



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 2 OF 2014

REPUBLIC..... PROSECUTOR

-VERSUS-

GEORGE ODHIAMBO OUMA.....ACCUSED

JUDGMENT

1. **GEORGE ODHIAMBO OUMA**, a motor cycle (*boda boda*) rider from Okore village in Nyatike District of Migori County was arraigned before this Court on 02/09/2014 and faced an information on the murder of one **COLLINS OTIENO** (hereinafter referred to as '**the deceased**'). The particulars of the offence were as follows:-

“On the 28th day of July 2014 at God-Bim village, Central Karungu Location in Nyatike District within Migori County in the Republic of Kenya murdered COLLINS OTIENO”.

2. The accused person denied committing the offence and the case was set for hearing. The trial began before **Hon. Majanja, J.** who recorded the evidence of the first two prosecution witnesses before the Judge was transferred from the station. The hearing continued before this Court from where it had reached upon compliance with **Section 200** of the **Criminal Procedure Code**.

3. A total of eight witnesses testified in support of the information facing the accused person. **PW1** was **GEORGE ODERA ORINDA** who was a neighbour to the deceased. **PW2** was **JOSEPH ODERO OKOTH**, a brother to the deceased, **PW3** was **JOSHUA OTIENO OWIDHI** who was the Assistant Chief of Orati Sub-Location, Central Karungu Location. Another brother to the deceased one **GEORGE ODHIAMBO OKOTH** testified as **PW4**. **ISABELL AKINYI OTIENO** who testified as **PW5** was the owner of the motor cycle that was operated by the accused person. **SAMWEL OMONDI OWITI** was also a neighbour to the deceased and testified as **PW6**. **Dr. ARNOLD MOSETI NYAMBANE** conducted the post mortem examination on the body of the deceased. He was **PW7**. The investigating officer **No. 49997 Cpl. JOSEPH KITAKA** attached to Nyatike CID offices testified as **PW8**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. The prosecution's case was based on circumstantial evidence for the reason that there was no one who witnessed how the deceased met his death but the accused person was the person allegedly seen last with the deceased. On 28/07/2014 at around 08:00pm, **PW1** was at the house of his first wife taking dinner when he heard a motor cycle driven into the home. The home was just near the road. He went out to see whom it was and with the aid of the light from his phone he met the deceased. As the deceased intended to spend some time drinking in the house of **PW1**, the motor cycle was driven off. **PW1** neither recognized the rider nor saw the registration number. The deceased however appeared drunk. The deceased entered into the house and continued drinking.

5. The deceased then called another motor cycle rider, the accused person, who picked him from PW1's house. When the accused person arrived at the home of PW1, he ate dinner with PW1 and then negotiated the fare with the deceased and agreed at Kshs. 100/= which amount the deceased paid before he left with the accused person. PW1 then retired to bed.

6. PW1 saw the accused person in the morning of the following day as he was passing by the road. PW1 talked to the accused person. The accused person informed PW1 that the deceased had been injured but could not know the extent of the injuries. PW1 learnt of the death of the deceased later at around 11:00am.

7. What the accused person told PW1 was corroborated by PW6 who was then a Form 3 student at Father Joseph's Orati Secondary School. Early that morning, PW6 had just left his home and was walking to school alone along a road. As it was still dark, he heard something roaring ahead of him. He quickly thought it was a wild animal and charged back home. He informed his elder brother **Daniel** (not a witness) who accompanied him to school. Daniel used a spotlight to illuminate the way. When they reached where the sound came from, they realized that it was instead a body of a man in a long trousers. PW6 did not recognize who that man was. They passed and went to school. Daniel then returned home.

8. When PW6 was on his way home from school in the evening he used the same road he had used in the morning and passed at the scene. He observed the scene. He saw some skid marks and pieces of broken driving mirror. It was Daniel who told PW6 when he reached home that the body was of the deceased. PW6 knew the deceased as he was from their neighbourhood.

9. PW2 was called by his in-law one **Maitha Adera** (not a witness) at around 06:00am on 29/07/2014 and informed that his brother, the deceased, was lying on the road in what seemed to have been an accident. PW2 then accompanied the caller and proceeded to the scene. It was between God-Bim Primary School and Otalo Primary School. The two schools were about 400 metres apart. PW2 found several people at the scene and asked them to assist him to place the deceased on a motor cycle so that he could take him to hospital. He was so assisted. PW2 observed the scene and the deceased. The scene had broken glasses of a motor cycle driving mirror. The deceased two cuts on the head; one on each side and was lying facing up. The deceased was still breathing but could not talk. PW2 rushed him to the main road and got a van which took them to Sori Sub-District Hospital from where they were referred to St. Camillus Hospital where the deceased passed on as he was undergoing treatment. He was placed in the mortuary.

10. While PW2 was at the scene, he called and informed PW3 of what was at the scene. PW3 asked PW2 to wait for him at the scene. When PW3 reached the scene, PW2 had already left with the deceased. PW3 also observed the scene and concluded that there must have been an accident. He saw skid marks measuring around 3 metres and a broken motor cycle driving mirror. There were still several people at the scene. He then went to his office and at around 10:00am he received information from the members of the family of the deceased that the deceased had passed on. PW3 informed his Chief and the police. He then summoned PW1 and PW2 for interrogation. After interrogating the two, PW3 summoned the accused person who declined to avail himself to his office. PW3 made effort and personally met the accused person and asked him to avail himself to his office but again he declined. PW3 then reported all that to the police.

11. A post mortem examination was conducted by PW7 after the body of the deceased was identified by PW4. PW7 observed several bruises on the head and neck and formed an opinion that the probable cause of death was severe head injury with possible fracture of cervical bones with sheating of spinal cord and vascular compromise. PW7 filled in a Post Mortem Report which he produced as an exhibit.

12. PW8 investigated the case. He recorded statements from witnesses and visited the scene. He saw the skid marks on the road and recovered a broken driving mirror and a broken accellerator handle of a motor cycle at the scene. The accellarator handle had the registration number KMCJ 858W at the back. According to him the scene was disturbed as evidence of a struggle. He then arrested the accused person at the offices of PW3 together with the motor cycle he was riding. He observed the motor cycle and noted that the registration number had been tampered with. To PW8, the original registration number which was

on the broken accelerator; KMCJ 858W had been tempered with to read KMCT 858W on the registration number plate of the motor cycle.

13. PW8 also interrogated PW5, the owner of the motor cycle, who availed documents in proof that the motor cycle she had given to the accused person was KMCT 858W instead. PW8 was sure the accused person had made the change to the registration number plate so as to conceal a wrong. He led the accused person to hospital where on assessment he was confirmed to be fit to stand trial and was later charged accordingly. He produced the motor cycle documents, photographs of the motor cycle and the P3 Form for the accused person as exhibits.

14. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony. The accused person admitted having picked the deceased on the alleged night and as he was on the way and on reaching God-Bim the deceased, who was not very drunk, asked the accused person to instead take him first to a woman's homestead. The woman was one **Mino Chola** (not a witness). Since it was late and raining the accused person refused the new directions and the deceased demanded half of his fare so that he could alight. The accused person gave him back Kshs. 50/= and the deceased alighted. The accused person then proceeded home and only learnt of the death of the deceased when he was confronted by the family members of the deceased at his usual stage the following day. He stated that he did not know what happened to the deceased when he left him on the way. The accused person closed his case without calling any witness.

15. At the close of the defence case, Learned Counsel for the accused person Mr. Mudeyi made brief submissions that there was no sufficient evidence to prove the information since no murder was at all committed. It was further submitted that the matter was a simple traffic case which was turned to a murder case. The prosecution through Learned State Counsel Miss. Owenga relied on the evidence as tendered on the record.

16. 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.

17. 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.

18. 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.

19. 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.'

20. The chain of events leading to the arrest and arraignment of the accused person before this Court came from the the eight witnesses who testified in this case. It is true the accused person left with the deceased as alleged. It was at night and they were the only two of them. They rode on the motor cycle ridden by the accused person. According to the accused person, the deceased alighted on the way, at God-Bim, and that he did not know what happened to him when he left. However, the accused person met PW1 the following morning and informed him that the deceased had been injured but he did not know the extent of the injuries.

21. I have weighed the two versions of what happened. PW1 testified and was examined. He remained consistent and was not shaken. I have carefully considered his evidence which in effect is in consonance with that of the accused person save the later part of what happened in the morning of the following day. There is no evidence to suggest that the relationship between the accused person and PW1 was strained. Infact the accused person took dinner with PW1 before he left with the deceased. I therefore find that the accused person knew what happened to the deceased on the way that led to the fatal injuries and that is why he so told PW1 the following morning.

22. That being so, could the injuries have been as a result of an accident or were intentionally occasioned on the deceased and the alleged accident used as a cover-up? All the witnesses who visited the scene confirmed the presence of skid marks and broken pieces of glass. The caller who informed PW2 said that it seemed there was an accident. PW3, who is an administartor, also stated that from what he saw at the scene, that was an occurence of an accident. As PW6 was returning home from school, he also observed the scene and concluded that it must have been an accident.

23. PW8 visited the scene much later. It is on record that many people had gathered at the scene long before PW8 arrived. It is also on record that the people assisted PW2 to carry the deceased and placed him on a motor cycle as he was rushed to hospital. It is equally not in dispute that the scene was a public road and that it had all along been used before the arrival of PW8. With an exception of PW8, none of the other witnesses talked about the evidence of any struggle at the scene. Not even PW3. Having carefully considered the two versions as to how the scene was, I find the position that the scene was an accident scene to be more believable than the proposition that there was a struggle and the issue of accident was only used as a cover-up. Even if I take it that the scene was disturbed as alluded to by PW8 still it remains upon the prosecution to prve how that struggle arose given the time taken for PW8 to reach the scene coupled with the fact that the scene had so many people.

24. Having settled the scene as an accident scene, I believe it is also important to deal with the issue if the registration number of the motor cycle that was involved in the accident. I have seen the accelerators which has clear inscription of registartion number KMCT 858W. I have also looked at the photographs of the motor cycle and the registration number is KMCT 858W. It is highly probable that the registration number plate was interfered with. There is a possibility that the letter "J" was changed to letter "T". But that aspect was not properly settled. PW8 ought to have carried out searches with the Registrar of Motor Vehicles to confirm both the ownership and the details of the vehicles in respect to numbers KMCT 858W and KMCT 858W. That information would have enabled PW8 to verify the documents adduced by PW5 as well as the evidence of PW5 and the accused person. What now remains is only but a strong suspicion.

25. Had that issue been properly settled and revealed that indeed the accused person took steps to conceal the registration number of the subject motor cycle, then the inevitable question would be why he did so. That evidence coupled with other appropriate evidence and the proof of the ingredients of reliance on circumstantial evidence, can lead to a finding of guilty of murder or other appropriate offence. Subject to the evidence, the prosecution could also use the window under the **Traffic Act**, Chapter 403 of the Laws of Kenya which provides for offences including causing death by dangerous driving (**Section 46**) and even the power of a court under **Section 48** of the Traffic Act. There was still the room for an inquest.

26. There is no doubt that there was a strong suspicion on the culpability of the accused person in the

death of the deceased. However, that strong suspicion alone cannot be a basis of finding a conviction; the circumstantial evidence relied upon must meet the required legal standard. In this case that legal standard has not been reached, but only suspicion. There are glaring gaps in the evidence including which motor cycle was involved in the accident. The circumstantial evidence in this case is unreliable.

27. As was stated by the Court of Appeal in the case of *James Tinega Omwenga v. Republic (2014) eKLR* : -

“ 20 Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion.....”

It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic -Criminal Appeal No. 17 of 1998, the court held,

'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'

See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.”

28. It is therefore the finding of this Court that the prosecution has failed to establish that the accused person caused the death of the deceased having failed to satisfy the conditions as required in law. I now come to the conclusion that the information of murder facing the accused person has not been proved. The accused person, **GEORGE ODHIAMBO OUMA**, is hereby found **NOT GUILTY** of the murder of **COLLINS OTIENO** and that he is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of June 2017

A. C. MRIMA

JUDGE