



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 10 OF 2014**  
**(FORMERLY KISII HCCR CASE NO. 76 OF 2010**  
**AS CONSOLIDATED WITH KISII HCCR NO. 83 & 111 OF 2010)**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**AND**

**ENOCK OKOTH KOI.....1<sup>ST</sup> ACCUSED**

**MORRIS OKINYI MAENDA.....2<sup>ND</sup> ACCUSED**

**JOSEPH NYAWANDA AKOTH.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. **ENOCK OKOTH KOI (DW 1), MORRIS OKINYI MAENDA (DW 2) and JOSEPH NYAWANDA AKOTH (DW 3)** were charged with the murder of **TITUS WAMWIRI WANYORO** (“the deceased”) which took place on the night of the 1<sup>st</sup> and 2<sup>nd</sup> August 2010 at North Kanyamkago Location in Uriri District within Migori County jointly with other not before the court contrary to **Section 203** as read with **Section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The prosecution relied on the circumstantial evidence and marshalled 14 witnesses to prove its case as follows.

2. Sharon Anyango (PW 3) recalled that on 5<sup>th</sup> August 2010 at about 11.00am, she was going to the shamba when she happened to stumble upon a body floating on the waters of River Olasi (also known as River Ongito), a tributary of River Kuja. She ran back home and informed a neighbour who, after confirming what PW 3 told him, decided to alert the villagers. One of the people who arrived at the scene was Wilson Okello Otieno (PW 8), the retired Chief, who told the court that he noted that the person in the water had injuries and a rope tied around his neck. He decided to call the Assistant Chief, Amos Asingo Keya (PW 9). PW 9 proceeded to the scene and found members of the public gathered. He also noticed that the body had a rope tied around the neck. He called police officers from Migori who came the next day with the deceased’s relatives.

3. At that time, the investigating officer, Corporal Elijah Njeru (PW 14) told the court that Christine Nyawira Gachoki (PW 2) and her relatives had come to Migori Police Station to report that her husband, Titus Wamwiri Wanyoro, had been missing and was suspected to be in Migori. They had tried looking for him without success. After receiving information that a body had been found at River Olasi, PW 14 proceeded to the scene on 6<sup>th</sup> August 2010 with PC Douglas Ongito (PW 11), Lawrence Ngugi Njambi

(PW 1) and PW 2 amongst others. PW 11 testified that at the river, they found a body in the water with a rope tied around his neck and injuries on the head. When the body was retrieved from the water, PW 2 confirmed that it was her husband, Timothy Wamwiri Wanyoro, as he was wearing the clothes she had last seen him in. PW 1 was able to identify the deceased's body. He also noticed that the body had been tied with a rope around the neck with a stone and what appeared to be a stab wound on the left side of the abdomen and an eye and an ear missing.

4. After the body was recovered, it was taken to Rapcom Mortuary Awendo where Dr Emmanuel Oyier (PW 13) conducted the post mortem exam after it had been identified by PW 1 and PW 2. PW 13 observed that the skin was peeling off the body and it had started to decompose. He estimated that it was 6 days old. Significant findings included cyanosis of the face with the eyes protruding, the tongue was blackish and protruding and a 5cm long deep cut on the right parental region but not bone deep. He noted that the neck was wobbling and had a rope around it with bruises and redness on the skin. The lungs were blackish in colour but were not full of fluid. The cervical spine had been fractured and the spinal cord damaged. As a result of the observations, he concluded that the cause of death was cardio respiratory arrest due to lack of oxygen as a result of strangulation.

5. The deceased's relatives and friends gave an account of how the deceased disappeared. The deceased's cousin, PW 1, was a mechanic working in Ongata Rongai. He recalled that some time in February 2010, he was at the garage when he was approached by his friend, Lawrence, who requested him to find transport on behalf of his friend. He referred Lawrence to the deceased who was also his cousin and was in the transport business. Lawrence then took them to meet with the person who turned out to be DW 1. PW 1 told the court that DW 1 and the deceased agreed that the deceased would transport his household items to Migori. PW 1 saw household items being loaded onto a Toyota Hillux Pickup, registration number KAK 301K ("the Pick-up") driven by the deceased. PW 1 recalled that he saw DW 1 and a lady who appeared to be his wife board the Pick-up as they left for Migori. He told the court that a few days later he met the deceased who confirmed to him that he had reached Migori safely.

6. PW 1 told the court that in early August his mother called him inquiring whether he had seen the deceased. He began making inquiries and learnt that the deceased had gone on another trip to Migori but had not returned. PW 1 was told that the deceased's phone was off, although he had called his wife, PW2 and his friend, John Sila, a few days earlier to ask for money for fuel. John Sila suggested that the deceased could have ferried goods for DW 1. PW 1 made further inquiries and in due course spoke to Njenga, the owner of the garage where the deceased had met the DW 1 in February. Njenga described the person who left with the deceased and he immediately recognised it was DW 1. PW 1 called Lawrence to ask about DW 1, and was informed that DW 1 had returned to Nairobi after ferrying his goods to Migori. PW 1 asked to be taken to DW 1's home but Lawrence did not know his home in Migori. Fortunately, he knew a place near Nairobi Women's Hospital where DW 1 had been and when they went there, they found someone called George who told them that DW 1 had been there about two weeks earlier and that he knew DW 1's home in Migori.

7. In the meantime, Patrick Kinyua Kariuki (PW 10), the deceased's employer and owner of the Pick-up, began getting concerned that the deceased had disappeared with his vehicle. He recalled that on 30<sup>th</sup> July 2010, Njenga, a welder in a local garage, informed him that someone wanted to ferry some goods from Migori to Nairobi. He instructed the deceased to go and meet with the customer. After the meeting, the deceased told him that he knew the customer as he had transported his goods from Nairobi to Migori in February. PW 10 confirmed to the court that the deceased left for Migori on Friday, 30<sup>th</sup> July 2010. When PW 10 called the deceased on Saturday, the deceased told him that the customer had not paid for the services. PW 10 called again on Sunday and was told the same thing. He could not reach the deceased by phone on Sunday night and so he went to look for the deceased's wife in Ongata Rongai market on Monday. When he met PW 2, she also mentioned to him that the deceased had problems with the customer. Since he would not get the deceased on Monday, he went on Tuesday to report the matter to the police at Ongata Rongai. On his way from the police station, he met PW 1 who was equally concerned about the deceased.

8. Both PW 1 and PW 10 figured that the deceased had left with DW 1. They went to visit DW 1's friend,

George, who informed them that DW 1 had been in the garage only that Friday. George accepted to take them to DW 1's house in Migori. At about 10.00pm on Tuesday, 3<sup>rd</sup> August 2010, PW 1, PW 10, John Sila and George left for Migori. They arrived at Migori early in the morning and were directed to DW 1's house by George where they found DW 1. PW 1 noted that the lady he was with was the one who he was with when he left for Migori in February and who PW 1 believed to be his wife. They asked DW 1 about the deceased, DW 1 informed them that the deceased had left for Nairobi. DW 1 also told them that he had been called and informed that his vehicle had been impounded and was at Migori Police Station. PW 10 recalled that when they inquired from DW 1 what had happened to the deceased, he confirmed that he had hired his vehicle but that they had disagreed with him over payment.

9. DW 1 led the group to Migori Police Station where they found the Pick-up parked in the police yard. According to PW 10, the vehicle was not damaged though he noticed that one of the tyres was worn out as if it had been stuck somewhere. PW 1 went to report the matter at the report desk and make inquiries whether the driver of the vehicle had been found. The police officers told them that from their inquiries, DW 1 had been with the driver. On narrating his story to the DCIO, DW 1 was placed under arrest. PW 14 informed them that the driver of the vehicle had been killed.

10. The group went to the mortuary to look for the deceased's body but it was not there. PW 1 and PW 10 recorded statements and returned to Nairobi. While in Nairobi, they received information that a body had been found in a river. PW 1 and PW 2 returned to Migori and were taken to the scene by PW 11 and PW 14 to identify the body. PW 1 recalled that after the body was recovered, a post mortem was done and the body released to them.

11. The deceased's wife, PW 2, gave an account of the deceased's movements prior to his death. She testified that the deceased called her in the evening of 30<sup>th</sup> July 2010 to inform her that he was heading to Kisumu on a transport job. She did not manage to reach him on phone after this conversation but he called her back the following Sunday to ask for Kshs. 1,000/-. Since she did not have money, she told him to wait but when she called back he was offline. The deceased called again at about 8.00pm to ask about the money then went off air. On Monday, she went to look for him at his place of work in Ongata Rongai and was informed by the deceased's cousin John Sila and another friend that he had gone with a customer to Migori. She was later informed that PW 1, PW 10 and Sila had left for Migori to look for the deceased.

12. PW 2 further testified that PW 1 called to inform her that they were in Migori where they had found her husband's Pick-up. When the group returned, they told her what had transpired in Migori. Later on, she was informed through Rongai Police Station that a body had been found and that she should travel to Migori to identify it. She left for Migori with PW 1, John Sila and other friends. At Migori, they were led to the river where she identified the body as that of her husband.

13. Before the deceased was discovered dead in River Olasi, PW 14, told the court that on Tuesday, 3<sup>rd</sup> August 2010, he proceeded with PW 11 with the area Chief to a homestead in Kajulu Sub-Location on instructions from the DCIO to make enquiries about a pick-up registration KAK 301K which was suspected to have been stolen. They went to the homestead where they found the Pick-up parked outside a house which was identified as belonging to Barrack Otieno Okik (PW 12). An elder who was present informed them that the vehicle had been brought by DW 1. A young girl at the home retrieved the ignition keys from the house and handed them over to the officers.

14. PW 12 told the court that DW 1 was his step brother. He confirmed that DW 1 was living with him as he did not have his own house. He recalled that DW 1 came to his home on the morning of 2<sup>nd</sup> August 2010 in the Pick-up accompanied by a driver whom he knew as Odhiambo. While the driver remained in the car, DW 1 came into the house. PW 12 recalled that DW 1 told him that he had been with DW 2 in Thim Lich and that he had asked some people to kill a Kikuyu man. When PW 12 sought to find out why DW 1 had committed such an act, he began crying and said he did not ask them to kill the person. Thereafter, DW 1 left saying that he was going to look for fuel as Odhiambo also left to go home.

15. On the evening of 3<sup>rd</sup> August 2010, Odhiambo returned to PW 12's home accompanied by DW 3 and

another person. They told him they wanted payment from DW 1 for bringing the vehicle to PW 12's home and for killing the person DW 1 had instructed them to kill and that they had come to collect a cow as payment as agreed with DW 1. They left with PW 12's cow even though he informed them that the cow did not belong to DW 1. PW 12 reported the incident to his uncle and neighbour, Duncan Oloo Oringo (PW 4) who then reported to a village elder who then informed the Chief. The Chief came the following day with police officers to collect the Pick-up while he was away.

16. PW 4 recalled that on 2<sup>nd</sup> August 2010, he passed by PW 12's homestead and saw the Pick-up parked in the compound. He went to the homestead and found DW 1 who told him that it belonged to one of his guests who had gone to Thim Lich. At about 10.00pm, PW 12 woke him up and informed him that he had been forced to part with a cow by some people who demanded it on account of some unspecified assignment they did for DW 1. PW 4 advised PW 12 to report the matter to the police. PW 4 confirmed that later on the Chief visited PW 12's home with police officers to inquire about the Pick-up. The officers spoke with a young girl who fetched the ignition keys from the house. The officers went away with the car.

17. On the morning of 3<sup>rd</sup> August 2010, Naftali Odoyo Onyango (PW 6), a village elder in Kanyodera Village, testified that he was called by his area Chief and instructed to proceed to the home of PW 12 and inquire about a white pickup parked at PW 12's homestead. When he arrived at the compound, PW 12 narrated to him what had transpired the previous day with DW 1 and the people who came to take a cow. PW 6 relayed the information to the Chief who came to the homestead after a while in the company of police officers.

18. PW 11 confirmed that on 3<sup>rd</sup> August 2010, he proceeded to PW 12's homestead where they found the Pick-up in the compound. He was informed by the villagers that the vehicle had been brought by DW 1. After the ignition keys were retrieved by a young girl, he found a spring file, assessment papers, exercise books, school diary and assessment record belonging to one Bush Karanja of Pinnacle School. The police officer took the Pick-up to Migori Police Station.

19. Daniel Ayugi (PW 5) testified that he was woken up by DW 3 at about 5.00am on 2<sup>nd</sup> August 2010 and requested to assist in pulling a vehicle that was stuck on the road. He knew DW 3 as a cousin and fellow villager. DW 3 was accompanied by a driver he was not familiar with. He went to the road with his oxen and assisted in getting the vehicle out of the mud. He noticed that there was a sack by the vehicle and when he inquired about its contents, DW 3 told him that it was part of a music system. The sack was later loaded onto the vehicle after which the vehicle headed to the direction of River Kuja. He later heard that a body had been found in the river. He made a report to CID officers who were making inquiries. PW 5 confirmed that he did not know the DW 1 or DW 2.

20. PW 5's mother, Rosaline Auma Ayugi (PW 7), confirmed that on that morning, she heard DW 3 call her son out. PW 5 informed her that he was going to help DW 3 tow a vehicle which had been stuck somewhere along the road. He left with the oxen to help out. PW 7 saw a vehicle drive by a short while later. When PW 5 arrived home with the oxen, he confirmed to her that he had assisted DW 3 to get the vehicle out of the mud.

21. After recording the statements of all the witnesses, PW 14 concluded that DW 1 led the deceased to the place where he met his death after duping him into a transport deal knowing that he did not have money to pay for the transport services. He arrested and charged DW 2 because he concluded that DW 1 took the deceased to DW 2's home as he sought from DW 2 assistance and a blessing for a ritual which involved the killing of the deceased. In his view DW 2 had prior knowledge of the killing as he was reportedly a witchdoctor. As for DW 3, PW 14 testified that his investigations led him to conclude that when DW 1's vehicle got stuck, DW 2 went to seek help from DW 3 who led them to another home where they got help. According to PW 14, both DW 2 and DW 3 had advance knowledge of the intended killing of the deceased but did not raise alarm.

22. At the conclusion of the prosecution case, I placed the accused on their defence. In his sworn

statement, DW 1 stated that he had no recollection of the events of 2<sup>nd</sup> August 2010. He could only recall that he was woken up by PW 1 and others in the morning of 4<sup>th</sup> August 2010. Although he admitted that PW 1 had linked him up with the deceased for the transport deal, he stated that the deceased had returned safely to Nairobi as confirmed by PW 1. He disputed PW 12's testimony that he took the car to his home, stating instead that he only saw the vehicle at the police station on the morning of 4<sup>th</sup> August 2010. He cited the testimony that the keys to the vehicle were found in PW12's house by a girl who was not called to testify. He admitted that he knew the deceased and that he had used his services. DW 1 maintained on cross examination that the last time he saw the deceased was in February 2010.

23. In his unsworn statement, DW 2 stated that he had nothing to do with the killing of the deceased. He stated that he was only arrested on 25<sup>th</sup> September 2010 after which he was charged with murder. In his unsworn statement, DW 3 denied knowledge of the deceased and stated that when he was arrested on 15<sup>th</sup> November 2010, he thought he had been arrested over a licence for his butchery.

24. In order to secure a conviction for the offence of murder, the prosecution must prove beyond reasonable doubt (a) the death of the deceased and the cause of that death (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.

25. There is no dispute about the fact and cause of death of the deceased. The deceased's lifeless body was found floating in River Olasi by PW 3. The people who came by the river including PW 1, PW 2, PW 8, PW 9, PW 11 and PW 14 all confirm that they were present when the deceased's lifeless body, with a rope strung around his neck, was pulled out of the river. The deceased's body was identified by his wife PW 2. PW 1, PW 2 and PW 10, who had seen the deceased prior to his death, confirm he was in good health while the post-mortem conducted by PW 13 confirmed that the deceased was strangled to death. Given the fact that the deceased was strangled to death, it cannot be denied that whoever killed him did so deliberately and with malice aforethought within the meaning of **section 206(a)** of the **Penal Code**. Thus, the identity of the killers was the substantial issue left for the prosecution to prove.

26. As none of the prosecution witnesses saw who killed the deceased, the case against the accused is based on circumstantial evidence. Circumstantial evidence has been defined as, "*...evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved*". (See **Mohamed & 3 Others v Republic [2005]1 KLR 722**)

27. The applicable principle in dealing with circumstantial evidence has been subject of various court decisions. The Court of Appeal in **Mwangi & Another v Republic [2004]2 KLR 32** held thus;

*In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypotheses except the hypothesis that the accused is guilty of the charge.*

28. Thus, the guilt of an accused person may be inferred from circumstantial evidence but the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference. As elucidated more recently by the Court of Appeal in **Musili Tulo v Republic NRB CA Criminal Appeal No. 30 of 2014 [2014] eKLR**

*[24] [T]he chain must be so complete that it establishes the culpability of the appellant, and no one else, without any reasonable doubt. That is because circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics. If there is a weak link in that chain, the whole chain must collapse.*

29. Apart from the fact that the deceased died from a deliberate act by a third party, the prosecution relied on the following facts to make its case against DW 1. First, DW 1 knew the deceased, had previously travelled with him to Migori and was the last person seen leaving with him to Migori in July 2010 and that before his disappearance, the deceased had communicated with third parties indicating he was in Migori with DW 1; Second, the Pick-up, which the deceased was driving when he left Nairobi with DW 1, was found in the possession of DW 1. Third, having been found in possession of the Pick-up, the accused did not have any reasonable explanation as to why the Pick-up was in his possession. The case against DW 2 and DW 3 was that they were accomplices of DW 1.

30. From the facts outlined, the case against DW 1 rested on the doctrine of recent possession. In the case of **Rex v Bakari s/o Abdulla [1949] 16 EACA 84** the Court of Appeal for Eastern Africa held that:

*That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal.*

The passage was quoted with approval by the same Court in the case of **Andrea Obonyo v R [1962] EA 592** where it stressed that, *“If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal.”*

31. The Court of Appeal in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005 [2006]eKLR** distilled the ingredients of the doctrine of recent possession as follows;

*It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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 the 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.*

32. For the doctrine to stand, the evidence of recovery of the material property must be sufficient and credible. There must also be sufficient and credible evidence for positive identification of the property as belonging to the murder victim.

33. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like this case, the evidential burden shifts to the accused to explain his possession. That explanation need only be a plausible one but he needs to put it forward for the court's consideration (see **Malingi v Republic [1988] KLR 225**). In **Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008 [2010]eKLR**, the Court of Appeal observed that;

*Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.*

34. DW 1 admitted that he knew the deceased and had indeed engaged him to ferry his household goods to Migori in February 2010. As to whether he engaged the deceased on 30<sup>th</sup> July 2010, the testimony of PW 1, PW 2 and PW 10 is clear and unassailable and it established that the deceased had travelled with DW 1 to Migori on the evening on 30<sup>th</sup> July 2010. PW 10 confirmed that the deceased told him that the customer referred to him Njenga was the person he had previously taken to Migori. Further through telephone calls the deceased made to PW 1 and PW 10 requesting for money, the evidence establishes

firmly that the deceased left for Nairobi to Migori with DW 1 using the Pick-up.

35. The first two of the ingredients of the doctrine of recent possession; that the property belonged to the deceased and that it was found in possession of the accused were proved by the prosecution. The testimony of PW 12 established that DW 1 in the company of another person brought the Pick-up vehicle to his homestead. PW 10 told the court that although the vehicle was registered in his father's name, he is the one who used it for business and had employed the deceased as the driver. In the case of **Charles Njoroge Ngige v Republic NBI CA Criminal Appeal No. 33 of 2015 [2016]eKLR**, the Court of Appeal dealt with this issue as follows;

*The appellant's other ground of appeal was that there was contradiction as regards the ownership of motor vehicle registration No. KAD 166H as the charge sheet indicated that PW 1 was the owner whilst PW 2 testified that she was the actual owner. On our part we find no such contradiction. PW 1 was employed by PW 2 and at the time of the robbery was driving the motor-vehicle hence PW 1 was the special owner.*

36. In other words, for purposes of the law, even though the deceased was not the registered owner of the Pick-up, he was deemed to be the special owner as he was the person in possession and control of the Pick-up when he left Nairobi and went with DW 1 to Migori and upto the time he disappeared. I therefore find and hold that the deceased was the special owner of the vehicle at the time when he disappeared.

37. As to whether the Pick-up was in DW 1's possession, the testimony of PW 12 established that it is DW 1 and a driver who brought it to his homestead. PW 12 stated that the DW 1 was his step-brother and did not have a home of his own while PW 4 and PW 6 confirmed that car was in the compound. PW 4 confirmed that DW 1 used to live with PW 12 and he did not have a home of his own. When DW 1 left the vehicle with PW 12, he left the ignition keys and told him that he was going to get fuel.

38. **Section 4(a)** of the **Penal Code** defines possession as follows;

*“be in possession of” or “have in possession” includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.*

39. Although the case dealt with a case of possession of prohibited publication, the meaning and application of this provision, was highlighted by the Court of Appeal in the case of **Maina Kinyatti v Republic NBI CA Criminal Appeal No. 60 of 1983 [1984]eKLR** as follows;

*Control let alone full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It is enough if the prosecution proves anyone of the following:*

*(i) The accused was in actual personal possession of the publication: or*

*(ii) He knew that the publication was in the actual possession or custody of another Person:*

*(iii) He had the publication in any place (regardless of whether the place belongs or is occupied by him or not) for the use or benefit of himself person. Being in personal possession includes actual holding or having the publication in one's custody. Knowledge that the publication is in the actual possession or one's custody or of another person may be referred from the circumstances and/or proved facts of the particular case.*

40. This is a case where DW 1 was in actual possession of the vehicle when he came with it to PW 12's home. Although he was not the driver, he left it in the custody of PW 12 ostensibly to go and get fuel with the intention of collecting it later. Contrary wise, PW 12 has no claim to the vehicle other than keep it in his compound at the request of DW 1. DW 1 could not deny knowledge of the Pick-up for when he was

confronted by PW 1 and PW 10 on the morning of 4<sup>th</sup> August 2010, he stated that he had been informed that it had been taken to the Police Station. Why would he have been informed that it had been impounded if he had nothing to do with it?

41. From what I have outlined, it is self-evident that the deceased was killed while he had the Pick-up. PW 10 had expressed fear that his vehicle may have been stolen when he went to report the matter to Rongai Police Station after the deceased had disappeared after leaving for Migori. DW 1 did not assert ownership of the vehicle. I therefore find and hold that DW 1 was in possession of the Pick-up within the meaning of **section 4(a)** of the *Penal Code* when the vehicle was found in custody of PW 12.

42. When called upon to explain how the vehicle came into his possession, DW 1 did not offer any reasonable explanation. Instead, he accused PW 12 of lying about him. However, DW 1's denials cannot stand in the face of the testimony PW 12 who had no reason to lie about it. Neither PW 12 nor any other people in the village had a connection or previous relationship with the deceased or PW 10. His bare denial is also rebutted by the collective testimonies of PW 1, PW 2 and PW 10 who confirmed that the deceased had travelled to Migori with DW 1. For the same reason DW 1's insistence that he last saw the deceased during the February trip cannot stand in the face of all the evidence which places him with the deceased and the Pick-Up in August 2010. Besides, when confronted by PW 10 at his house on the morning of Wednesday, 4<sup>th</sup> August 2010, DW 1 confirmed that he had hired the vehicle and stated that he had disagreed with the deceased over payment which confirms what the deceased had told PW 2 and PW 10 before he disappeared. He could not have been speaking about disagreements during the February trip which was long behind them.

43. It is crucial when applying the doctrine of recent possession that the stolen property must be found with the accused shortly after it was stolen. In the present case, there is evidence that DW 1 showed up with the deceased's vehicle 3 days after the deceased had left Nairobi for Migori, and a day after the deceased last spoke with his wife and employer. According to the testimony from PW 2 and PW 10, the deceased left Nairobi for Migori on 30<sup>th</sup> July and they last spoke with him on 1<sup>st</sup> August 2010. PW 12 testified that DW 1 showed up at his compound with the vehicle in the morning of 2<sup>nd</sup> July 2010.

44. As regards DW 2, PW 14 testified that he charged him because he concluded that DW 2 had prior knowledge of the killing of the deceased. He testified that his investigations revealed that DW 1 went with the deceased to DW 2, who was a witchdoctor, to seek his assistance and blessing for a ritual which involved the killing of the deceased and that they agreed on a payment after the ritual took place. His testimony also seemed to suggest that DW 2 had the deceased's Pick-up when it got stuck in the morning of 2<sup>nd</sup> August 2010 and DW 2 went to seek help from DW 3 who in turn got them help from PW 5. However, this testimony from PW 14 is hearsay. The only other witness who mentioned DW 2 is PW 12 who testified that DW 1 had informed him during the morning visit on 2<sup>nd</sup> August 2010 that he had been with DW 2 in Thim Lich where he had asked some people to kill a Kikuyu man.

45. The prosecution case against DW 3 is grounded on the testimony of PW 5 and PW 7 who both confirmed that DW 3 sought help from PW 5 to tow a vehicle which was stuck along the road going towards the river where the deceased's body was recovered. PW 5 and PW 7 recalled how DW3 went to seek PW5's help to tow a vehicle that had been stuck nearby. There was also the evidence of PW 12 also recalled that DW 3 was one of the people who came to demand a cow from him on account of having brought the Pick-up and for killing the person DW 1 had instructed them to kill.

46. Although there is great suspicion that DW 2 and DW 3 had something to with the murder, the suspicion far outweighs the evidence against them and I give them the benefit of doubt. As observed by Court of Appeal in *Musili Tulo v Republic (Supra)*, "*There may well be serious suspicions that the appellant killed his wife, but suspicion alone, however high, has never sustained any conviction for a criminal offence.*" The prosecution's evidence, when considered cumulatively, does not form a complete chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the two accused.

47. Having analysed the evidence, I find that the totality of the evidence shows that DW 1 duped the deceased to go to a trip knowing that he did not intend to pay him. The deceased, who had come with DW 1 previously to Migori, came willingly to Migori. They left Nairobi together on Friday, 30<sup>th</sup> July 2010 and arrived in Migori the next day. From what DW 1 told PW 10, they had a disagreement over payment causing the deceased to call PW 2 for money and to inform PW 10 that he had not been paid. Thereafter, the deceased could not be reached on phone. The last time the deceased spoke to anyone on phone was on Sunday, 1<sup>st</sup> August 2010. At this point DW 1 acting with other persons killed the deceased by strangling him and proceeded to dump the body in the river. He then took the deceased's vehicle to his step brother's home on 2<sup>nd</sup> August 2010 where it was recovered by police on 3<sup>rd</sup> August 2010. The deceased's body was found at River Olasi on 5<sup>th</sup> August 2010 and retrieved on 6<sup>th</sup> August 2010.

48. The evidence shows DW 1 as the only person with any connection with the deceased in Migori where the deceased met his death. The Pick-up used to ferry DW 1 and his goods was later seen at home where he stayed, the same vehicle was seen heading towards a river, where the deceased body was found dumped. Only he could explain what happened to the deceased. I find the chain of evidence forming the prosecution case and which I have outlined so strong and complete and when pieced together one cannot arrive at any other hypothesis other than that DW 1 murdered the deceased with others. His defence did not shake the prosecution case at all.

49. I therefore find the 1<sup>st</sup> accused, **ENOCK OKOTH KOI**, guilty of the murder of **TITUS WAMWIRI WANYORO** and I convict him accordingly. The 2<sup>nd</sup> accused **MORRIS OKINYI MAENDA** and the 3<sup>rd</sup> accused, **JOSEPH NYAWANDA AKOTH**, are hereby acquitted of the charges and shall be released forthwith unless otherwise lawfully held.

**SIGNED AND DATED at NAIROBI this 14<sup>th</sup> day of July 2016**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MIGORI this 19<sup>th</sup> day of July 2016.**

**A.C.MRIMA**

**JUDGE**

Mr Sagwe instructed by S. M. Sagwe and Company Advocates for the 1<sup>st</sup> accused.

Mr Ondari instructed by Sonye Ondari & Company Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> accused

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the Prosecution.