



**Republic v Ochieng & another (Criminal Case E017 of 2022)  
[2024] KEHC 9529 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E017 OF 2022  
WM MUSYOKA, J  
JULY 26, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JOSEPH OWINO OCHIENG ..... 1<sup>ST</sup> ACCUSED**

**JOSEPH AHENDA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons, Joseph Owino Ochieng and Joseph Ahenda, face a murder charge, based on sections 203 and 204 of the Penal Code, Cap 63, Laws of Kenya. It is alleged that on 26<sup>th</sup> October 2022, at Ruambwa Sub-Location, Budalangi Sub-County, within Busia County, they jointly, with others not before the court, murdered Gordon Ochieng Onyango, hereafter the deceased. They denied the charge, and a trial ensued, where 6 witnesses testified.
2. PW1 was a girlfriend of the deceased, and the 2 were together on the fatal night. They drove to the dyke that night, and had intimacy inside the car of the deceased, registration mark and number KDL 397Z, during which a group of people emerged, around 100, according to her, armed with assorted weapons, who accused them of being thieves. The deceased asked PW1 to run away, for her own safety. She was captured, and brought back to the scene, and was taken to safety by her mother and the local Chief, PW2. She was later taken to the scene, by the police, only to find that the vehicle of the deceased had been burnt completely. She did not immediately find the deceased, although she saw the form of a person lying nearby, bleeding, badly injured. She later identified him as the deceased. He was taken to the nearby Ruambwa health centre, where he passed on, and his body was removed to a mortuary. She testified to having seen 2<sup>nd</sup> accused, when she and the deceased were attacked at the car, carrying a rungu, but she did not see him attack the deceased. She stated that she did not know who killed the deceased.



3. PW2 was the Assistant Chief of Ruambwa Sub-Location. He knew the deceased as a teacher of one of his children. He testified that on the material day, he was telephoned by the 1<sup>st</sup> accused, informing him that there was a car at the dyke, which he suspected was carrying thieves. He asked to speak to one of the persons in the car, through the phone of the 1<sup>st</sup> accused, but he did not get to, for there sounded to be a dispute between the 1<sup>st</sup> accused and the people in the car, and others. He telephoned the OCPD, and made a report. He then set out for the scene, using a motorcycle. He met many people on the way, heading in that direction. At the scene he found a vehicle burning, and a person surrounded by a crowd. He saw PW1 at the scene, and spoke to her. He took pictures, and then moved PW1 to safety, as there were threats to kill her. The police arrived, and PW1 was placed inside their vehicle. They approached the scene and found the deceased still alive, but with many injuries. The deceased was removed to a health centre, where he later died. PW2 said that by the time he got to the scene the deceased had already been assaulted. He stated that he knew both accused persons, but he did not see them at the scene.
4. PW3 was the medical officer who conducted post-mortem on the body of the deceased. He had cut wounds on his legs, hands and head. There was fracture of the radius of his right leg. He opined that what caused the death was a severe sharp head injury, with intercranial haemorrhage. PW3 stated that the medical history given was that the deceased had been subjected to mob justice, and that he was rescued dead.
5. PW4 was among the persons who rushed to the scene, after an alarm was raised that thieves had been caught. When he got to the scene, he found a crowd of many people. The deceased emerged from a maize farm, with his hands raised, and he identified himself, by name, and profession, adding that he was the person that they were calling a thief, but he was not one. He explained that his car had landed in a ditch, and got stuck, and he walked them to where the car was. When they got there, they found that the crowd had begun to attack the vehicle. When the people in that crowd saw the deceased, they attacked him, and when the witness sought to defend him, he was threatened, being accused of defending a thief. The crowd then attacked both the witness and the deceased, whereupon the witness was advised by his uncle to get away, for his own sake. He stated that the crowd did not allow the deceased to talk or to explain himself. PW4 stated that the 1<sup>st</sup> accused threw a panga at him, telling him not to protect thieves, and that the 1<sup>st</sup> accused also beat the deceased. He stated that he also saw the 2<sup>nd</sup> accused at the scene. A person in the crowd offered to burn the vehicle belonging to the deceased, they took petrol from the boot of the car, and set it ablaze. He said that the 2 accused persons were both armed with runguns, then again he said the 2<sup>nd</sup> accused had a panga. He said that he was present when the deceased was beaten senseless. He said that the crowd began to disperse as the car was burning, and the deceased was left at the scene. Someone called PW2, and the police. PW2 showed up after the deceased had already been beaten. He said that the crowd comprised of about 50 people, and he was able to identify some of those that he knew and saw at the scene. He said that the 2 accused persons beat the deceased, adding that they also beat him, accusing him of protecting a thief. He stated that at that juncture, the deceased was holding on to him, but his uncle pulled him away, after the accused began to beat the deceased. He said that several people had pangas, but he could not tell who had pangas. Later, at re-examination, he stated that he saw the 2<sup>nd</sup> accused with a panga, as the crowd was dispersing. He said that the deceased did not meet his death through mob justice. He said that the accused killed the deceased, as he saw them doing it.
6. PW5 produced the photographs taken at the scene by his colleague; PW6 was the investigating officer.
7. I put the accused on their defence, in a ruling that I delivered on 11<sup>th</sup> April 2024. The accused testified on 15<sup>th</sup> March 2024.



8. The 1<sup>st</sup> accused testified as DW1. He was the area village elder. He said that the locals raised an alarm, shouting that they had caught a thief. He got out of his house, and saw a car flashing its lights, it was surrounded by a crowd, who began to attack it. He telephoned PW2 and informed him, and he was advised to call the police, and to go to the scene, to monitor the situation, and try to restrain the crowd from taking the law into their own hands. When he got to the scene he found the crowd stoning the car. He telephoned PW2, who instructed him to restrain the crowd. He was asked to read out the registration particulars of the vehicle to PW2, which he did. Thereafter, the crowd began to shout that it had caught the thief, and he was brought out by the youth. He tried to restrain them, from harming the person, but the crowd shouted back at him. A youth tripped the person, and he fell, and was beaten. He approached the scene to restrain the crowd, but, he, the witness, was hit by a person, called David Karani, who told him that he had nothing to be stolen, and therefore he should not try to restrain him, as he had lost cattle. He stepped back. The police came. He said the said David was the first person to hit the deceased, and then the rest followed. He said that he left before PW2 arrived. He was arrested after 2 weeks. He said that he was tortured after his arrest, to force him to sign a statement. During cross-examination, he stated that he saw PW4 and his uncle. He said that he did not identify the people in the crowd, neither did he identify the deceased. He said that he did not know the deceased. He only got to know that he was a teacher, when the matter came to court. He said that there was a land case, in court, between him and PW2, and he also alluded to differences between them, which arose from the last general elections.
9. The 2<sup>nd</sup> accused testified as DW2. He also heard the alarm, and went to the scene. He found a huge crowd and a car burning. He found the deceased lying there. He said that it was his first time to see someone being beaten, and a car burning. The police came and took the deceased away, whereupon he left the scene. He was arrested 2 weeks later, at his place of work. He denied killing the deceased. He said that he did not see DW1 at the scene.
10. The accused persons filed written submissions. They submitted that there was no direct evidence that connected them to the death, and that the ingredients of malice aforethought had not been established. They cited *Boniface Mutua Mwangi vs. Republic* [2012] eKLR (Dulu & J. Ngugi, JJ), *Augustino Orete & others vs. Uganda* [1966] EA 430 (Sir Charles Newbold P, Duffus Ag VP & Law JA), *Republic vs. Andrew Mueche Omwenga* [2009] eKLR (Maraga, J), *Republic vs. Jenipher Akoth Juma & Another* [2017] eKLR (JA Makau, J), *Philip Muiruri Ndaruga vs. Republic* [2016] eKLR (Mativo, J) and *Abdalla bin Wendo Nabudere vs. Uganda* [1953] 20 EACA 166.
11. 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) and *Boniface Mutua Mwangi vs. Republic* [2012] eKLR (Dulu & J. Ngugi, JJ).
12. On the death, there is ample proof that the deceased died. PW1 and PW2 testified that he had been badly hurt, and that he later died of his injuries, and his body was moved to a mortuary. PW3 conducted post-mortem on the body.
13. On the cause of death, the evidence of the medical officer, PW3, is critical. He testified that the body had multiple injuries on various parts, but the one that caused his death was that on his head, which led to intercranial haemorrhage, or internal bleeding into the brain.
14. On the role of the accused persons in the causation, there is no dispute that the 2 were at the scene, for they were placed there by PW1 and PW4. Whereas PW1 did not witness the only accused person she saw, that is to say the 2<sup>nd</sup> accused, do anything to the deceased, PW4 said that both of them had rungus, and that he saw them beat the deceased. The evidence that emerged was that the deceased was attacked



by a mob, that was accusing him of being a thief. PW2, PW4 and the 2 accused persons responded to the ruckus, and among those who testified it was PW4 who claimed to have had seen the 2 accused persons armed, and attacking the deceased. The testimonies that the deceased was attacked by many people was supported by PW3, the medical officer who conducted post-mortem on the body of the deceased. The history given was that the deceased was a victim of mob justice. He described multiple injuries, consistent with an assault by numerous persons, in the context of mob justice.

15. So, did the accused persons attack the deceased? PW4 was at the scene, and the 1<sup>st</sup> accused confirmed seeing him there. He said that he saw the accused persons assault the deceased. He also stated that the deceased was beaten by many people. So, the question would be whether the blow or blows from the accused persons was or were the most decisive, in terms of being responsible for the death. PW4 did not describe the manner in which the accused allegedly beat the deceased. He merely said that they had rungus, and he saw them beat the deceased. He did not mention the part of the body of the deceased that he saw being hit by the accused persons. PW3 opined that the head injury was the cause of the death. PW4 did not testify as to whether he saw the accused hit the deceased with their rungus on the head. So, there is no material pointing to the accused persons as the persons who caused that fatal head injury. There is no evidence, therefore, that, whatever the role the accused played in assaulting the deceased, they caused his death, or contributed to the causation of the death.
16. 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.
17. The injuries inflicted on the deceased were fatal. They led to his death within a matter of hours. The injury that caused the death, according to PW3, was the head injury, which led to bleeding into the brain, which usually creates pressure in the brain, causing trauma, leading to death. Anyone inflicting such 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. As indicated above, at paragraph 15 hereof, there is insufficient evidence that the accused persons caused that fatal head injury, and based on that there would be no foundation to conclude that there was malice aforethought on their part.
18. Where a death is caused in circumstances which involve more than 1 assailant, criminal responsibility can still be attributed based on a common intention to kill, or cause death, or cause grave injury, or to commit some felony which leads to death. The individuals who responded to the alarm were probably driven by various motives. Some came to see what was happening. Some came to deal with thieves. Some probably formed an intention to kill the person said to be the thief, or to cause him some sort of harm, by way of discipline, once they got to the scene. The deceased was attacked by multiple individuals, using multiple weapons, and he suffered multiple injuries as a result. If he was said to have had died of the cumulative effect of the multiple injuries, it would follow that whoever had succeeded in landing a blow on him would be deemed to have had a common intention to either kill or cause him a bad injury. However, PW3 isolated the cause of death to be the head injury, and culpability for the death can only attach on the person identified as having inflicted that head injury. None of the witnesses identified the person who landed that killer head blow on the deceased. Regarding the accused persons, only PW4 testified to seeing them strike at the deceased, but he did not state that he saw them hit the deceased on the head. That, therefore, would mean that there is inadequate evidence



that they did inflict the decisive injury. See Augustino Orete & others vs. Uganda [1966] EA 430 (Sir Charles Newbold P, Duffus Ag VP & Law JA).

19. The burden was on the prosecution, to prove that the accused persons caused the death of the deceased, to the standard required, that is beyond reasonable doubt. The evidence that came out was that an alarm was raised, that a thief or thieves had been caught, the accused were part of a large crowd, put at between 50 and 100 people, who responded to that alarm. PW3 isolated the injury that caused the death, but none of the witnesses were able to identify the persons who caused that decisive injury. There was no proof, therefore, beyond reasonable doubt, that the accused persons herein caused that death.
20. Overall, it is my finding and holding that the offence of murder has not been sufficiently proved against the accused persons herein, and I do hereby find them, Joseph Owino Ochieng and Joseph Ahenda, not guilty of the murder of Gordon Ochieng Onyango, and I acquit them, under section 306 of the Criminal Procedure Code, Cap 75, Laws of Kenya. They shall be set free from remand custody, if they are still in remand, unless they are otherwise lawfully held. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 26<sup>TH</sup> DAY OF JULY 2024**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

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

Mr. Ouma, Advocate for the accused persons.

