



**Republic v Okwara (Criminal Case E015 of 2023)  
[2024] KEHC 9763 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9763 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E015 OF 2023  
WM MUSYOKA, J  
JULY 31, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BENARD OKWARA ..... ACCUSED**

**JUDGMENT**

1. The accused person, Benard Okwara, faces a murder charge, based on sections 203 and 204 of the Penal Code, Cap 63, Laws of Kenya. It is alleged that, on 11<sup>th</sup> June 2023, at Kisoko Sub-Location, Nambale Sub-County, within Busia County, he murdered Calara Nawire, hereafter referred to as the deceased. He denied the charge, and a trial ensued, where 4 witnesses testified.
2. PW1, Albina Makokha, was an aunt of the accused, and a daughter of the deceased. She testified that the accused had mental issues. She was informed, by the mother of the accused, PW2, Sabella Ouma Omwayo, that the accused had been brought home, from school, where he worked as a teacher, on account of his mental unwellness. She went to the home, and saw the accused, leave his house with a knife, and enter the house of the deceased, from whence she heard a scream, and when she went there, she found that the deceased, had been fatally stabbed. That happened as they waited for a vehicle to take the accused to hospital. PW2 testified along similar lines. PW3, No. 91602 Police Corporal Odilia Shali, was the investigating officer. PW4, Dr. Michael Odhiambo, was the medical officer who conducted post-mortem on the remains of the deceased. He opined that the death was caused by severe haemorrhage, due to assault with a sharp object.
3. I reluctantly put the accused on his defence, in a ruling that I delivered on 16<sup>th</sup> February 2024. Reluctantly for reasons that shall become clear in the receding paragraphs of this judgment. The accused testified on 16<sup>th</sup> May 2024. He made a rumbling unsworn statement, which was incoherent at times. He began by stating that civil servants should be given realistic goals, which are time-bound. He cited the Bible, 1<sup>st</sup> Timothy 1:1-4, and argued that there is power to conduct euthanasia. He stated



that the deceased was his grandmother, who had been sickly, suffering from blood pressure, and that he was the one who used to take her to hospital. He stated that her condition worsened, and there was no means to save her life, or to take it back, and she died in his hands. He stated that, although he was being accused, ostensibly, of causing her death, she had died, and he prayed for her to rest in eternal peace, and he asked the court to forgive his hands, for causing the death unknowingly.

4. The parties filed written submissions. The prosecution, after reviewing what transpired after the accused was initially arraigned, up to when he was placed on his defence, submitted that the accused was suffering from mental illness, at the time of the incident, which deprived him of capacity to form the necessary mens rea for murder. It was urged that he should be found guilty, but insane.
5. The accused, through his Advocate, submitted that the prosecution had not established that he had committed the act intentionally. He submitted that the evidence placed on record, including by the investigating officer, PW3, was that he suffered mental illness which started sometime in 2020, when he was in university. He submitted that at the time of the death, he still suffered from mental illness, and he did not have the mens rea to commit murder.
6. The elements of the offence of murder are proof of the death, the cause of it, the involvement of the accused in the causation, and the fact that he caused the same with malice aforethought. See [Republic vs. Andrew Mueche Omwenga](#) [2009] eKLR (Maraga, J), [Boniface Mutua Mwangi vs. Republic](#) [2012] eKLR (Dulu & J. Ngugi, JJ) and [Antony Ndegwa Ngari vs. Republic](#) [2014] eKLR (Visram, Koome & Odek, JJA).
7. On the death, there is ample proof that the deceased died. PW1 was present when the killing happened, and saw the dead body. PW3 went to the scene and saw the body, and arranged its removal to the mortuary. PW4 conducted post-mortem on it. On the cause of death, the medical officer, PW4, rendered the opinion that it was severe haemorrhage due to assault with a sharp object. The cause of death was linked to the accused. PW1 saw him armed with a knife, and was at the scene, when she heard a scream from the house, where the accused had locked himself, with the deceased inside, and when she forced her way into the house, the accused still had the knife, threatened her with it, and in that house, the deceased lay dead, bleeding. There is evidence pointing to the death of the deceased having been caused by the accused.
8. The last consideration should be whether the accused person caused that death with malice aforethought. What constitutes malice aforethought is defined in section 206 of the [Penal Code](#). One, it is a direct intention to cause death, usually signified by a verbal expression of a desire to kill. Two, it is an intention to cause grievous harm, or to cause a bad injury, which results in death. Malice aforethought, in that case, would be inferred from the circumstances. Three, it is knowledge that the act causing death could cause death, or grievous harm, but the perpetrator is indifferent to the consequences. Four, it is an intention to commit a felony, such as assault or battery or whichever, which causes death.
9. The injury inflicted on the deceased was fatal. It led to her death instantaneously. It was such a severe injury that PW1 testified that the neck was literally held by the skin. In medical terms, of PW4, there was a deep cut wound, on the left side of the neck, with severed left external jugular veins and left common carotid artery, which caused the severe haemorrhage. Anyone inflicting such severe injuries, on such a delicate part of a human body, would be deemed to have had an intention to cause death or a very bad injury or to be indifferent to whether the injury could cause death, which would suffice to establish malice aforethought.
10. In view of paragraph 7, above, there can be no doubt that the death was caused by the accused person, something which the defence concedes. The actus reus elements of the offence were, accordingly, proved against the accused. What has to be determined is whether he did it with malice aforethought.



Did he intend to kill the deceased, or to cause grievous harm, or to commit some felony on her which led to the death, or did he have the knowledge that what he was doing to her could cause her death and he was indifferent to that?

11. The accused person was said, by PW1 and PW2, to have had a history of mental illness. Indeed, he had just been brought home, a day before, from his work station, a school where he worked as a teacher, when that problem manifested, ostensibly, for the family to manage him or his situation. It was mentioned, by PW1, that efforts were being made to get transport to take him to a facility, where he was usually attended to and treated, whenever that condition manifested, and the killing happened as they waited for the means of transport. PW3, the investigator, stated that she got information, when she went to the scene, that the accused had mental issues, and she had to take him for mental assessment before he could be presented for plea. Indeed, the exercise of taking plea was held off from 5<sup>th</sup> July 2023 to 9<sup>th</sup> October 2023, as he was said to be unfit to stand trial.
12. I have observed the accused during trial, and noted, from his behaviour, especially at the end of each session, that he is not fully in control of himself. Before arraignment, a consultant psychiatrist, based at Jaramogi Oginga Odinga Teaching and Referral Hospital, Prof. C. Othieno, in a letter addressed to the court, dated 4<sup>th</sup> July 2023, while advising that the accused was not fit to stand trial, gave the opinion that the accused suffered from a mental disorder, which was either severe depression or schizophrenia, and recommended treatment. It was on the basis of that opinion that plea-taking and trial was delayed.
13. In view of the above, I would agree, with both the prosecution and the defence, that due to that mental illness, the accused could not form an intention to kill, and was not in control of his faculties, when he committed the act that caused the death of the deceased, and he cannot, therefore, be held to be criminally liable for the murder of the deceased. See *Leonard Mwangemi Munyasia vs. Republic* [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA), *Republic vs. SOM* [2017] eKLR (Majanja, J) and *RWB vs. Republic* [2021] KECA 329 (KLR)(Kiage, Mohammed & M. Ngugi, JJ). That then would require, given that he committed the act that caused the death, that he be found guilty, but insane, of the murder of Calara Nawire, which finding and holding I hereby make.
14. Consequent on that, I shall order and direct, as I hereby do, that he be immediately committed to a mental facility, to wit Mathari Mental Hospital, for treatment, until such time that the psychiatrist, in charge of the hospital, shall be satisfied that he is well enough to be discharged, and released to the community. Should he remain in the hospital for a period in excess of 1 year, the said hospital shall prepare, and file in court, periodic reports on his condition, at intervals of 1 year, until he is discharged. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 31<sup>ST</sup> DAY OF JULY 2024**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Ms. Sibika and Mr. Ouma, Advocates for the accused person.

