



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

Criminal Case 9 of 2017

REPUBLIC.....PROSECUTOR

-versus-

1. JOEL OTIENO OKUMU *alias* OJEO

2. JARED OUMA OYUGI *alias* OMUMBO

3. ZACHARIA ODIRA OSANO *alias* ONDUTO..... ACCUSED

ZXJUDGMENT

1. **Gershom Oyugi** (hereinafter referred to as '**the deceased**') was a retired civil servant aged around 70 years old when he cruelly met his death on 06/02/2017 at Godjoppe Centre in Suna East Sub-County within Migori County. Following police investigations, the accused persons herein, **Joel Otieno Okumu *alias* Ojeo**, **Jared Ouma Oyugi *alias* Omumbo** and **Zacharia Odira Osano *alias* Onduto** were charged with the murder of the deceased. The deceased was an Uncle to the second accused person and a neighbour to the first and third accused persons.

2. The accused persons denied the offence and a trial was ordered. The prosecution availed eight witnesses in a bid to prove the charge. **PW1** was also a neighbour to the deceased. He was one **Moses Ooko Mboya**. **PW2** was the wife of the deceased. She was **Gaudentia Ligala Oyugi**. One of the second accused person's brother testified as **PW3**. He was **Peter Okinyi Odira**. The father to the second accused person and Peter Okinyi Odira who was also a brother to the deceased testified as **PW4**. He was one **Samuel Okano Mbeyu**. **PW5** was one **Luke Ouma Ochieng** who was the Chief of Godjoppe Location, the area where the deceased hailed from. The investigating officer one **No. 231892 C.I. Samuel Kibor** who was the DCIO Nyatike Sub-County testified as **PW6**. **Dr. Awinda Victor Omollo** who conducted the post mortem examination for the deceased testified as **PW7** whereas **John Kipkoech Ruto**, a Registered Clinician who conducted mental assessments for the accused persons testified as **PW8**. I will refer to the witnesses in the sequence in which they testified before Court.

3. The prosecution's case was centered on circumstantial evidence. Leading the evidence was **PW1**. He testified that on 06/02/2017 at around 08:00pm as he walked home along the Godjoppe – Dosabeya road he came across a motor cycle which was parked on the other side of the road with someone on it. He then heard voices of two men talking in the nearby bushes. One of them was commenting on how the road had been recently murramed and was so good whereas the other asked the one who talked of the road to wait for a minute. **PW1** stated that there was very bright moonlight that day and he clearly saw and could even recognize anyone he knew. As he approached the motor cycle he recognized the first accused person whom he knew so well as his neighbour. The motor cycle had Navy blue, black and green colours. **PW1** greeted the first accused person, but instead the first accused person kept quiet. He also recognized the third accused person whom he also knew very well as his neighbour. Infact it was the third accused person who talked of the road.

4. Wondering why his village mates refused to talk to him **PW1** passed them and after walking for a distance of about 50 metres he stood by the roadside and watched what they were up to. Shortly, **PW1** saw them carrying something which looked like a person and he thought that they were carrying a sick person. The person who was carried was from the nearby bush and was placed on the motor cycle. All the people boarded the motor cycle and they left. **PW1** walked home, took supper and slept.

5. After a while, **PW1** was woken up by one of his family members amid screams from the neighbouring homestead. He rushed there only to learn that the deceased had died. He heard that the deceased got lost and was discovered dead in a sugarcane farm near the Godjoppe Centre. He accompanied the villagers who went to the scene and found the deceased truly dead. He briefly observed him and noted the head bleeding and some scratches on the right cheek. He returned home after the body had been removed from the scene by the police. On the next day he joined the other villagers in trying to locate any possible place where the deceased could have been killed before being dumped at the Centre. The search did not yield anything. **PW1** then informed **PW5** what he witnessed the day before and he was directed to the police where he recorded a statement.

6. **PW2** had waited her husband, the deceased, to return home in the evening of 06/02/2017 after he had gone to Godjoppe Centre to buy some meat for supper. When it was getting late **PW1** called **PW4** to her home and informed him of her concern. **PW4** mobilized the family members including the second accused person, **PW2** and **PW3** and began searching for the deceased as they headed towards Godjoppe. They

kept on calling the deceased's cellphone number which was calling but no one picked it up. On reaching a sugar cane farm near the Godjoppe Centre they again called the deceased's number and as before it was not picked. However, they heard the sound of a phone ringing in the farm and they went to search for it. That is when they found the body of the deceased lying dead. PW4 called and informed PW5 who came to the scene and called the police. When the police arrived, they took photographs of the scene and the body and removed it to the mortuary. They also interrogated several people thereat.

7. The police tasked PW5 to gather any information that would be of assistance and inform them. Shortly, PW5 referred PW1 and one **Katana Sulubu** (not a witness) to the police. The said Katana Sulubu had informed PW5 that he witnessed the accused persons, whom he knew so well, carrying the deceased as they headed into a bush and he thought that the deceased was drunk and was being carried home. That, the said Katana Sulubu was shocked to learn of the death of the deceased on the same day and that is why he informed PW5.

8. The investigating officer continued with investigations. He recorded statements from several witnesses and also organized for and a post mortem examination was conducted by PW7 on 08/02/2017. PW7 formed the opinion that the deceased had been throttled and died out of asphyxia. The investigating officer then processed the accused persons by escorting them for a mental checkup which were conducted by PW8 and who found all of them fit to stand trial. The accused persons were then formally charged with the murder of the deceased.

9. At the close of the prosecution's case, this Court found that the prosecution had established a *prima-facie* case and placed all the accused persons on their defences. The accused persons elected to give unsworn evidences without calling any witness. They all denied the offence and variously narrated how they were arrested and where they had been on the 06/02/2017 in contending that they had no hand in the death of the deceased.

10. At the close of the defence case the matter was left to this Court for a decision. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether the accused persons and/or any of them is guilty as charged.

11. 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 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.

12. There is no doubt that the deceased died. All the prosecution witnesses (except PW8) and the accused persons as well so confirmed. As to the cause of death, PW7 took this Court through the Post Mortem Report he had personally prepared and suspected that the cause of death was asphyxia caused by throttling. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

13. On the second ingredient as to whether the accused persons caused the death of the deceased, since there is no eye-witness account on how the deceased died, reliance is now on the 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.

14. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

15. 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.'

16. It is only the evidence of PW1 which was an iota on the culpability of the accused persons. However, the evidence did not state with certainty that what PW1 saw looking like a person was indeed a human being and if it was the deceased. I have no doubt that PW1 recognized the first and third accused persons as he walked home. The question which now begs an answer is suppose the accused persons truly carried a human being, but a different human being from the deceased, would they still be liable for conviction on the offence they are now facing? I do not think so.

17. PW1 's evidence would have been neatly corroborated by that of **Katana Sulubu** who allegedly saw the accused persons carrying the deceased. That evidence was not availed and no reasons tendered to that effect. The upshot is that the evidence on record 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 doubts must be resolved in favour of the accused persons.

18. The upshot is that the prosecution failed to prove the second ingredient of the offence of murder. The accused persons are hence found **NOT GUILTY** of the murder of **GERSHOM OYUGI**. The accused persons shall be forthwith set at liberty unless otherwise lawfully held.

19. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of May, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mwita Counsel 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