



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 13 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

AGUNJA LAWRENCE ORAGO.....ACCUSED

JUDGMENT

1. The accused person herein, **Agunja Lawrence Orago**, was charged with the murder of his wife one **Quinter Atoti Adado** (hereinafter referred to as '**the deceased**'). That, on the 3rd day of October 2014 at Ranen Trading Village in 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 motor cycle rider stationed at Ranen Trading Centre one **Michael Otieno Okoti**. **PW2** was one **No. 99014258 Ssgt Darwin E. Mulunda** stationed at Ranen AP Camp in Awendo Sub-County. **PW3** was **No. 96067163 AP Corp. Bon Korir** attached at Rongo Division Headquarters. **Dr. Ruwa Sammy Mwatela** testified as **PW4** when he produced the Mental Assessment Report for the accused person and later testified as **PW8** when he produced a Post Mortem Report which had been prepared by his colleague one **Dr. Otieno**. **PW6** was one **Tonick Owino Ojero** who was also a motor cycle rider at Ranen Trading Centre who testified as **PW6**. **PW7** was one **John Ochieng Kibogo** who saw the accused person in a motor vehicle at Ranen stage and informed the police. **PW5** was **Dr. Awinda Victor Omondi** who unsuccessfully attempted to produce the Post Mortem Report on behalf of his colleague one Dr. Otieno and was stepped down. 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 arrest and arraignment before Court. **PW1** found a group of people at Ranen Trading Centre at around 07:00pm on 03/06/2014 as he returned from dropping a customer at Dedee. He saw a woman seriously wounded on the head and since there was no other motor cycle he took the woman to Awendo Sub-County Hospital. Later **PW2** returned to the Ranen stage and while in the company of the people whom he had met at the Ranen stage prior to rushing the deceased to hospital **PW1** reported the matter to **PW2**. Those who accompanied **PW1** informed **PW2** that it was the accused person who had injured his wife, the deceased, and fled.

4. **PW2** in the company of his colleague rushed to the home of the deceased which was about 500 metres away. He met the children of the deceased crying and learnt that their father who is the accused person had fled. He called and informed the OCS Awendo Police Station who sent Crime Scene Officers to the scene and who took over the investigations. About a half an hour later, **PW2** learnt that the deceased had passed on.

5. On 14/06/2014 a post mortem examination on the body of the deceased was conducted by Dr. Otieno at Rapcom Medical Centre in Awendo and a Post Mortem Report was prepared which Report was produced as an exhibit by **PW8**. Dr. Otieno formed the opinion that the cause of death was head injury due to assault.

6. The matter rested until the morning of 25/04/2016 when **PW7** saw the accused person in a motor vehicle at Ranen stage travelling towards Rongo town and since he was aware that the accused person was sought by the police on account of the murder of his wife **PW7** readily informed **PW2** who was then at the stage. **PW2** arranged with his colleagues at Rakwaro AP Camp and dispatched **PW7** to link up with the officers and pursue the vehicle. It was **PW6** who carried **PW7** to Rakwaro where they picked **PW3** and his colleague who rode in a different motor cycle and pursued the vehicle. They managed to catch up with the vehicle at Rongo and stopped it. The police officers then entered the vehicle with **PW7** who identified the accused person and the police arrested and took the accused person to Awendo Police station.

7. The accused person was escorted to Rongo Sub-County Hospital where he was examined and found mentally-fit to stand trial on 03/05/2016. The accused person was formally charged with an information on the murder of the deceased on 09/05/2016.

8. At the close of the prosecution's case, the accused person was placed on his defence and opted to give an unsworn testimony. He explained his whereabouts on 03/06/2014 that he was at work at Sony Sugar Company Ltd and had gone to pick sugar cane at Ngego Riedo where the

tractor was stuck and they were forced to spend there until the following day. As he passed Ranen stage the following day he learnt that his wife had been injured and later died. He rushed to work and returned home where his children informed him that the deceased was attacked at their home the previous night. The accused person then buried his wife and was advised by the police to await for investigations to be completed only to be instead arrested and charged. He called no witness and closed the defence case. At the close of the defence case, Counsels made brief submissions.

9. As the accused person is 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.

10. There is no doubt that the deceased died. PW4 who also testified as PW8 so confirmed. As to the cause of death, PW8 took this Court through the Post Mortem Report prepared by Dr. Otieno and opined that the cause of death was due to the head injury. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

11. On the second ingredient as to whether the accused person 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.

12. 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.

13. 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 he 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.'

14. The chain of events leading to the arrest and arraignment of the accused person before this Court came from the the six witnesses who testified in this case. I must say that this was a matter which was not properly investigated. Whereas there was evidence that when PW2 visited the home of the deceased he met the children of the deceased crying, the said children never testified as well the investigating officer. Apart from the hearsay that it was the accused person who caused the death of the deceased, there was no any form of evidence linking the accused person with the death of the deceased even though remotely. Even the investigating officer did not testify and lay a basis on why the children of the deceased did not testify and how the accused person was culpable.

15. 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 killed the deceased. 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.

16. 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, **Agunja Lawrence Orago** is hereby found **NOT GUILTY** of the murder of **Quinter Atoti Adado** and he is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of October, 2018

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Jura, Counsel for the Accused person.

Joseph Kimanthi, Learned State Counsel instructed by the Office of the Director of Public Prosecutions.

Evelyne Nyauke – Court Assistant