



**State v Owuor (Criminal Case E002 of 2022)  
[2024] KEHC 7691 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E002 OF 2022**

**RE ABURILI, J  
JUNE 25, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**FREDRICK ODHIAMBO OWUOR ..... ACCUSED**

**JUDGMENT**

1. The accused person Fredrick Odhiambo Omondi is charged with the of the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the night of 30th and 31st December 2021 at an unknown time at Daraja Mbili area in South Kapuonja sub-location within Kisumu West sub-county in Kisumu County, the accused murdered one Eunice Aoko. The accused person pleaded not guilty to the charge against him and the matter proceeded to trial. The prosecution called a total of seven (7) witnesses in support of its case which is summarised herein below.

**The Prosecution’s Case**

2. PW1 Elias Owino Ngala testified that he knows the accused and that he knew the deceased, Eunice Aoko, as he was the one who found her body. It was his testimony that on the 31<sup>st</sup> December 2021 at around 5pm, he left home for the River and on reaching the river, he saw a body of a dead person. He testified that he called his village elder to the scene but the village elder did not show up. PW1 testified that he called the Area Chief who was also not responsive so he boarded his friend’s boda boda and they proceeded to Daraja Mbili Police Post. It was his testimony that eventually, the police from Maseno went to the scene. PW1 testified that the deceased’s body had a swollen neck and bleeding in the ear after it was removed from the river. He further testified that the people at the scene knew the deceased as she was a sister to one of them.



3. PW2 Phillipus Omondi Awiti testified that the deceased, Eunice Aoko, was his village mate. He testified that he also knew the accused who rented and lived in a house behind his, a distance of about 70 metres. It was his testimony that on the night of 30<sup>th</sup> December 2021 at about 7am, while in his house, he heard the accused and a lady shouting from the accused's house as if they were quarrelling. He testified that he opened his window and asked what was happening but did not leave his house and went to sleep as the noise went down.
4. It was his testimony that the following day at about 7am, he went about his usual duties in the course of which he found the accused's house locked as was the norm. It was his testimony that on that day when he returned from work, he heard that a lady's body had been found dumped in the river and that it turned out that the body was that of the deceased, Eunice Aoko, so he called the owner of the plot where the accused lived and inquired of him because he connected the shouting he heard at night to be from the accused and a lady.
5. PW2 testified that he told the owner of the plot, Julius Odhiambo a.k.a Mobulo, to investigate the accused in regard to the death of Eunice because he heard screams from the accused person's house the previous night. It was his testimony that later on, the police went to the plot where the accused lived, broke into the house and removed some things from the toilet. It was his testimony that the police found blood on the walls, curtains and mattress recovered from the accused person's house and they removed shoes from the toilet which items PW2 identified in court. PW2 further identified the accused in court.
6. In cross-examination, PW2 testified that the deceased's body was found in a river that was separated from the accused's house by a field. He testified that he heard about 3 – 4 noises from where the accused lived near the road though he did not know the other voices. It was his testimony that the deceased never lived with the accused as the accused lived with his wife who was absent from time to time.
7. In re-examination, PW2 stated that the distance from his house to the river was a walking distance.
8. PW3 Nicholas Otieno Oranda testified that he worked with the accused in the jua kali sector and that the deceased was his sister who was married but had separated from her husband. He testified that on the 31<sup>st</sup> January 2022 at about 8pm, Police officers called him informing him that they had found his sister's body and taken it to JOOTRH.
9. PW3 testified that he went to the morgue and found her body which had no clothing and further that he noticed that she was bleeding from the nose. He testified that he went home and informed his parents of the death of his sister. It was his testimony that on the 1<sup>st</sup> January 2022 he was called and informed that his late sister's items were found where the accused lived. He testified that he went and confirmed that the brown purse (PMFI 4) and red shoes PMFI 3 were items belonging to his sister, the deceased. He further testified that in the house, the police also recovered blooded curtains and a mattress. It was his testimony that when he went to Fredrick Odhiambo's house, which was a single room, there was blood on the wall, on the curtains and the mattress.
10. In cross-examination, PW3 testified that he used to see the deceased with the purse and red shoes which were recovered. He testified that he was the one who got the wire which was used to remove the purse and the leather shoes from the toilet which was in the residence where the accused lived.
11. PW4 Julius Odhiambo Okoth testified that he knew the deceased as a customer while the accused was his tenant and also a customer. It was his testimony that on the 1<sup>st</sup> January 2022 at noon, he received a call from his neighbour Phillipus who called saying that he heard people quarrelling at night at his place and that now, the tenant of PW4 was missing. It was his testimony that he invited Phillipus to his



house, explained the issue further to him so PW4 called the police officer Mr. Simiyu who informed him that he had already received information that some lady who lived with PW4 's tenant had been found dead in a river.

12. PW4 testified that the police got to the residence of the accused and removed the red shoes and the purse which PW4 identified in court, from the accused person's pit latrine and got into the house and found items scattered all over and broken. He testified that he found the mattress that he had rented out to the accused already outside. It was his testimony that he had known the accused for a long time but that the accused had been his tenant that December and was paying Kshs. 3,000.
13. In cross-examination, PW4 testified that his plot was not fenced and that the door to his pit latrine was always open. It was his testimony that he knew the river where the body was found and that it was 30 – 40 metres away from his and Phillipus house. He testified that only Fredrick lived in the rental house.
14. PW5 Godwin Khamala Waliama, a Senior Government Analyst, Kisumu Government Laboratories testified that they received an exhibit memo on 11<sup>th</sup> January 2022 from PC Masika of DCI Kisumu West requesting them to do a DNA examination on submitted items. He testified that the items submitted to them were:
  - i. 2 cotton swabs with red stains - A1 and A2.
  - ii. 4 X 6 inch Mattress covered by a torn multicoloured cover - B1
  - iii. Multicoloured curtain - B2.
  - iv. Piece of carton box in a brown envelope - B3.
  - v. A blue bed sheet with prints decorations in a gunny bag - B4
  - vi. A muddy black T-Shirt - B5
  - vii. A blue trouser - B6
  - viii. One used condom – C1
  - ix. 2 unused condoms - C2
  - x. A red cap labelled 'TM' 'The Money Team' - D1
  - xi. A pair of soiled red socks - D2
  - xii. A pair of blue sleepers of size 11 - D3
  - xiii. A knife with a brown plastic handle - F
  - xiv. A blue jeans trouser - G1
  - xv. A white checked long sleeved shirt - G2
  - xvi. Buccal swab of Fredrick Odhiambo Owuor – H1
  - xvii. Buccal swap of Omondi Juma - H2.
  - xviii. Buccal swab of Fenny Akinyi – H3.
  - xix. A pair of red shoes – X1
  - xx. A brown handbag with a chain strap – X2.



15. It was his testimony that on the 12<sup>th</sup> November 2022 two extra items were presented:
  - i. High vaginal swab of Eunice Aoko – deceased marked – M
  - ii. Finger nail cutting samples of Eunice Aoko marked – N.
  
16. PW5 further testified that three persons were availed physically at their laboratory, by the investigating officer and they took buccal swabs from them namely; Fredrick Odhiambo Owuor, Fredrick Omondi Juma and Fenny Akinyi. It was his testimony that they were requested to do the following:
  - i. Determine whether the physical items presented had any biological evidential material
  - ii. Determine the source of the biological material with reference to the human samples obtained.
  
17. PW5 testified that after examination, his findings were:
  - i. The two (2) cotton swabs A1 and A2 the curtain –B2, T-shirt – B5, Trouser – B6, socks – D2, trouser – G1 and shirt – G2 were all lightly stained with blood of human origin.
  - ii. The carton box – B3 and the Knife – F, were both heavily stained with blood of human origin.
  - iii. The brownish stains on the Mattress – BI on the bedsheet – B4 and cap –D1 all tested negative for presence of human blood.
  - iv. Stains in the used condoms – C1 tested positive for presence of seminal fluid.
  - v. The stains in the High vaginal swab – M tested negative for presence of seminal fluid. The DNA profiles generated are in the report.
  
18. It was his testimony that he made the following conclusions:
  - i. The DNA profiles generated from the blood stains on cotton swabs A1 and A2, curtain – B2, T-shirt – B5, Trouser – B6, socks – D2, knife – F, Trouser – G1 and shirt – G2 were all identical DNA profiles and matched DNA profile of Eunice Aoko, the deceased.
  - ii. The DNA profile generated from stains for High Vaginal swab – M, matches DNA profile of Eunice Aoko, the deceased.
  - iii. The DNA profile generated from blood stains on the carton box – B3 and the touch surface of the exterior surface of the condom – C1 are identical and match the DNA profile of Fenny Akinyi.
  - iv. The DNA profiles generated from blood stains on the mattress – B1 and bedsheet – B4 are identical mixed profiles matching DNA profile of Fredrick Odhiambo and Fenny Akinyi.
  - v. The DNA profile generated from Seminal stains inside the condom item – C1 and the touch DNA from the inner lining of the Cap item – D are identical and match the profile of Fredrick Odhiambo.



- vi. Touch DNA profiles generated from sleepers – D3, Shoes – X1 and the handbag – X2 are partial and inconclusive. They could not determine DNA profiles on them because of degradation.
  - vii. DNA profile generated from Reference sample of Fredrick Omondi Juma did not match any of the DNA profiles generated from the submitted exhibits.
19. PW5 testified that he prepared the report on 24<sup>th</sup> August 2023, signed it and had it sealed by their institution as authentic. He produced it as PEx.1. In cross-examination, PW5 testified that they did not lift any DNA samples from the knife – F and that they could not tell who handled it.
  20. PW6 Henry Waga Otum testified that on the 31<sup>st</sup> January 2021 he went to work and returned in the evening and went to Mobulo club to drink alcohol. It was his testimony that he went behind where he drunk from and at 5.30pm went to pay at the counter where he met Odhis, the alias short name for Odhiambo, the accused person herein and Eunice, the deceased whom he greeted as he knew both of them. It was his testimony that he went back to drink and that when he went to pay for another bottle, he saw the two, Odhis and Eunice leave together.
  21. PW6 testified that he got a motorcycle, went home, ate and slept and that in the morning, he got up early and went to work and in the evening, went to the same club where he heard people saying that Eunice had died. It was his testimony that he informed them that that he had seen Eunice and Fredrick Odhiambo drinking together at the club. He further testified that he went to the police station at Maseno to record his statement. He testified that he knew the deceased who was from his area and that he knew the accused as they worked together.
  22. In cross-examination, PW5 testified that he had taken ½ Kibao drink and that the deceased and accused were drinking ‘Triple S’. He reiterated that he saw them leave the club and that they were at the door on their way out.
  23. PW7 No. 241244 Inspector Paul Masika, the Investigating officer in this case testified that on the 5<sup>th</sup> January 2022, he was directed to investigate a death of Eunice Aoko whose body was discovered at Daraja Mbili river in Bumbu village by one Elius Owino Ngala who had gone to bath in the river. It was his testimony that it was initially suspected to be a case of drowning.
  24. PW7 testified that he met family members in the company of Assistant Chief of the area, the landlord to the accused and a neighbour to the accused, one Phillip Omondi. He testified that the family stated that the late was last seen in the company of Fredrick Odhiambo Owuor by Henry Owaga at a bar in Daraja Mbili partaking drinks.
  25. He testified that they went to the house of the accused after a neighbour, Phillipus Omondi, said that on the night of 30<sup>th</sup>/31<sup>st</sup> December 2021, he heard the accused quarrel with a lady but that they did not find the accused so they broke his rented house along Kisumu/Busia road at Daraja Mbili in the presence of the owner – landlord, Julius Odhiambo.
  26. PW7 testified that from the house they recovered the following items:
    - i. A mattress with blood stains.
    - ii. Blood stained curtains.
    - iii. Blood stained bed sheet.
    - iv. Blood stained carton.



- v. Blood stained blue trouser.
  - vi. Blood stained knife.
  - vii. A red and black cap labelled TMT.
  - viii. Soiled red socks (a pair)
  - ix. Black T-Shirt with blood.
  - x. Pack of Trust condom, one used, found under the mattress.
  - xi. Extract of blood spats on the floor and on the wall using a swab.
27. He further testified that in the pit latrine, they retrieved a pair of red lady's shoes and a red lady's handbag which the deceased's family identified to be hers. It was his testimony that along the path they also recovered waste bins and that all these items were escorted to the Government Chemist for DNA analysis. PW7 further testified that they met Henry Waga, a friend to the accused who said he last saw accused and deceased at Mobulo Bar.
28. PW7 testified that they arrested the accused person from a hideout in an abandoned homestead, interrogated him and he confirmed to them that he was with the deceased on the night of 30<sup>th</sup> and 31<sup>st</sup> December 2021. It was his testimony that the accused led them to the home of Akinyi whom he said was the owner of the blood stains which they found at his rented house. He testified that they arrested Akinyi and she said she had a fight on the night of 25<sup>th</sup> and 26<sup>th</sup> December 2021 and she had a cut between her thumb and the middle finger of her right hand. PW7 testified that Akinyi later took them to the dispensary where she had been treated and that they were given treatment her notes from the hospital at Daraja Mbili. It was his testimony that they also discovered that the deceased had another boyfriend Fred Omondi whom they arrested and recorded his statement.
29. PW7 testified that Fred Omondi informed them that he was the deceased's boyfriend earlier on but had parted ways as at the time of the of her death. He testified that they went to ahis house and recovered a blue jeans trouser and a checked white long sleeved shirt which had blood stains which Omondi stated were animal blood stains as he was a butcher. PW7 testified that they took the clothing to the Government Chemist for a DNA analysis.
30. It was his testimony that Akinyi and Fredrick Omondi were released on free police bond while the accused was charged with murder of Eunice Aoko. PW7 produced the recovered items identified by PW 7 as the ones he recovered following investigations from item 1 – 16 above as exhibits 3 – 18.
31. In cross-examination, PW7 testified that on the night of 5<sup>th</sup> January 2022 they were accompanied by Phillipus Omondi a neighbour and the accused's Landlord Julius Odhiambo. He testified that they arrested the accused on 6<sup>th</sup> January 2022 and found his house locked so they broke it. He testified that the accused was at large because his phone was not going through.
32. PW7 reiterated that they had not charged anyone and the landlord was present when they broke the door and when they made recoveries. He testified that there were blood stains on clothes of Fredrick Omondi the boyfriend to the deceased.
33. It was his testimony that they arranged for a post-mortem on the body of the deceased on 12<sup>th</sup> January 2022 at JOOTRH which post-mortem was carried out by Dr. Owiti. He testified that the body of the deceased was identified to the doctor by a brother and sister of the deceased. He produced the autopsy report done by Dr. Owiti as P. Exhibit 19, with concurrence from the defence counsel.



## The Defence Case

34. Placed on his defence, the accused person gave sworn testimony denying the allegations brought forth against him. He denied knowing the deceased and stated that on the night of 30<sup>th</sup> – 31<sup>st</sup> December 2021, he woke up and went to work as usual and returned home as usual. It was his testimony that on the 31<sup>st</sup> December, he went to work as usual and after work, he returned to his residence. It was further his testimony that he was arrested on 5<sup>th</sup> January 2022 by the CID at 11am and they failed to give him a reason for the arrest.
35. The accused testified that he was arrested alone but when he was taken to Maseno Police station, he found 2 other suspects, a man and a woman, that Corporal Masika told them to give Kshs. 30,000 for their release but he did not have the money so he was not released while the other two persons were released. He testified that CPL Masika then told him that he would be charged with murder since he had refused to give the money.

### Analysis and Determination

36. I have carefully considered the evidence adduced in this case for the prosecution and the defence. The issue for determination is whether the prosecution have proved the guilt of the accused beyond reasonable doubt to warrant a conviction for the murder of the person of Eunice Aoko as per the Information for murder and therefore, whether all the essential elements of the offence of murder as defined under section 203 as read with section 206 of the Penal Code have been proved beyond reasonable doubt.
37. Section 203 of the Penal Code establishes the offence of murder while section of the same statute is the penalty section, upon conviction. That section 203 defines murder as follows:
- “ Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”
38. The prosecution has to adduce evidence to establish that there was death, the cause of that death, that the accused caused the death of the deceased by an unlawful act or omission. The prosecution must also that the unlawful killing of the deceased was with malice aforethought.
39. The deceased’s death and its cause are not in doubt and was confirmed vide the testimonies of PW1, PW2 and PW3. PW1 who was the first on the scene testified that he found the deceased’s body at the river where he had gone to bath. PW3 the deceased’s older brother also testified that he saw the deceased’s body at the morgue. The deceased’s death was further evidenced by the post-mortem report filled by Dr. Owiti and which was produced by PW7 as PEx. 19 in which Dr. Owiti formed the opinion that the cause of death was Subdural haematoma due to assault.
40. As to whether the deceased’s death was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. The postmortem report revealed that the deceased sustained widespread scalp haematoma; biparietal subdural haematoma and a brain oedema. In essence these were injuries to the deceased’s head. It also provided that the deceased had injuries to both thighs and both lumbar regions and that she sustained peeled off skin on the back and gluteal region. These injuries in my view, if caused by an individual, then in my view amounted to an unlawful act as no-one has the right to deprive another of their life. I am thus persuaded beyond reasonable doubt that the deceased person died out of an unlawful act.



41. As to whether it was the accused who unlawfully caused the deceased persons death, none of the prosecution witnesses saw the accused kill the deceased. In essence, the prosecution case was based on circumstantial evidence.

42. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

43. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; 9iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

44. In this case I note that PW2, a neighbour to the accused testified that on the 30<sup>th</sup> January 2021 he heard voices of quarrelling coming from the accused’s house. He testified that he called out to inquire as to what was wrong but the noise quelled down. In cross-examination he testified that the noise emanating from the accused’s house seemed to belong to 3 – 4 people.

45. PW3, the deceased’s brother testified that he managed to identify the deceased’s brown purse and red shoes that were discovered in the accused’s house. In cross-examination he confirmed that the said items were recovered from a pit latrine that the accused used to use. PW7 the Investigations Officer corroborated this testimony on recovery of the deceased’s item.

46. PW6 on his part testified that on 31<sup>st</sup> January 2021 he was at Mobulo Club where he saw the accused leaving with the deceased.

47. The accused on his part denied knowing the deceased and further denied the charges brought against him. The accused attributed his charging with this serious offence to his failure to bribe one Corporal Masika with Kshs. 30,000 allegedly demanded.



48. From the evidence adduced herein by the 7 prosecution witnesses against the defence proffered by the accused that he never knew the deceased, despite that vehement denial, the evidence that the accused was the last person seen with the deceased coming out of Mobulo Club remained uncontroverted.
49. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide any explanation as to what happened. Nonetheless, this does not shift the burden of proving the guilt of the accused person by the prosecution beyond reasonable doubt. However, having been placed at the scene of the incident as the person who was last seen with the deceased, the accused has a duty to give an explanation of what he was doing at the scene and how the deceased victim met his death. That is the principle, essentially. That principle has its root in Sections 111(1) and 119 of the *Evidence Act* which provide that:

“

“ 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. 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.”

50. In *Republic v E K K* [2018] eKLR, the Court held thus and I agree, concerning the last seen with the deceased doctrine:

“Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of *Moses Jua V. The State* (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”



51. In *Stephen Haruna v The Attorney-General of The Federation* (2010) 1iLAW/CA/A/86/C/2009 cited severally by Kenyan Courts, the Nigerian Court of Appeal held that:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

52. In *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the Indian Supreme Court held that:

“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

53. In the present case, and from the evidence of PW6, the accused was the last person ‘to be seen’ with the deceased. The accused person was under no duty to adduce and challenge the prosecution’s evidence but having been the last seen person by PW6, he failed to offer any explanation as to how the deceased met her death after they were seen leaving Mobulo Bar together. His defence, as I have stated above that he never knew the deceased or at all, is in my view, not credible and amounted to a mere denial.

54. This combined with the evidence adduced by various prosecution witnesses specifically PW3 that the deceased’s brown purse and red shoes were found in the pit latrine used by the accused all point at the accused as the one who unlawfully killed the deceased. There was no contrary evidence that the accused was the user of the toilet from who the items belonging to the deceased, namely, her purse and her shoes as identified by her brother, were found.

55. Additionally, and more importantly, is that there were several items recovered from the house of the accused person and there was no contrary evidence that the said house was his rental residence as at the material time, with his own landlord testifying to that fact. The items recovered which were submitted to the Government Chemist at Kisumu for DNA analysis by PW7 included a mattress and curtain. There was also blood collected from the wall of the said house and some clothing too. I reiterate that PW7 recovered the following items which upon DNA analysis, showed that they had DNA profile of the deceased and the question would be, if the accused did not know the deceased, how did the DNA profile for the deceased find itself on the items recovered from the house of the accused? The items recovered were:

- xii. Blood stained curtains.
- xiii. Blood stained blue trouser.
- xiv. Blood stained knife.
- xv. Soiled red socks (a pair)
- xvi. Black T-Shirt with blood.
- xvii. Extract of blood spats on the floor and on the wall using a swab.



56. The results and conclusions that connected the deceased to the accused were as testified by PW5 who produced the Government Analyst report dated 24<sup>th</sup> August 2023. The Government Analyst's conclusions were as follows:
- viii. The DNA profiles generated from the blood stains on cotton swabs A1 and A2, curtain – B2, T-shirt – B5, Trouser – B6, socks – D2, knife – F, Trouser – G1 and shirt – G2 were all identical DNA profiles and matched DNA profile of Eunice Aoko, the deceased.
57. All the above items were found in the house which was rented and occupied by the accused. Even in the absence of any other evidence of last seen with, I find that the forensic evidence adduced was sufficient to establish the presence of the deceased in the house occupied by the accused, which house was broken into and recoveries made.
58. PW2 who was neighbor heard noises from the house of the accused on the night the incident took place. He recognized the accused person's voice and the voice of a lady. It was this witness whose revelation led to the house of the accused being broken into and discoveries made by the DCI, PW7 included.
59. I further do not doubt the evidence by the deceased's brother PW3 that he positively identified his sister's shoes and hand bag and that he knew the accused as they had been working together. The shoes and bag could not generate DNA profiles due to degeneration but the deceased's brother positively identified those items as belonging to the deceased.
60. In the circumstances I am satisfied that the prosecution has proved beyond reasonable doubt that it was the accused who committed the unlawful act which caused the deceased's death.
61. Finally, as to whether the accused had malice aforethought when he unlawfully killed the deceased, what can be deduced from section 206 (a-e), is that, malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial.
62. It is worth noting that the essential ingredient for the offence of murder is malice aforethought. The circumstances which constitutes malice aforethought are described under Section 206 of the Penal Code as follows:
- “ 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –
    - (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
    - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
    - (c) an intent to commit a felony;
    - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”



63. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
64. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased's attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased as contained in the post-mortem report produced as PEx.19. The conduct of the accused too, is relevant. In this case, after scooping life out of the deceased, the accused person carried the deceased's body and went and threw it in the river for it to go with the waters. that is why, initially, the police thought that it was a drowning case, until investigations rule out drowning. the accused no doubt wanted to dispose of the deceased's body after unlawfully killing her. had the death been accidental, he would have tried to save her life. He did not.
65. Motive is irrelevant in criminal cases and in this case where the court has already found that the killing of the deceased was unlawful, no evidence of any of the absolute defences available in law. Neither is non-recovery of the murder weapon fatal to the prosecution's case as the accused had sufficient time to dispose of the weapon, since he was arrested some days after the incident. In *Julius Mutei Muthama v Republic* [2018] e KLR citing *Ekai v Republic* [1981] KLR, 569, the Court of Appeal stated:
- “This Court held that failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the postmortem report had established the cause of death. See also *Karani v Republic* [2010] 1 KLR 73. We adopt the same holding here and reject that ground of appeal.”
66. In the end, I find and hold that the prosecution has proved beyond reasonable doubt that the accused person had malice aforethought when he unlawfully killed the deceased.
67. Accordingly, I find and hold that all the elements of the offence of murder against the accused person have been proved beyond reasonable doubt.
68. For all the above reasons, I find the accused person Fredrick Odhiambo Owuor GUILTY of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly.
69. Sentence shall be pronounced after records, mitigation and victim impact statement, if any.

**Dated, Signed and Delivered at Kisumu this 25<sup>th</sup> day of June, 2024**

**R.E. ABURILI**

**JUDGE**

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