



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL CASE NO 58 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**YASIN KIPTOO KIMUTAI.....1ST ACCUSED**

**PAUL ANJAH NJIRI.....2ND ACCUSED**

**J U D G M E N T**

The two accused persons are charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The Particulars of the offence are that on the **17<sup>th</sup> day of October 2010 at Keptumbo village in trans Nzoia County murdered Bakari Makina Mulongo**.

The prosecution called a total of 7 witnesses whose evidence can be summarised as hereunder.

**PW1 Peter Wesonga Mulongo** is the deceased brother. He testified that he heard about the disappearance of the deceased on 18/10/2010 having seen him the last time on 17/10/2010.

He then decided to report his disappearance. On the said 18/10/2010 at 6 pm they called his mobile phone and was answered by someone else who claimed to be at Kiminini. Later someone else called his younger brother demanding a sum of Kshs 22,000/- which allegedly the deceased owed. Because of numerous calls they reported the matter to the police as well as Safaricom. The police established that the person calling was at Cherengani.

He further said that he sent Kshs 100 to mobile No. **[particulars withheld]** which identified the name of one Yasin Kimutai the 1<sup>st</sup> accused herein. The police called the assistant chief who apparently knew the accused. Later the 1<sup>st</sup> accused was traced and arrested at a bar at Kipkeikei. He told the police the whereabouts of the 2<sup>nd</sup> accused who was equally arrested while asleep in a room nearby. The house was searched and the deceased motor bike recovered.

Later at around 8 pm the 1st accused directed the police as well as the witnesses to where the deceased body was. The same was exhumed and taken to the mortuary.

He said that the deceased body had a cut on the neck and on the face. The 1st accused house was equally searched and the deceased voting card, Sim card and identity cards were recovered. The motor cycle number plate number **[particulars withheld]** was equally recovered.

**PW2 Salim Jesse Muniangi** is equally deceased brother. He stays in Kakamega. He got the news about the deceased disappearance on 19/10/2010 through the deceased wife. He travelled to Kachibora and on

that evening he received a phone call through a private number demanding Kshs 22,000/- so as to release the deceased who had been kidnapped. He further said that on 26/10/2010 they sent Kshs 100 to that mobile number 0727718624 and it showed the name of Yasin Kiptoo Kimutai.

They arranged to buy the deceased phone from the 1<sup>st</sup> accused where in the process he was arrested by the police. The 1<sup>st</sup> accused led them to the house where the 2<sup>nd</sup> accused was and he was too arrested. The motorcycle was recovered in the same house. He was also present when the 1<sup>st</sup> accused led them to the scene where the deceased body was recovered.

**PW3 Mildred Anyona Lucheli** is the deceased wife. She said that she last saw the deceased on 17/10/2010 when he left for work. Unusually, he had not return home by 8.30 pm as expected. She tried calling his mobile number in vain. She then informed his brothers. The following day someone received his call and demanded a sum of Kshs 22,000/- or else they would only recover deceased body. She too said that they sent Kshs 100 to that number and the name of the 1<sup>st</sup> accused emerged as the owner of that number.

Later she was called to identify the deceased body.

**PW4 Ephraim Wekulo Mulongo** who is also the deceased brother was notified of the incident by PW3, the deceased wife. He said that someone called them and demanded a sum of Kshs 52,000/- before releasing the deceased.

He sent the sum of Kshs 125 to that number and the name of Yasin Kimutai was indicated. They sent to another number and the name of Abraham Cheruiyot was shown. They went ahead to arrest the 1<sup>st</sup> accused who showed them where the 2<sup>nd</sup> accused was.

He said Abraham Cheruiyot was not found. He confirmed that the motorbike was found in the house where the 2<sup>nd</sup> accused was found sleeping.

**PW5 Kipchumba Koskei Sitienei** testified that one Ngala brought in a tenant who wanted to rent his house. He agreed to rent the same at a cost of Kshs 250 per month. He paid Kshs 100 and was to look for the balance later. Around October 28 2010 someone told him that a motorcycle owned by the tenant, 2<sup>nd</sup> accused, had been found and that he had been arrested. The same had been taken by the police.

He identified the 2<sup>nd</sup> accused as his tenant although there was no formal tenancy agreement between them.

**PW6 PC David Alari** said that they had received a report of a missing person. He learned that the person was communicating with deceased relatives using 2 Safaricom numbers. The same were referred to Safaricom by the OCS and the names of Yasin Kimutai and Abraham Cheruiyot emerged as the bearers. He said that they traced the 1<sup>st</sup> accused and managed to arrest him at Kipkeikei trading centre at a bar. They also arrested his accomplice the 2<sup>nd</sup> accused after getting assistance from the 1<sup>st</sup> accused. They recovered the motorcycle in the room where the 2<sup>nd</sup> accused was. The said motorcycle did not have a number plate.

On 28/10/2010 with the assistance of the 1<sup>st</sup> accused the said witness with the contingent of other witnesses went to the place where the deceased body had been buried. They recovered it and photographs were taken. The deceased voters card, Safaricom cards and number were recovered in the house of the 1<sup>st</sup> accused. Safaricom number namely 0727-718624 which was registered in the 1<sup>st</sup> accused name and which had been used to solicit for the ransom was recovered. The motorcycle insurance was equally recovered. The motorcycle number plate was equally recovered. He also availed himself during the postmortem of the deceased body.

**PW7 David Kipchumba** the officer attached to the scenes of crime by then produced several sets of

photographs which included the jembe, deceased body and the scene generally. He told the court that he was present when the body was recovered .

He also produced the postmortem report.

When put on their defences the 1<sup>st</sup> accused gave unsworn evidence.

He said that on 27/10/2010 he was working as a pool attendant when police officer came at around 1 pm. They then took him outside where he was interrogated.

They asked for his phone which was charging at the counter. He told them that his other phone was lost namely line No 0727 718-624 and the one he had was 0719 -404190.

They also inquired about one Abraham Cheruiyot whom he said had taken his phone as well as that of the barman and cash and had disappeared. He was then arrested and taken to Kwanza police station and was told of a lost person .

At around 7 pm together with the police officers they went to the farm of his neighbour one Benjamin who took them to the scene where the body was recovered. They then went to his house where they recovered the phone numbers he had written on a piece of paper. They also according to his testimony went to the home of one Abraham Cheruiyot where some items were recovered. He denied any involvement with the deceased death.

The 2<sup>nd</sup> accused equally gave unsworn evidence denying the charge . He said that on 28/10/2010 he went to Kipkeikei where he left the phone to be charged. As he waited for the shop where he worked to be opened he was approached by a person in civilian clothes who began to interrogate him.

They went to his home and conducted a search. He was arrested and put in the cells at Kachibora police station till 6 pm when they went with him to Kipkeikei and did a search at some farm. He said that he was shocked to see a dead body recovered.

He denied the charge.

### **Analysis and Determination**

Having read the proceedings herein together with the two opposing written submissions by the parties counsels, its clear that there was no eye witness to the murder of the deceased herein. All the prosecution witnesses came after the fact. The recourse consequently would have to be circumstantial evidence. That kind of evidence was well put by the court of Appeal in ***Sawe Vs Rep (2003) KLR 364*** where it rendered itself as follows:-

**(1) “In order to justify on the circumstance evidence, inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt -----.**

**(2) Circumstantial evidence can be a basis of conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.”**

I find that the prosecution relied heavily on the phone calls made demanding the payments of kshs 22,000/- or kshs 52,000/- before the deceased could be released. Although there was no confirmation from the mobile provider (Safaricom) Its evidently clear that the two numbers namely 0719-404 190 and 0727 718 624 was owned by the 1<sup>st</sup> accused. This was duly confirmed by his unsworn evidence.

Clearly when the police traced the accused numbers it all pointed to him which led to his arrest. The Assistant chief confirmed to the police that the 1<sup>st</sup> accused was his subject.

Further I am satisfied that it was on his own volition that he cooperated with the police in showing them where the deceased body was. There is nothing to show that he was duped or coerced. Infact some of the deceased personal effects were recovered from his house including the motorcycle number plate.

On those two grounds I find that the 1<sup>st</sup> accused had a hand in the disappearance and subsequent death of the deceased.

As regards the 2<sup>nd</sup> accused, I am satisfied that he was an accomplice to the 1st accused. Although the motorcycle was not produced or even photographed all the witness testified that it was recovered from the room where the said second accused had rented. It is infact the 1<sup>st</sup> accused who had led the police to the room where the 2<sup>nd</sup> accused was. The number plates of the said deceased's motorcycle was eventually traced to the 1<sup>st</sup> accused's house.

Further PW5 the 2<sup>nd</sup> accuseds landlord did testify that he had rented the room to the 2<sup>nd</sup> accused. His evidence was never rebutted.

Putting the above evidence together I find the accused defences not water tight enough to oust that of the prosecution. I find that indeed the two had a hand in the disappearance and subsequent death of the deceased. Whatever the motive was they succeeded in killing and burying his body never to be seen. As to allegation of the 1st accused that one Abraham Cheruiyot ought to be a suspect, the same in my finding for now is not sufficient.

Even if he was to be charged still I find that the evidence against the two jointly and severally to be strong enough to warrant a conviction.

The post mortem report shows the injuries sustained by the deceased to be consistent with what the witness saw, namely injury on the neck.

In the premises I do find that the prosecution proved its case beyond a shadow of doubt and I proceed to convict each of the accused herein with the Murder of Bakari Makina Mulongo under the provision of Section 203 of the Penal Code.

Dated this 8<sup>th</sup> day of September 2016.

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**H.K. CHEMITEI**

**JUDGE**

**Bororio for accused**

**Abele for prosecution**

**Kirong- Court Assistant**