to get the assistant chief to get him the 1<sup>st</sup> accused but was told that the 1<sup>st</sup> accused did not reside at Sensi and that he resided in Kitale. PW 7 described the scene of the crime as a corridor about 3 meters wide bordering the house of the deceased and that of Silvia. He testified that he collected a manila rope at the scene which he believed was used to strangle the deceased. He also found a shoe the deceased had been wearing and the *sufuria* she had been using on the night she was attacked.

16. He testified that he proceeded to the scene where the body of the deceased had been dumped, about 2.4 kilometres away. He testified that since it had not rained for days, he noticed some traces of blood on the scene. He caused the scene to be photographed together with the main scene and also had the deceased's body photographed at the mortuary and a post-mortem carried out at Bosongo Mortuary.

17. PW 7 further testified that when he tried to interview the family members he realized that there had been a long running land feud. He discovered that the deceased was a widow and had had a court case with her father in law once but was impressed to drop the case against her father in law. He testified that Silvia had also not wanted the deceased to inherit her husband's parcel of land. He issued an arrest order for the 1<sup>st</sup> accused as he had been identified by the minor. The 1<sup>st</sup> accused person denied being at Sensi and insisted that he had been in Kitale throughout. PW 7 requested for an identification parade to be carried out but PW 3 was unable to identify him. He testified that he had heard that she was still very unstable due to the events and had not been informed that her mother had been murdered.

18. He requested the accused person's cell data and that of his brother and other family members by a letter dated 15<sup>th</sup> March 2017. The data gave him a brief of the 1<sup>st</sup> accused's movements on Friday 10<sup>th</sup> March 2017. It showed that the accused had left Kitale and on his way called his brother at the junction of Ahero Kisii Nyamira Road. The accused was briefly off after that communication until 12<sup>th</sup> March 2017, when he left Sensi to Eldoret and arrived in Kitale at 5:00 p.m. PW 7 told the court that when he interviewed the accused he confirmed that he had travelled to Sensi on 10<sup>th</sup> March 2017. The accused also confirmed that he met his brother Gisebe at the stage in Gekonga market at 10:00 p.m. He told him, that after that he went to his home in Sensi and left his brother at Gekonga. PW 7 stated that the accused had told him that he stayed at Sensi until 12<sup>th</sup> when he left to Eldoret. The accused told PW 7 that he had spent the night of 10<sup>th</sup> at his brother's place and when he told the accused that his brother had said that he had not seen him, the accused changed his story. PW7 testified that he also informed the accused that he had interviewed his sister Doreen Abere Mokeira and she had denied that the accused had spent the night there. He testified that he also showed the accused brother the call data and he confirmed that he had met the accused that evening and stated that he did not see or communicate with the 1<sup>st</sup> accused again after that.

19. The inspector testified that the denial and contradictions of the accused person until he showed him the call data and the fact that he could not satisfactorily explain his whereabouts between 10<sup>th</sup> and 12<sup>th</sup> led to the conclusion that he was at the scene of the murder. PW 7 told the court that he was convinced that the accused planned the attack jointly with others. He went on to testify that the deceased's call data showed that she had received a call from her son 2 days prior. The son told him that the deceased had confided that she feared for her life and he had advised her to report to the police. He testified that the post mortem that had been carried out, concluded that the deceased had died of asphyxia secondary to manual ligature strangulation.

20. During cross examination PW 7 admitted that the 1<sup>st</sup> accused call data did not show he was in Sensi or Gekonga. He stated that the accused location on 10<sup>th</sup> March 2017 was not captured although he was still receiving calls. PW 7 stated that from the data, the accused could not be traced at Sensi or Marani. He also testified that he visited the scene on 14<sup>th</sup> March 2017 by which time the body had been collected. He further admitted that PW 3 had not disclosed to PW 1 who the attackers were.

21. The 1<sup>st</sup> accused testified that on 11<sup>th</sup> March 2017 he went to church after doing some chores and rested for most of the day. He stated that he was still at his place in Kitale doing his work on 12<sup>th</sup> March 2017 and that after returning from a crusade at 8:00 p.m., police officers came to his place with a warrant and took him to Kisii. He denied the charges facing him and stated that he did not have any quarrel with the deceased and stated that he was young and could not have been involved in the dispute between his father and his aunt. The 1<sup>st</sup> accused testified that PW 3 was unable to identify him in an identification parade that had been conducted and produced the identification form as an exhibit.

22. The 1<sup>st</sup> accused's counsel, in his closing remarks submitted that the prosecution had not proved its case beyond reasonable doubt. He stated that there was no evidence linking the accused person to the murder. He argued that it was clear from her failure to identify the accused, that the 1<sup>st</sup> accused was not known to the key witness, PW 3. Counsel also submitted that the accused had raised the defence of *alibi* which was supported by the prosecution's data from Safaricom. He questioned PW 3's failure to inform PW 1 the identity of the attackers when the incident occurred. Counsel noted that the investigating officer went to the scene of the crime 2 days after the body had been collected and the blood at scene had also not been collected and subjected to analysis to confirm if it belonged to the deceased. In his view, the investigations had been conducted shoddily and did not warrant a conviction. The prosecution relied on the evidence on record.

### ANALYSIS AND DETERMINATION

23. The offence of murder is defined under **section 203** of the **Penal Code** as follows; ***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”*** From this definition, the prosecution is expected to prove the following facts beyond reasonable doubt:

- a. The death of the deceased and cause of that death;
- b. That the accused committed an unlawful act or omission that led to the death; and
- c. That the accused committed the unlawful act with malice aforethought.

24. The fact and cause of the deceased's death is not in dispute. PW1 and PW4 testified that they saw the deceased's body lying along the roadside on 12<sup>th</sup> March 2017. The deceased's brother PW2 testified that he identified the deceased's body when the post mortem was conducted. In the report dated 12<sup>th</sup> March 2017 it was concluded that the deceased died due to asphyxia secondary to manual ligature strangulation.

25. To prove that the accused was the person who had killed the deceased, the prosecution relied on the direct evidence of the deceased's daughter PW 3 who was a child of tender years. She testified that on the evening her mother was killed, they were both home when they were attacked by two men. She testified that the two men had strangled her mother and had also turned on her and strangled her then left with her mother.

26. The court in ***R -vs- Turnbull & Others (1976) 3 ALL ER 549***, interrogated the circumstances to be taken into account when a case turns on identification by a single witness. The court proposed factors for consideration including the length of time the witness had the accused under observation; the distance at which the observation was made, the nature of the light and whether the observation was impeded in any way. In the case of recognition, the court found that, ***“Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

27. From PW 3's evidence, it was clear that the incident occurred at night. PW 3 stated that there was no light in the kitchen where the deceased was and that she saw her by the light of a tin lamp she had. PW 3 testified that she had seen the 1<sup>st</sup> accused previously but was unable to point out the 1<sup>st</sup> accused when asked to identify him in an identification parade. PW7 testified that the reason they had arrested the 1<sup>st</sup> accused was because the minor had mentioned his name as one of the people who had attacked the deceased. When probed on this, PW3 stated that she had not told the police the names of the people who took the deceased. My take on the evidence of PW 3 is that her identification of the accused was not conclusive and free from the possibility of error.

28. In determining the manner in which the evidence of children of tender years should be treated, the Court of Appeal in ***Michael Muriithi Kinyua v Republic Criminal Appeal No 38 of 2002 [2002] eKLR*** held;

*“Up to 1963, the relevant statutory provision was the proviso to section 19 (1) of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya which was in the following terms:-*

“Provided that, where evidence by virtue of this section is given on behalf of the prosecution in any proceedings against any person, for any offence, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other evidence in support thereof implicating him.”...

That was the state of the law until 1963. The Evidence Act No 46 of 1963, in the second schedule, thereto, carried out amendments to some other statutes with bearing on the Law of Evidence. One of the statutes amended was the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya by removal of the proviso to section 19(1) thereof. It follows, therefore, that the proviso has not been part of the Act since 1963.

The net result, in our opinion, is that, the removal of the proviso also removed the requirement that the unsworn evidence of a child of tender years required corroboration as a matter of law. **Despite this, we think that the practice is a sound one and should still be followed by courts as a rule of practice.** [Emphasis added]

29. To corroborate Pw3's evidence, the prosecution led circumstantial evidence to show that the 1st accused was in the locus in quo when the crime was committed. The Court in **Abanga Alias Onyango vs. Rep Criminal Appeal No.32 of 1990(UR)** set out the following test for considering the circumstantial evidence;

*It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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.*

30. PW 7 testified that when he interrogated him after his arrest the 1<sup>st</sup> accused could not explain his whereabouts on the night in question. He testified that after showing the accused the call data he had obtained from Safaricom, the accused admitted that he had travelled to Sensi on 10<sup>th</sup> March 2017 and stayed there up to 12<sup>th</sup> March 2017 when he left to Eldoret. He testified that the 1<sup>st</sup> accused brother had denied seeing the accused on 10<sup>th</sup> March 2017 but admitted that he had met him when he showed him the call data.

31. The call data referred to by PW 7 was produced by PW 6. During cross examination, PW 7 admitted that the 1<sup>st</sup> accused call log data (P.exh. 3 (d) did not place him at Sensi or Marani. Having analysed the 1<sup>st</sup> accused's call data, I find that it indicated that he was in Eldoret at around 7:00 p.m. on 10<sup>th</sup> March 2017. Between 10<sup>th</sup> and 11<sup>th</sup> March 2017, there is no indication of where the 1<sup>st</sup> accused was although he continued receiving and making calls. The records then place the 1<sup>st</sup> accused in Eldoret on the afternoon of 12<sup>th</sup> March 2017.

32. When placed on his defence, the 1<sup>st</sup> accused insisted that he was at his home in Kitale on the night in question. Where an accused person puts forward an *alibi* as an answer to a charge he does not in law assume any burden of proving it. It is sufficient if an *alibi* introduces into the mind of a court a doubt that is not unreasonable. (See **Kiarie v Republic [1984] KLR 73**)

33. PW 7 testified that there had been a long standing dispute between the deceased and the 1<sup>st</sup> accused person's father concerning land. He testified that he reached the conclusion that the 1<sup>st</sup> accused had killed the deceased based on the evidence of PW 3, the call log data and the accused admission that he was in Sensi when the deceased was killed. As shown above, PW 3's evidence was inconclusive that the 1<sup>st</sup> accused had killed the deceased. The call data produced was also silent on the whereabouts of the accused on the night the deceased was murdered. Further, no formal confession was placed before this court to support the assertion that the 1<sup>st</sup> accused admitted that he was in Sensi on the night in question. PW 7 also testified that he collected a manila rope he believed was used to strangle the deceased but did not tell the court whether the rope was blood stained or why he had reached the conclusion that it had been used to murder the deceased. Having analysed the evidence of PW 7, I am not convinced that his testimony placed the accused at the scene of the crime on the material night. His evidence did not displace the alibi raised by the 1<sup>st</sup> accused.

34. It is trite law that suspicion however strong, cannot provide a basis for inferring guilt. The prosecution failed to adduce convincing proof that the 1<sup>st</sup> accused person was involved in the murder of the deceased. Accordingly, I acquit **KEPHA OIRA ABERE** for the murder of **TABITHA BARONGO ONDIEKI**. He is at liberty to go unless otherwise lawfully held.

**Dated, Signed and Delivered at KISII this 5<sup>th</sup> day of May 2020.**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Accused Kepha Oira Abere Present**

**Mr. Kimaiyo For the Accused Person**

**Mr. Otieno Senior State Counsel Office of the DPP**

**Rael Court Assistant**