



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE NO. 17 OF 2012
(FORMERLY KISII HCCR NO. 6 OF 2012)

BETWEEN

REPUBLIC PROSECUTOR

AND

SILAS OBONYO NUNDA alias MOSES ODUOR OMONDI ACCUSED

JUDGMENT

1. On 15th January 2012 two boys from Mbita Primary School came to Mbita Police Station and reported that as they were heading to Lake Victoria they spotted some bones in a nearby bush. The Investigating Officer, Corporal Edwin Nyongesa (PW 8), went to the scene accompanied by the boys and other police officers and found that there were human bones comprising a skull and a complete skeleton. There was also a pair of shoes, pieces of clothes and socks.
2. The remains were later identified as those of **MOSES BARRACK OPIJAH** (“the deceased”) who had been reported missing. As a result of investigations, this court was informed on 30th January 2012 that **SILAS OBONYO NUNDA alias MOSES ODUOR OMONDI** (“the accused”) had murdered the deceased on 28th December 2011 at Mbita Township, Mbita District within Homa Bay County contrary to **section 203** as read with **section 204** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The accused pleaded not guilty and the prosecution marshalled 8 witnesses while the accused gave sworn testimony.
3. On 30th December 2011, PW 8 was at the Mbita Police Station when he received a report from Nicholas Okello Owiti (PW1) who reported that on 28th December 2011, he had lent a motorbike to the deceased at around 11.00am and the deceased had not returned it. PW 1 testified that it was normal for him to lend the deceased his motorbike. The deceased had informed him that he had been called by a customer to go and pick him near Mbita Primary School. PW 1 did not tell PW 8 who the customer was when he made the initial report.
4. When the deceased did not turn up, PW1 started making inquiries about the customer deceased had gone to pick. Since he could not reach the deceased he got the number of the customer from Maxwell Ochieng Mboya (PW 4), a motorbike rider, who gave him the number of a customer he had given the deceased to take to Mbita Secondary School. When he called that customer, the customer told him that he had given the deceased another customer to take to Mbita District Hospital. The number of the customer, which he saved as Musa’s Customer on his phone, was

0711***949.

5. PW 4 recalled that on 28th December 2011 at about 11.00am, the deceased borrowed a motorbike from PW 1 to go and pick up a customer from Mbita Secondary School after he had received a phone call from him. In his testimony he denied that he knew the customer the deceased was going to pick from Mbita Secondary School.
6. Since the deceased did not return the motorbike, PW 1 went and informed the deceased's uncle Paul Keta Odundo (PW 5). PW 5 testified that he was staying with the deceased while the deceased was attending Waware Secondary School. He further testified that the deceased did not return home on 28th December 2011 after he left to go and pick a customer. On that day he called the deceased mother, Mary Akumu Opija (PW 3) to inquire whether the deceased had been to their home in Kanyamwa, Ndhiwa. PW 3, on her part, confirmed that the deceased came home for two days in December but he returned to Mbita on 27th December 2011. PW 3 went to Mbita to look for the deceased without any success whereupon she returned home.
7. On 16th January 2012, PW 5 heard that the deceased's remains had been found and were at Homa Bay District Hospital Mortuary. On 17th January 2012, PW 5 and George Otieno Kungu (PW2), the deceased's uncle, heard rumours that the suspect who had killed the deceased was residing near Mbita Primary School. PW 5 testified that he and other members of the public traced the accused in his house at night.
8. PW 2 testified that the deceased was his nephew and that on 17th January 2012, he met with PW 4 and PW 5 at Mbita Town at about 5.00pm. They decided to go to the home of the suspect whom they had heard resided in a house next to Mbita Primary School. They went to a house and found the door of the suspect's room locked. They continued to investigate and at about midnight someone came to one of the houses accompanied by a girl. PW 2, PW 4 and PW 5 pounced on him, tied and arrested him and took him Mbita Police Station. PW 2 stated in cross-examination that the information he heard was that the suspect who had killed the deceased was called Moses Omondi.
9. On the next morning PW 8 took the accused accompanied by PW 2, PW 4 and PW 5 to the accused room which they searched and recovered the following items; an M-Pesa Registration form dated 8th April 2011 in the name of Moses Oduor Omondi with telephone number 0711***949 (Exhibit No. 5), a key holder and keys (Exhibit No. 2), an identity card no. 25***612 in the name of Moses Oduor Omondi (Exhibit No. 4). PW 8 testified that when the accused was brought to the police station he gave his name as Moses Oduor Omondi and that he had with him a Nokia E77 cell phone (Exhibit No. 3). PW 8 removed the sim card from the telephone and it was for line 0711***949. PW 8 further testified that he recovered an identification card No. 25***612 in the name of Moses Oduor Omondi. The items which recovered were identified by the witnesses. The set of key and key holder (Exhibit No.2) were identified as those of the deceased by PW2, PW 3, PW 4 and PW 5. PW 8 denied that the accused gave him his identity card in the name of Silas Obonyo Nunda.
10. After investigations, PW 8 managed to find the accused's sister, Angeline Okoth Nunda (PW7). She testified that the accused was her real brother and he was called Silas Obonyo Nunda. She stated that he was a fisherman and he was staying alone near Mbita Primary School in a house that had several rented rooms which she had visited before. She stated that his cell phone number was 0711***949. She had last seen him two days prior to his arrest and she saw him at the police station after he had been arrested on 21st January 2012.
11. The autopsy on the deceased's body was conducted on 20th March 2012 by Dr Ayoma Ojwang (PW 6). PW 5 went to Homa Bay District Hospital Mortuary to identify the deceased's remains. He noted that the deceased was still wearing the shoes (Exhibit No. 6) he had given him and that shirt and trousers were his although they were torn. He confirmed that the remains were those of

the deceased. PW 6 observed that the body was of a male person aged about 16 years old in old tattered clothes. On external appearance he noted that only dismantled skeletons were present and with no flesh. There was a black rubber band tied at one point most probably used strangulation of the victim. He concluded that the cause of death was asphyxia as a result of strangulation based on the presence of the rubber band.

12. When called upon to make his defence, the accused elected to give sworn testimony. He denied that he was called Moses Oduor Omondi. He stated that his name was Silas Obonyo Nunda and that he gave his identity card to PW 8 when he was arrested. He further stated that he was a fisherman to Mbita Beach. He denied that he knew the deceased. He testified that when he was arrested he informed the police that he was not Moses Oduor Omondi and that he was not the holder of the identity card (Exhibit No. 4). He admitted that he was arrested at night in his house with his girlfriend who was assaulted by members of the public. As regards the items that were recovered, the accused testified that the same were recovered in the house of his neighbour Moses Oduor Omondi. He testified that he was the holder of Identity Card Registration Number 22892024 which was in the name of Silas Obonyo Nunda from Nyando District, Nyando Division, Kochogo Location, Kochogo North Sub-location, Kanyabande Village. According to the certificate by the County Registrar of Person dated 27th October 2015, his father was Remjius Nunda Nyaoro and Lilian Juma Nunda. He produced the certificate as an exhibit.

13. The prosecution case is grounded on circumstantial evidence since there was no eye witness to the killing of the deceased. Several cases provide guidance in the manner circumstantial evidence is to be approached. In **R v Taylor Weaver and Donovan [1928] 21 Cr. App. R. 20**, the principle as regards the application of circumstantial evidence was enunciated in these words:-

Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

14. In **Mwita v Republic [2004] 2 KLR 60, 66** the Court of Appeal stated as follows:-

*It is trite that (sic) in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt; see **Simon Musoke v Republic [1958] EA 715** where the following extract from **Teper v R [1952] AC 480, 489**, was quoted [1958] EA at page 719:-*

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

15. And in **Mwangi & Another v Republic [2004] 2 KLR 32** the Court of Appeal stated:-

*It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that 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 hypothesis except the hypothesis that the accused is guilty of the charge – see for example **Rex v Kipkering Arap Koske & Another [1949] 16 EACA 135**.*

16. In order to complete the cycle of circumstantial evidence pointing to the accused, the prosecution case was that the deceased's remains were found in the vicinity of the accused's house. Prior to his disappearance the deceased was normal and could not have died from illness or other natural causes. That the deceased was called by a customer bearing number 0711***949 and that the bearer of the number was the last known customer he picked before his disappearance. That the accused was connected to that number as it was the number of the Nokia E77 cell phone (Exhibit

- No. 3) which he handed over to the police when he was arrested which had the sim card bearing the number (Exhibit No. 3A) and that was reflected in Safaricom number plate (Exhibit No. 1) and the M-Pesa Registration Form (Exhibit 5) found in his house when it was searched. The prosecution contended that the accused identified himself as Moses Oduor Omondi when he was arrested and he was found in possession of the said documents in his house. Finally, that he was found in possession of the deceased's keys and key holder (Exhibit No. 2). I am now called upon to establish each link closely to establish whether when taken together they point irresistibly and exclusively to the accused's guilt.
17. There is irresistible evidence that the accused was connected to the murder of the deceased. He was found in possession of the deceased keys and keyholder (Exhibit No. 2). The set of keys and the key holder comprising a plastic plates of the Kenyan flag and bank notes taken together were sufficiently unique and the witnesses; PW 1, PW 2, PW 3 and PW 5 identified that keys and key holder as belonging to the deceased. The keys, amongst the other items, were found in the accused's room.
 18. In his defence, the accused stated that the items were collected from his neighbour's house. I reject the accused's defence that the items were found elsewhere other than his house. PW 2 and PW 5 arrested the accused on the night of 17th January 2012 at his house. The accused admitted the fact that he was arrested from his house when he was with his girlfriend. Thus when the police officers including PW 8 went to his room on the next day, they proceeded to the same house, where the other witnesses had been on the previous day, and collected the keys and key holder, the Mpesa registration form and sim card plate which were in the name of Moses Oduor Omondi. Since the items found in the accused's possession including the sim card bearing the number belonging to Moses Oduor Omondi, the original MPesa application form and the sim card plate were of such a personal nature, the accused had a duty to provide a reasonable explanation how these items came into his possession. No such explanation was forthcoming or rather his explanation that the items were found in his neighbour's house rang hollow.
 19. The defence suggested that the murder could have been committed by Moses Oduor Omondi. In this respect the prosecution needed to eliminate that possibility that an unknown person other than the accused could have committed the murder. However, as PW 8 stated, it is the accused who introduced himself as Moses Oduor Omondi and the items belonging to Moses Oduor Omondi found in his house. Although the accused denied that he was Moses Oduor Omondi, his own sister, PW 7, testified that the accused was living at Mbita Primary School and that his cell phone number was 0711***949. She confirmed that he was the person who was at the police station after he had been arrested.
 20. The prosecution evidence forecloses any possibility that a person known as Moses Oduor Omondi could have murdered the deceased. The accused is the one who used the persona of Moses Oduor Omondi to divert attention from his own felonious act. He had the documents of Moses Oduor Omondi and used his cell phone number. He could not provide a reasonable explanation why he had those documents. The fact that he had the accused keys and key holders in his house completes the cycle of evidence pointing to the fact that he murdered the deceased whose remains were found nearest to the last room where he lived on the tenement house nearest to the lake. According to PW 8, the place where the deceased body was found was about 50 metres from the accused's room and was not a public path.
 21. The prosecution did not call the customer who is alleged to have given the telephone number to PW 1 of the customer who is alleged to have been the last person to carry the deceased. In my view, this was not necessary as ultimately the deceased's property was found in the accused's room and in light of the other evidence the accused is clearly implicated. It was also not necessary to call the two boys who recovered the deceased's body as the issue was not in dispute and PW 8 who went to the scene testified to the fact of recovery of the deceased's remains. I also do not think it was necessary to find Moses Oduor Omondi because the entire evidence pointed to the accused and not a third person known as Moses Oduor Omondi as the perpetrator of the murder.

22. Having considered all the evidence, I find the accused **SILAS OBONYO NUNDA alias MOSES ODUOR OMONDI** guilty of the murder of **MOSES BARRACK OPIJA** and I convict him.

DATED and DELIVERED at HOMA BAY this 6th day of November 2015

D.S. MAJANJA

JUDGE

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

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