



IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE NO. 18 OF 2012

(FORMERLY KISII HCCR CASES NO. 68, 70 & 81 OF 2012)

BETWEEN

REPUBLICPROSECUTOR

AND

LEWIS ASMAN SALMIN alias MUSA 1ST ACCUSED

VICTOR OMONDI OTIENO alias BOSS 2ND ACCUSED

WYCLIFF ODIWUOR NYABWA alias ONGIDI 3RD ACCUSED

FREDRICK OMONDI ODHIAMBO alias ISSA 4TH ACCUSED

SAMSON OGUTU ONYANGO alias JAOTE 5TH ACCUSED

JOASH ONGADI OSOO6TH ACCUSED

JUDGMENT

1. The accused persons, **LEWIS ASMAN SALMIN alias MUSA (A1)**, **VICTOR OMONDI OTIENO alias BOSS (A2)**, **WYCLIFF ODIWUOR NYABWA alias ONGIDI (A3)**, **FREDRICK OMONDI ODHIAMBO alias ISSA (A4)**, **SAMSON OGUTU ONYANGO alias JAOTE (A5)** and **JOASH ONGADI OSOO (A6)** were charged with murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information are that on 21st April 2012 at Kamser Village in Rachuonyo North District within Homa Bay County, they jointly murdered **ZAINABU ATIENO ABUBAKAR** (“the deceased”).
2. After the accused persons pleaded not guilty, the trial commenced before Maina J. I took over conduct of the trial in accordance with the provisions of **Section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* after the learned judge was transferred. On 4th September 2015 after hearing 10 prosecution witnesses, I acquitted all the accused persons except **VICTOR OMONDI OTIENO alias BOSS (A2)** whom I called upon to make his defence.
3. The brief facts leading to this case are that on 22nd April 2012, the deceased’s body was found in a bush at a local centre popularly known at Youth Market. After investigations, the six accused persons were arrested and charged in Court with the murder of the deceased. After the close of the Prosecution’s case, I found that there was no evidence linking five of the accused persons to the

deceased's death but put the A2 on his defence because the testimony of the investigating officer (PW 2) established that he was in possession of the deceased's phone at the time of her death.

4. The deceased's husband, Abubakar Salim Mumbo (PW 1), recalled that he purchased for his wife, the deceased, a Nokia phone serial no. 33267714 and produced the receipt. He stated that on the night she disappeared, he tried to call her but she was not picking his call. Rukia Akinyi Abubakar (PW 5), the deceased's daughter, recalled that her mother had a black Nokia 1202 phone whose number was 0702***594. Both PW 1 and PW 2 identified the Nokia 1202 phone produced as Exhibit No. 2 as the deceased's phone.
5. Chief Inspector Ayub Bakari (PW 10), the investigating officer, recalled that he received a report of the murder of the deceased on 22nd April 2012 from PW 1 while he was at Kosele Police Station. He testified that he took statements from the deceased's relatives and members of the public and when the accused were arrested on 24th April 2012, he recovered a mobile phone from A2 which PW 1 and PW 7 verified as belonging to the deceased. He produced the receipt which was issued when the phone was purchased (Exhibit No. 1) as well as the phone itself (Exhibit No. 2). In cross-examination, he admitted that although he took down the IMEI number of the phone, he did not record it in the Occurrence Book, an inventory or his statement. After completing his investigations, he caused the accused to be charged.
6. The case against the A2 is grounded on the doctrine of recent possession. The evidence of recent possession of stolen property has been relied on by courts to convict on various criminal offences including robbery with violence and murder. The doctrine of recent possession is based on the presumption that a person who is found in possession of stolen goods soon after the theft is either the thief or one who has received the goods knowing them to be stolen, unless he gives a reasonable explanation as to how he came into possession of the goods. **Section 119 of the Evidence Act (Chapter 80 Laws of Kenya)** gives this doctrine statutory force and it states;

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

7. In *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic*, Nyeri Criminal Appeal No. 272 of 2005 [2006] eKLR the Court of Appeal stated that:

It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

8. It is my duty to analyze the evidence to determine whether the doctrine is applicable in this case and whether by the application of the doctrine of recent possession, the accused is guilty of the murder of the deceased.
9. When the accused was put on his defence, he applied to call the investigating officer to produce the Occurrence Book for the relevant period and the phone records for the deceased's phone. Unfortunately, PW 10 had retired from the Police Service hence the Deputy DCIO of Rachuonyo South, Corporal Thomas Mbuvi (DW 1), came to testify in his place.
10. DW 1 testified that he could not obtain the telephone records from Safaricom as he was informed by the Company that it does not keep records beyond 2 years. When cross-examined on the issue, he stated that deceased's IMEI number was sent to data analysts at the CID Headquarters in Nairobi but the results were not returned. He confirmed that the IMEI number is a unique number

for each phone which can be used to track a phone and confirm its ownership.

11. DW 1 informed the court that the accused was arrested on 24th April 2012 but the Occurrence Book did not have a record of whether he had the phone in his possession and whether it was recovered from him. He also confirmed that there was no inventory of any of the items taken from the accused when he was arrested in the investigation file or diary.

12. One of the essential ingredients for the doctrine of recent possession is that the accused must be found in possession of the deceased's item. In this respect, the chain of custody of the item or goods must be established. From the testimony of DW 1, it is clear that the recovery of the phone was not recorded in the initial documentation after his arrest. It was not recorded in the Occurrence Book or in an inventory. Moreover, there appears to have been no follow up on whether the phone was being used by the deceased prior to her death or by another person after her death. This evidence leads me to conclude that the element of possession of the deceased's phone by the accused has not been established beyond reasonable doubt. Since the deceased's phone IMEI number was sent for analysis, we can only speculate on the results and the accused is therefore entitled to the benefit of doubt.

13. The meaning of this is that the prosecution has not proved beyond reasonable doubt that the second accused murdered the deceased. I therefore acquit **VICTOR OMONDI OTIENO alias BOSS (A2)** of the murder of **ZAINABU ATIENO ABUBAKAR**.

DATED and DELIVERED at HOMA BAY this 12th day of April 2016.

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro Moriasi and Company Advocates for the accused.

Ms Andabwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.