



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL CASE NO. 10 OF 2018

REPUBLIC.....PROSECUTOR

-versus-

EDWIN OTIENO WANYARA.....ACCUSED

JUDGMENT

1. *Arthur Arwa Obuolo* (hereinafter referred to as '**the deceased**') was found dead in the morning of 02/04/2018 outside his shop at Osogo village in Uriri Sub-County. His head was badly mutilated.
2. When the matter was reported to the police, investigations were commenced which culminated with the arraignment of the accused person in this matter, *Edwin Otieno Wanyara*, before Court. The accused person was charged with the murder of the deceased. That was on 10/05/2018.
3. The accused person denied the information of murder and the case was set for hearing. Seven witnesses testified in support of the information facing the accused person. *Kilion Obuoro Aruwa* was a son of the deceased and a neighbour to the accused person. He testified as **PW1**. **PW2** was *Dr. Victor Awinda Omollo*. The wife of the deceased testified as **PW3**. She was *Alice Akinyi Aruwa*. A Scenes of Crime Expert testified as **PW4**. He was *No. 79093 Corp. James Olago*. **PW5** was *No. 231201 ASP Stephen Mutua*. He was the DCIO Migori. *Kilion Obwono Opondo* whom the deceased was his uncle testified as **PW6**. The investigating officer was *No. 43478 Corp. James Mwangi* then attached at the DCI Migori who testified as **PW7**.
4. For purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.
5. The prosecution's case was mainly centered on circumstantial evidence. PW1 learnt of the death of his father in the morning of 02/04/2018. He was called and so informed by his sister. He rushed to the scene which was at the deceased's home in Osogo village. He found his father lying dead in front of his shop which was adjacent to his school; Kabolo Junior Academy. He observed the body. The head was grossly mutilated. The skull was cut while the lower jaw and the heart were missing. He also saw a side mirror of a motor cycle just next to the deceased. PW1 readily recognized the side mirror as of his father's motor cycle. The deceased had just recently bought a new motor cycle which was registered as KMCH 887V.
6. There were so many people at the scene. PW1 called the police. The deceased was around 70 years old.
7. PW3 testified that the deceased had, on the previous day, noticed that some items in his shop had been stolen. The deceased told PW3 who also went and so confirmed. The deceased stayed late in his shop that day. PW3 sent her children to call him to return home for supper but he did not. PW3 was shocked to learn in the morning that the deceased had been killed. The new motor cycle was missing.
8. PW5 received the news of the death of the deceased. He assigned PW7 to investigate the case. PW7 visited the scene in the company of PW4 and other officers. They met the OCS Uriri Police Station at the scene. He observed the body of the deceased. It had deep cuts on the head, neck and face. PW4 processed the scene and took several photographs. The body of the deceased was later removed to Migori County Referral and Teaching Hospital (MCRTH) Mortuary for preservation and further police action.
9. PW7 interrogated the people at the scene. He learnt that the deceased had been attacked and his new motor cycle stolen. He recovered a motor cycle side mirror at the scene. PW7 further stated that the OCS of Uriri Police Station informed him that members of the public had seen a blood-stained panga about one kilometre from the scene. PW7 went to the place the panga was. He saw it. The panga had blood-stains but had been interfered with. PW4 photographed the panga and PW7 recovered it as an exhibit.

10. In the course of the investigations PW7 recorded statements from several potential witnesses. PW7 also organized for the post mortem examination on the body of the deceased. The examination was conducted by PW2 on 11/04/2018 at the MCRTH Mortuary. The body of the deceased was identified by PW1. The autopsy was conducted in the presence of PW7.

11. PW2 noted liquidity, liquefaction and decomposition on the body. The skull was missing from the middle taking away the face, the nose, the lower incisors and the tongue. The edges of the cuts were sharp indicative of use of sharp objects. Blood vessels were badly severed. PW2 formed the opinion that the cause of the death of the deceased was assault due to deep cut wounds.

12. He filled in a Post Mortem Form and signed it. PW2 produced the form as an exhibit.

13. It was PW6 who led to the arrest of the accused person. PW6 was a serving Prisons Officer attached at Rachuonyo GK Prison within Homa Bay County. He hailed from Ososgo village and the deceased was his uncle. PW6 testified that on 07/04/2018 at around 08:00am he slowly rode his motor cycle from his home to Migori town. He used an old road and wore a helmet. While on the way he saw a motor cycle parked by the side of the road. No one was near the motor cycle. He stopped.

14. PW6 then saw someone peeping from the nearby bush. PW6 removed his helmet so as to clearly see who the person was. He recognized the person as the accused person. PW6 knew the accused person from the time the accused person was born. The accused person ran away while shouting ‘..thief...thief...’.

15. PW6 gave chase of the person. He was joined by other people, but they did not manage to arrest the person. PW6 returned to where he had left his motor cycle and the other motor cycle which had earlier on been parked. PW6 examined the parked motor cycle closely. There was a bag on it. He opened it. He saw Manual for the motor cycle. The manual had the name of the deceased written on it. There was also another motor cycle registration plate in the bag and some clothes.

16. The Manual had the motor cycle’s Frame Number in it. It was Number MD2A18AZXFNA65468. PW6 confirmed that the Frame Number was the same as the one on the motor cycle. He called the police who collected the parked motor cycle.

17. On 22/04/2018 PW7 received information of the arrest of the accused person. It was from the DCI Nyatike who informed him that the accused person was held at Nyatike Police Station. PW7 proceeded and picked the accused person and took him to Migori Police Station. He booked him in the cells.

18. On 30/04/2018 PW7 removed the accused person from the cells for interrogation. In the course of the interrogation the accused person admitted taking part in the killing of the deceased. PW7 handed the accused person over to PW5 where a confession was recorded.

19. The accused person was mentally examined on 02/05/2018. He was certified fit to stand trial. He was subsequently arraigned and charged before Court.

20. PW7 produced several exhibits. They were the Motor cycle’s Registration Certificate (Logbook), the motor cycle, side mirror and the mental assessment report. PW4 produced the photographs he took at the scene together with a Certificate as exhibits.

21. The prosecution then closed its case.

22. By a ruling of this Court rendered on 22/05/2020 the accused person was placed on his defence. He gave a sworn *alibi* that he had been in Nyatke mines since 29/03/2018 until he was arrested on 03/04/2018.

23. At the close of the defense case, the Defence Counsel filed written submissions. The prosecution relied on the evidence on record in calling for a conviction.

24. 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.

25. 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.

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

27. On the first ingredient, there is no doubt that the deceased died. All the witnesses except PW4 and PW5 so confirmed. As to the cause of death, PW2 took this Court through the Post Mortem Report which he prepared after conducting the autopsy. The cause of death was opined as assault due to deep cut wounds. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical opinion.

28. The second ingredient focuses on whether the accused person 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 congenitally 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.

29. 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.

30. 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: -

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.

31. Having set out the law on circumstantial evidence, there is need to deal with evidence. PW7 testified that the only evidence linking the accused person to the offence was that of the recovered motor cycle.

32. The prosecution had mainly relied on the accused person's confession in this matter. The accused person objected to the production of the statement. A trial-within-a-trial was held. By a ruling rendered on 14/11/2019 the confessionary statement was not admitted as an exhibit.

33. The non-admissibility of the confessionary statement left the evidence of the recovered motor cycle as the main nexus between the accused person and the commission of the offence.

34. PW6 was a Prisons officer. When he found the motor cycle parked on the side of an old road he quickly raised his antennae and was curious to know what was happening. After failing to apprehend the person who was in the nearby bush, whom PW6 testified was the accused person, PW6 returned to the motor cycle. He inspected it. He saw the Manual which had the name of the deceased on it. It also had a Frame Number. It was Number MD2A18AZXFNA65468. PW6 confirmed that the said Frame number in the Manual was the same as the one which was inscribed on the motor cycle. According to PW6 that was the motor cycle which was recovered by the police.

35. PW7 produced the motor cycle together with its Logbook as exhibits. The Logbook had a Frame Number in it. It was Number MD2A18AZ9EWB35668. This Court confirmed that the number in the Logbook was the same as the one on the motor cycle produced in Court. However, the Frame Number in the Logbook and the motor cycle produced in Court was different from the one in the Manual which PW6 had confirmed at the place he found the motor cycle.

36. The foregone therefore means that the motor vehicle which PW6 found and called the police to recover, which the police did, was not the same as the motor cycle which was produced in Court by PW7. As a result, so many questions beg for answers. They include where PW7 got the motor cycle he produced in Court from, how that motor cycle was linked to the accused person, what happened to the motor vehicle found by PW6, among many others.

37. As said, the evidence of the motor cycle was the main link between the accused person and the commission of the offence. PW7 confirmed as much.

38. The evidence at hand presented several loose-ends. The totality of it is that such evidence negates 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 person and none else. The various doubts must be resolved in favour of the accused person.

39. There was however profound suspicion on the possible involvement of the accused person 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.

40. 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.

41. 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.

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

43. The information cannot therefore be sustained against the accused person. The matter must come to an end. The accused person is hence found **NOT GUILTY** of the murder of **Arthur Arwa Obuolo** and he is hereby set at liberty forthwith unless otherwise lawfully held.

44. The accused person is held at the Migori GK Prison. Resulting from the restrictions on Court appearances due to the COVID-19 pandemic and the inability to hold online proceedings at the moment due to frequent power surges coupled with the fact that the decision is in favour of the accused person, this judgment is hereby delivered in the absence of the accused person. The Deputy Registrar shall forward a certified copy of this decision to the Migori GK Prison.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 07th day of September 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Brian Mboya, Counsel for the accused person.

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

Evelyne Nyauke – Court Assistant