



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 106 OF 2014**

**REPUBLIC.....PROSECUTOR**

**-versus-**

**ISAIAH OTIENO OGOLA.....ACCUSED**

**JUDGMENT**

1. The accused person herein, **Isaiah Otieno Ogola**, was charged with the murder of his wife one **Judith Adhiambo Ogola** (hereinafter referred to as '**the deceased**'). That, between the night of 28<sup>th</sup> day of October 2014 and the morning of 29<sup>th</sup> day of October 2014 at Posta Area in Migori Township within Migori County in the Republic of Kenya the accused person murdered the deceased.

2. The accused person denied committing the offence and the case was set for hearing. A total of six witnesses testified in support of the information. **PW1** was a sister to the deceased one **Maureen Achieng Olao**. **PW2** was one **Peter Otieno Ongang** who had married a cousin to the deceased. **Beatrice Awuor Osana** was a cousin to the deceased. She testified as **PW3**. Another cousin to the deceased testified as **PW4**. She was one **Rose Akeyo Obonyo**. **Dr. Emmanuel Odhiambo Oyier** who produced a Post Mortem Report which had been prepared by **Dr. Ndege** testified as **PW6**. **No. 84757 Corp. Bashir Sheikh** testified as **PW5** and he was the investigating officer then attached to Migori Police Station. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was based on circumstantial evidence for the reason that there was no one who witnessed how the deceased met her death but that the accused person was alleged to have inflicted the injuries that caused the death of the deceased hence the culpability. **PW3** received a call from someone he did not know in the night of 28/10/2014. The caller was a man and who introduced himself as one Ogola the husband to the deceased who was also known as Madam. The caller told **PW3** that he had beaten the deceased and asked **PW3** to give her phone to **PW1** since **PW1**'s phone was off. **PW3** lived with **PW1** in the same homestead in Lolgorian in Kilgoris but in different houses although their houses were just next to each other. The caller then told **PW3** that he was going to call back shortly as the credit in his phone was depleted.

4. **PW3** took her phone and handed it over to **PW1** and shortly the caller called. The conversation between the deceased and **PW1** was put on the phone's loudspeaker and **PW3** clearly heard what the deceased said. The accused person told **PW1** that he had beaten up the deceased and he was continuing to do so as the deceased had so much wronged him. **PW1** requested to talk to the deceased and the accused person handed over his phone to the deceased. That, the deceased asked **PW1** to plead with the accused person not to continue beating her up she was badly injured and was not even sure if she would be able to withstand any further assault. **PW1** then pleaded with the accused person and after a while the two agreed that **PW1** was to go to the accused person's house in Migori the following morning and sort out the matter.

5. **PW4** also testified that she was called by the accused person on 28/10/2014 at around 10:00pm and the accused person complained bitterly that the deceased was unfaithful to him and that the accused person had investigated the matter and confirmed so. That, as a result the accused person was beating the deceased. That, **PW4** asked the accused person to give his phone to the deceased and the accused person agreed and the deceased admitted the allegations and vowed not to repeat but complained that the accused person had beaten him so badly. That, **PW4** then told the accused person that she was intending to see them the following week to sort out the matter, but the accused person disconnected the call and did not pick up any of her calls.

6. **PW1** managed to travel to Migori in the morning of 29/10/2014 and arrived at around 08:00am. She proceeded to where the deceased lived with the accused person and as she was nearing the place she was told by some neighbours that the accused person had killed the deceased. **PW1** collapsed and regained consciousness later. She did not find the accused person at home.

7. **PW1** then called her family members and informed them of the death of the deceased. **PW3** and **PW4** among other family members proceeded to Migori and headed to the Migori County Referral Hospital Mortuary where they viewed the body of the deceased which had several visible injuries.

8. **PW2** was called by a driver to the accused person in the morning of 29/10/2014 and informed of the death of the deceased. He rushed to the house where the deceased and the accused person lived and saw the body of the deceased in a sitting position on the floor. After

confirming that the deceased had died PW2 placed the body on the bed on instructions of the police officers who had arrived at the scene before him. He also assisted the police in taking the body of the deceased to the Mortuary.

9. Dr. Ndege conducted a post mortem examination on the body of the deceased on 30/10/2014 and prepared a Report which was produced as an exhibit by PW6. Dr. Ndege formed the opinion that the cause of death was massive multiple joint haemorrhage resulting from vascular damage at the joints.

10. PW5 investigated the case. On instructions from the then OCS PW5 proceeded to the scene in the company of several other police officers. They viewed the body and searched the one-roomed house. They recovered a club and some treatment kit from under the only bed in the room. They collected the body and took it to the Mortuary. PW5 prepared a sketch plan of the scene. He then recorded statements from potential witnesses and witnessed the post-mortem examination on 30/10/2014. That, the accused person presented himself at the Migori Police Station on 29/10/2014 and he was arrested. That, on completing investigations PW5 accompanied the accused person to hospital where he was assessed to be mental fit to stand trial and he accordingly charged him. He produced the sketch plan and the club as exhibits.

11. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony and called his younger brother, **Phillip Obungu Orinda (DW1)** as a witness. The accused person in denying the charge raised an alibi that he had taken his motor vehicle registration number KAR 875D to Kisumu for repairs in the morning of 27/10/2014 and since the repairs were not completed on that day he did not travel back to Migori but spent at DW1's place in Kisumu. That, the works were again not completed on 28/10/2014 and that he was again forced to spend at Kisumu. In the morning of 29/10/2014 the accused person received a call from his cousin and told that the deceased had died. That, he rushed back to Migori and after viewing the body of the deceased at the Mortuary he proceeded to make a report at the Migori Police Station where he was arrested and charged. He wondered why he had lived so well with the deceased and her relatives only for PW1, PW3 and PW4 to hatch a lie against him before Court. He denied ever making any of the alleged phone calls to any of them.

12. DW1 reiterated that the accused person had spent at his home in Kisumu on 27/10/2014 and 28/10/2014 and left in the morning of 29/10/2014 for Migori on receiving information on the death of the deceased.

13. At the close of the defence case, Counsels made brief submissions.

14. It is now on the basis of the foregone circumstantial evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

15. 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.**

16. 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.

17. 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.'*

18. The chain of events leading to the arrest and arraignment of the accused person before this Court came from the six witnesses who testified in this case. The crux of the matter rests with whether the accused person called PW1, PW3 and PW4 during the time when he was allegedly assaulting the deceased. The accused person vehemently denied such whereas PW1, PW3 and PW4 maintained their common position. But was the issue resolved by way of investigations? I do not think so. PW5 seemed not to have placed any premium on the issue. Despite the witnesses availing all the phone numbers used in the alleged conversations, PW5 did not bother to ascertain whether the accused person really called the witnesses. This Court is not sure whether the lapse on the part of PW5 was by design or default. A simple enquiry to the service provider would have rested that crucial issue. PW5 would have proved the genuinity of the statements of PW1, PW3 and PW4 and as well proved where the accused person was at the material time. Without settling that issue in favour of the prosecution the rest of the evidence adds no value to the prosecution's case.

19. In view of the defence by the accused person and the evidence of the prosecution there is no way this Court can confirm that indeed that accused person called PW1, PW3 and PW4 to be deemed as the assailant. The defence raises serious doubts on the prosecution's case. In this case the legal standard required to sustain a conviction based on circumstantial evidence has not been attained.

20. Having said so, it is the finding of this Court that the prosecution has failed to prove that the accused person caused the death of the deceased. I now come to the conclusion that the information of murder facing the accused person has not been proved. The accused person herein, **Isaiah Otieno Ogola** is hereby found **NOT GUILTY** of the murder of **Judith Adhiambo Ogola** and he is hereby set at liberty unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MIGORI this 7<sup>th</sup> day of June 2018**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Kisera**, Counsel instructed by the firm of Messrs. Omonde Kisera & Company Advocates for the Accused person.

**Miss Atieno** Learned State Counsel instructed by the Office of the Director of Public Prosecutions.

**Evelyne Nyauke** – Court Assistant