



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**CRIMINAL CASE NO. 76 OF 2014**  
**(FORMERLY OF KISII HCCRC NO. 75 OF 2010)**

**BETWEEN**

**REPUBLIC .....PROSECUTOR**

**AND**

**TOBIAS OPIYO OBWOLLA ..... 1<sup>ST</sup> ACCUSED**

**JULIUS OUMA OBWOLLA ..... 2<sup>ND</sup> ACCUSED**

**R U L I N G**

1. The accused persons, **TOBIAS OPIYO OBWOLLA** and **JULIUS OUMA OBWOLLA** were both charged with the murder of **PETER OTIENO OBER**. The murder is said to have occurred on 24<sup>th</sup> July 2010 at Kamgundho Village within Migori County on 24<sup>th</sup> July 2010. The 1<sup>st</sup> accused was arrested, charged and appeared in court to plead on 20<sup>th</sup> September 2010 while the 2<sup>nd</sup> accused took his plea on 8<sup>th</sup> November 2010.
2. The hearing commenced on 17<sup>th</sup> July 2013 before Sitati J., at the High Court at Kisii. Three witnesses testified. A fourth witness testified on 27<sup>th</sup> May 2014. Once the High Court at Migori was established, this matter came up for hearing on 15<sup>th</sup> October 2015. The accused elected to have the matter proceed from where it had reached and I obliged and gave directions under **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. I accordingly fixed the matter for hearing on 21<sup>st</sup> November 2014. On that day the prosecution notified the Court that the two remaining civilian witnesses; Phoebe Atieno Lawi and Kenton Ochieng' had been bonded but did not come due to alleged threats. Counsel for the accused denied that there were any threats. I directed the Police to intervene and ensure that witnesses attend Court on 13<sup>th</sup> February 2015. I accordingly issued summons to the witnesses and that they be notified that they should show cause why they should not forfeit Kshs. 500/= for failing to attend Court after being bonded.
3. On 13<sup>th</sup> February 2015, the prosecutor notified the Court that witnesses were not summoned as her office did not follow up the matter. Despite opposition from accused's Advocate, I reluctantly allowed the adjournment and directed that summons and notices be issued for witnesses to attend Court on 4<sup>th</sup> May, 2015 when the matter was scheduled for hearing.

4. As the witnesses were not present on 4<sup>th</sup> May 2015, I issued warrants of arrest and directed that the matter be heard on 6<sup>th</sup> May 2015. On 6<sup>th</sup> May 2015, PC David Rop of Awendo Police Station informed the Court that the Investigating Officer had been transferred and when he went to the home of the witnesses on the day prior to the hearing, he did not find the witnesses although he left information with the Assistant Chief. He prayed for more time to locate the witnesses. I once again obliged despite spirited opposition from the defence and fixed that matter for hearing on 16<sup>th</sup> July 2015. The warrants of arrest were still in force.
5. When the matter came up for hearing today, 16<sup>th</sup> July 2015, the witnesses were not present. PC Simeon Chengo of Awendo Police Station stated that he received the warrants on 6<sup>th</sup> May 2015 and he went to the home of the witnesses with the assistance of the Chief on the same day, he did not get the witnesses. He further went there on 15<sup>th</sup> July 2015, a day prior to the hearing but he did not find them.
6. I was not satisfied with the explanation as it appears that the police officer only went to the witnesses home a day prior to the hearing yet the warrants of arrest had been in force since May 2013. I summoned OCS, Awendo to explain this state of affairs but she has not turned up by the time I delivered this decision.
7. For the reasons I have outlined above, I rejected the prosecution's application for adjournment and ordered the prosecution to proceed. Learned Counsel for the prosecution then applied to withdraw the case against the accused.
8. Defence counsel, Mr. Okenye for the 1<sup>st</sup> accused and Mr. Okenye for the 2<sup>nd</sup> accused opposed the application. They saw the application as an attempt to evade the order rejecting the application for adjournment. They urged that in light of what had transpired the prosecution should be ordered to close its case.
9. This case has been before this Court since the year 2010. It is a disgrace to our system of justice that such cases still occupy our Court rolls. Nevertheless, the reality is that whereas such cases exist, it is the duty of all actors to ensure that such matters proceed for hearing. In this case the Court has given the prosecution all the opportunities to complete its case including exercising its coercive powers to ensure the witnesses attend court. Unfortunately the court's action has been taken positively.
10. The duty of the court is to balance the interests of justice on both sides of the scale. On the side of the public is the fact that wrong doers must be prosecuted to the fullest extent of the law. On the other hand the accused are entitled to a speedy prosecution within a reasonable time.
11. In this case and from the facts I have outlined, the scales now tilt in favour of the accused who have waited for over four years to have their trial completed. The Court has exercised its coercive power and it must now put a stop to further prevarication by the prosecution.
12. If the prosecution want leave to withdraw the case, such leave shall be granted and is hereby granted. However, four witnesses have testified and I have rejected the prosecution's application for adjournment. The application to withdraw the case is a collateral attack on the order rejecting the adjournment. I now acquit the accused and set them free. The sureties to this case are discharged.

**DATED and DELIVERED in MIGORI this 16<sup>th</sup> day of July 2015.**

**D.S. MAJANJA**

**JUDGE**

**Mr Okenya instructed by C. A. Okenye and Company Advocates for the 1<sup>st</sup> accused.**

**Mr Ondari instructed by Ondari and Company Advocates for the 2<sup>nd</sup> accused.**

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