



**Republic v Ondiek (Criminal Case E009 of 2023)
[2024] KEHC 15137 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E009 OF 2023
KW KIARIE, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MOSES OCHIENG ONDIEK ACCUSED

JUDGMENT

1. Moses Ochieng Ondiek is charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence in count one is that on the 5th day of October 2023, at Kodwar village, Atela location in Rachuonyo East sub-county of Homa Bay County, he unlawfully murdered Mercy Awuor Odhiambo.
3. In count two, the particulars are that on the 5th day of October 2023, at Kodwar village, Atela location in Rachuonyo East sub-county of Homa Bay County, he unlawfully murdered Jayden Okoth.
4. Mercy Awuor Okoth was the accused's wife, while Jayden Okoth was his son. On the evening of the 5th day of October 2023, the two deceased and the accused had supper in the house of Rose Auma Ondiek, the accused's mother. On the following morning, the deceased were found dead while the accused had gone to Ikonge Police Post, where he surrendered. The prosecution contends that he was responsible for the two deaths.
5. Moses Ochieng Ondiek, the accused, contended in his defence that when he returned from Sondu, he found the two deceased dead.
6. The issues for determination are:
 - a. Whether the accused was involved in the deaths of the deceased; and



- b. Whether the offence of murder was proved against any or all the accused.
7. A horror spectacle met Rose Auma Ondiek (PW2), Mercy Awuor Odhiambo's mother-in-law and Jayden Okoth's grandmother. The two had been brutally butchered. On the 5th day of October 2023, they had supper together in her house. She testified that her daughter-in-law had prepared the meal, which they, including the accused, partook in before the accused and his family retired to their house for the night. When she woke up, she noticed that the door to the house of the accused was bolted from outside. When she unbolted it, she witnessed the heart-wrenching scene. The accused was not present.
 8. Ip Geoffrey Osoti (PW3) was at the Ikonge Police Post on the 6th day of October 2023. His evidence was that the accused went to the Post and requested to be arrested. They arrested him after he was interrogated. He handed them an exercise book with some details.
 9. The accused, in his defence, contended that when he returned from Sondu, he found his wife and child dead, and when he went to report to the police, he was arrested.
 10. This contention contradicted the evidence of his mother, who said that they took supper with the accused and his family on the 5th day of October 2023. He also contradicted PW3, who testified that the accused had surrendered himself.
 11. The accused's version of what happened to his family is invalid. All the evidence points at him as the perpetrator of the heinous killing. He attempted suicide after the incident and surrendered himself to the police.
 12. I, therefore, find that he was the one who killed the two victims.
 13. To convict for the offence of murder, the prosecution must prove the existence of malice aforethought based on the evidence on record. In Black's Law Dictionary, 10th Edition, malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).
 14. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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.
 15. The two victims were brutally butchered. Mercy Awuor had only some skin holding her neck, among other deep injuries, while the child had a circumferential cut wound on the head and a deep cut



wound on the neck involving significant vessels. These injuries were intended to kill. I, therefore, find that the prosecution has proved the offences of murder on both counts. I find the accused guilty and accordingly convict him.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF NOVEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

