



State v Omondi alias Mzungu alias Nelly Omondi Chore (Criminal Case E002 of 2020) [2024] KEHC 15223 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E002 OF 2020
RE ABURILI, J
NOVEMBER 27, 2024**

BETWEEN

STATE PROSECUTION

AND

**BERNARD OMONDI ALIAS MZUNGU ALIAS NELLY OMONDI
CHORE ACCUSED**

JUDGMENT

Introduction

1. The accused person herein Bernard Omondi alias Mzungu alias Nelly Omondi Chore 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 24th day of August 2019 at Lela sub-location, Nyando sub-county within Kisumu County murdered one Sylvester Stephen Onyango. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial.
2. The prosecution called a total of eight (8) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

3. PW2 Gordon Okoth Otieno testified that on the 30th August 2019 at 3pm, he received a call from his brother Dickson Odhiambo informing him that their last born Stephen Onyango had disappeared and that he had last seen him on the 24th August 2022 when Stephen had come home a bit drunk. It was his testimony that he told Dickson to report the matter to the police which he did at Ahero Police Station.
4. PW2 testified that he travelled from Nairobi to Ahero and arrived on the 2nd September 2019 and proceeded to Ahero Police Station where he met a Mr. Kariuki, a police officer who had received the report of the missing person. It was his testimony that he then proceeded to the home of Hezekiah



- Nangó where he found Ouko selling chang'aa and despite the fact that Ouko agreed to speak to him, he escaped.
5. PW2 testified that he then spoke to Ouko's grandmother and recorded their conversation in which she told him that his brother Stephen alias Apache had been in their home and was heard crying whilst locked up in a house saying; "Ouko why are you killing me?". He testified that as it was late in the evening so he went home and the next day, together with village mates, they stormed the home of Hezekiah Nangó to look for Stephen but they found the doors locked as there was nobody.
 6. It was his testimony that they eventually got authority from the police to break into the houses, searched but found nothing. He testified that they searched all over the compound and one of them, a police officer named Dave, stepped on a spot on the ground that was sinking and he advised them to remove rubbish from the spot which they did only to realize that it was a pit latrine and that as they continued removing rubbish and soil, they caught a whiff of a smell
 7. PW2 testified that they continued digging until they hit something hard like a bone after which Dave told them to stop and called the police who arrived from Ahero and Kisumu and they took over the task and eventually removed the body of his brother. He testified that the deceased's head was rotten and only the skull remained, that the body was rotten. He testified that the body was removed and taken to Ahero mortuary.
 8. It was his testimony that he had not known the accused prior to the incident and only knew Mama Hongo. It was his testimony that they took the body to the mortuary and made burial arrangements. He further testified that he saw the deceased's body and recognized the belt and his trouser. PW2 identified Ouko as the accused person in court.
 9. PW3 Polycarp Lutta Kweyu, the Principal Government Analyst at Kisumu Government Chemist testified that on the 11th September 2019, PC Michael Rotich of DCI Nyando submitted the following items to us for DNA Analysis to determine the presence and origin of biological evidential material.
 - i. A white mosquito net in a brown envelope marked 'A'
 - ii. A piece of cartilage and fingernails from Sylvester Stephen Onyango indicated as deceased and marked as 'B'
 10. He testified that he analyzed and made the following findings: -
 - i. The mosquito net was heavily stained with blood of a human being.
 - ii. I proceeded to generate DNA profiles to know the source of the blood and the report at its back shows the profiles.
 - iii. By comparing the DNA profiles, I concluded and opined that the DNA profile generated from the blood stain on the mosquito net matched the DNA profile of Sylvester Stephen Onyango.
 11. PW3 testified that he prepared the Report on 5th August 2021, signed it and sealed it. He produced it as P. Exhibit 1(a) and the Exhibit Memo as P. Exhibit 1 (b).
 12. In cross-examination, PW3 testified that the police officer who brought the items told him that the mosquito net was recovered from the suspect's house while the cartilage and nails were extracted from the body of the deceased. He testified that the mosquito net is portable but he could not tell if it was gotten from elsewhere and taken to the accused's house.
 13. PW4 Margaret Nangó testified that in 2019, Ouko her grandson whom she identified to be the accused herein sold changaa and that that he had gone to buy changaa then he came back and hid it in the bush.



- She testified that she was bereaved so she headed to the mortuary. PW4 testified that she left Ouko in her co-wife's house and that Ouko had left his friend in the house when he went to buy changaa.
14. She testified that as she was leaving for the mortuary, her colleagues were calling her saying she was being left by a motorcyclist. She testified that she heard 'Apati' crying from Ouko's house and that Ouko had locked Apati in the house. PW4 testified that when she returned, she found her house, the house of Ouko and her son's house all razed down. It was her testimony that she ran to their home for safety and never saw Ouko again until in court. PW4 testified that her house and homestead were all burnt, that the home was not habitable and that she did not know why her home was razed down. She testified that she learnt that Ouko fought with his friend. PW4 identified Ouko as the accused in the dock.
 15. PW5 Lydia Akoth Otieno, the deceased's older sister testified that on the 21st August 2019 at 4pm she got information that Sylvester had gone missing for 3 days. She testified that she was called by her brother that Onyango had not been found and they started looking for him for five days and a report was made to the police.
 16. It was her testimony that later she went and saw the body of Onyango being retrieved from the hole. It was her testimony that Ouko had escaped and that the deceased's body was taken to the mortuary. She testified that she witnessed the post-mortem of the deceased. PW5 identified Ouko as the accused in court.
 17. PW6 Dr. Muchana Dickson testified on the postmortem Report for Stephen Onyango Otieno that was carried out on the 10th September 2019 at Ahero Sub County mortuary with the body being identified by Gordon Okuta Otieno and Lydia Akoth Otieno. It was his testimony that the body was of a male in a maroon sheet, 176cm height and just a skeleton due to decomposition. He testified that death occurred more than 2 weeks earlier. Dr. Muchana testified that the finger nails and toe nails were very pale, there were compound fractures in right forearm towards the wrist and that the small bone had a sharp bone fracture meaning, it was induced. He further testified that the left forearm had fractures on bones, the big and small bones and that compound fractures in the right leg involving both bones
 18. Dr. Muchana testified that internally, there was severance of blood vessels of both forearm and right leg that the internal organs were decomposed. He testified that there was no skull fracture, all teeth were present and that the brain was missing. It was his testimony that there were extensive contusion and blood clot formation on the skin and soft tissues.
 19. Dr. Muchana testified that he formed the opinion that the cause of death was severe blood loss secondary to sharp force trauma following assault. He testified that he took the soft part of the rib and nail and handed to the investigator for DNA analysis. Dr. Muchana produced the postmortem Report of 10th September 2019 as P. Exhibit 2.
 20. In cross—examination, Dr. Muchana testified that he estimated the time of death to have been more than two weeks but not more than three months.
 21. PW7 No. 61332 PC Simon Kipkirui testified that in 2019-2020, he was at Asembo Bay Police Post, Rarieda, Siaya County. He testified that on the 4th October 2020 he was in the office when at 2pm, a report was made that the reportee had seen a suspect Nelly Omondi Chore drinking Busaa in Mabinju area in Rarieda and that the suspect had committed murder in Ahero.
 22. PW7 testified that he and PC Rotich went to Mabinju and on arrival they saw the person running away upon seeing them towards the Lake Victoria. He testified that Members of the public helped them to arrest him after which they took him to OCS, Aram Police station. It was his testimony that the OCS



- called OCS Ahero who came and escorted the suspect to Ahero. PW7 identified the accused person as the person whom he arrested and handed to OCS Aram police station.
23. PW8 No. 114153 PC Richard Kinyua, the investigating officer testified that on the 1st September 2019 a missing person report was made at Ahero Police station by a family had looked for their kin who could not be found since 24th August 2019. It was his testimony that the missing person was Sylvester Stephen Onyango alias Apachi.
 24. PW8 testified that one of the family members of the deceased called Gordon Okoth recorded his statement saying he had followed up the movements of the deceased and found that he had been in the house of Benard Omondi to help him sell changaa, he testified that the house was also called mama Margaret's house. PW8 testified that Gordon and his sister visited that home severally and that when they inquired from Benard on the whereabouts of the deceased, Benard took off.
 25. PW8 testified that on the 5th September 2019, a dead body was discovered in a toilet in the homestead of the accused after which the OCS CIP Benjamin Kisera sought and obtained an exhumation order from Nyando Law courts in Nyando Misc. No. 21 of 2019 and together with other police officers they exhumed a decomposing body. He testified that they took the body to Ahero Hospital mortuary after which they went to the home of Margaret, PW 1 who recorded her statement.
 26. It was his testimony that on the 10th September 2019, he witnessed postmortem on the deceased's body done by Dr. Muchana at Ahero District Hospital. He testified that the body was retrieved from the pit latrine in the home of Benard Omondi but from his house they recovered a mosquito net, white in colour which had blood stains which they preserved.
 27. PW8 testified that on the 4th October 2020, the DCIO received a report of a suspect arrested at Siaya, having escaped from Ahero after committing the murder of the deceased. He testified that he was tasked to go to Siaya to collect the arrested suspect and that while in Siaya, the accused was found to be using the name Nelly Chore. He identified the accused person as the person they arrested. He further produced the mosquito net which they recovered from the house of the accused Benard Omondi as P. Exhibit 3.
 28. In cross-examination, the investigating officer testified that he could not recall the exact number of people who were present when the deceased was being assaulted but that they were several. He stated that the net was found in the accused person's house hanging above the bed. In re-examination, PW8 testified that Japheth and Margaret were also present when the deceased was being assaulted.

Defence Case

29. Placed on his defence, the accused person gave a sworn testimony in which he denied killing the deceased. He testified that he was a musician with a band and that on the 24th August 2019 he was in Usenge, Siaya playing music where the person who hired him wanted them to stay for 6 months because they entertained at his bar pulling customers to the bar and that he was then called to Rarieda to entertain those who had gone to pay dowry on 4th October 2020 but that at 11am, he was surprised to see the police and thinking that they were NEMA officials. That they ran as they had no entertainment permit. He testified that he stopped running as he wanted to see if they would take his music instruments. It was his testimony that he was arrested and asked if he knew Sylvester in Ahero which he admitted to as they went to school together. He testified that he was taken to Ahero police station and subsequently to court. He denied having a cottage or mosquito net.



Analysis and Determination

30. I have carefully considered the evidence adduced in this case for the prosecution and the defence put forth by the accused person denying that he was in any way involved in the murder of the deceased. The issue for determination is whether the prosecution had proved all the elements of the offence of murder against the accused person beyond reasonable doubt. The accused faces a charge of murder contrary to section 203 of the *Penal Code*. That section 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”

31. The prosecution has to adduce evidence to establish that there was death, the cause of that death, that the death was unlawfully caused by acts and omissions of the accused person and that the unlawful killing was with malice aforethought. The standard of proof is beyond reasonable doubt and the burden of proof lies on the prosecution throughout the trial to prove its case against the accused person.

32. As to the deceased’s death, PW2 and PW5 testified that they were present when the deceased’s body was discovered and retrieved. PW5 further testified that she witnessed the post-mortem on the body of the deceased. PW8, the investigating officer also testified that he witnessed the post-mortem. The fact of the deceased’s death and its cause was placed beyond doubt by the post-mortem report produced by PW6, Dr. Muchana who concluded that the cause of death was severe blood loss secondary to sharp force trauma following assault.

33. On whether the death of the deceased was caused by an unlawful act or omission, the aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. Article 26 of the *Constitution* is clear that every person has the right to life and that a person shall not be deprived of life intentionally except as au or other written law. In *Gusambizi Wesanga v Republic* [1948] 15 EACA 65 the Court stated:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

34. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained as detailed by Dr Muchana, the pathologist and as contained in the postmortem report produced as an exhibit PEX 2. There is no evidence showing that the injuries found on the body of the deceased which was decomposing were self-inflicted or that it was justified in any way under the law. Further evidence presented before court irresistibly points to an unlawful act that led to the death of the deceased following an assault. A person cannot, by any means, kill themselves and bury themselves in a dug-up hole and cover themselves with soil, the way the body of the deceased was found after he had gone missing. Accordingly, I find and hold that the death of the deceased was caused by an unlawful Act.

35. As to whether it was the accused who unlawfully caused the deceased person’s death, none of the prosecution witnesses saw how the deceased met his death. Admittedly, the prosecution case against the Accused person primarily rests on circumstantial evidence. In the case of *Abamad Abolfathi Mobammed and Another v Republic* [2018] eKLR, the Court of Appeal had this to say on this point:

“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.” *Musili Tulo v Republic* Cr. App. No. 30 of 2013.

36. The Court of Appeal in the above case also laid down 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 Accused 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 Accused; (iii) 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.

(see also *Sawe v Republic* (2003) eKLR and *GMI v R* Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see *Teper v R* [1952] ALLER 480 and *Musoke v R* [1958] EA 715). In *Dhalay Singh v Republic*, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

37. The prosecution led evidence to the effect that the accused was the last person to be seen with the deceased. PW1 testified that on learning that the deceased was missing, he learnt that the deceased was last seen in the company of the accused so he proceeded to the accused’s home where he found the accused and despite the accused agreeing to speak to him, the accused later escaped.
38. PW1 and PW5 both testified that they later were present when the deceased’s body was found in the accused person’s home and compound.
39. PW4, the accused person’s grandmother testified that sometime in 2019, Ouko, the accused person herein, had left his friend in the house when he went to buy changaa and that as she was leaving her home for the mortuary, she heard Apati, who was the accused’s friend crying from the accused’s house.



40. The testimony of the government analyst is also instructive. He testified that the DNA profile generated from the blood stain on the mosquito net recovered from the accused person's house, as testified by the investigating officer, following the arrest of the accused person, matched the DNA profile of Sylvester Stephen Onyango, the deceased herein.
41. PW7 who arrested the accused in Siaya testified that when the accused noticed them, he started running away only for him to be restrained by the public. Further, that while in Siaya, the police learnt that the accused had since changed his name and was called Nelly Chore.
42. Conversely, the accused denied committing the offence and raised an alibi that he was in Siaya when the deceased passed on performing with his music band. He stated that he was an entertainer and that on that day, as he did not have an entertainment permit, he ran only to be arrested.
43. 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 before he died, the accused has a duty to give an explanation of what he was doing at the scene and how the deceased victim of his vicious assault as was seen by PW2 met his death.
44. Under Sections 111(1) and 119 of the *Evidence Act*:

“ 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.”



45. 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.”

46. In *Stephen Haruna v The Attorney-General Of The Federation* (2010) 1 iLAW/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.”

47. In *Ramreddy Rajeshkbanna 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.”

48. In the present case, and from the evidence of PW2, PW4 and PW8, it is the accused who was the last person ‘to be seen’ with the deceased. PW4 in particular, stated that the accused went to buy changaa and when he brought it, he hid it in the bush and that he had left his friend Apati in his-accused person’s house. That as she was leaving for the mortuary to mourn a relative, she heard the deceased cry from the house of the accused who was her grandson. She was meeting him in court for the first time after that day that she left him at home and proceeded to the morgue.

49. The deceased person’s decomposing body was subsequently found buried in the accused person’s compound. The deceased’s brother testified how he kept asking the accused on the whereabouts of the deceased upon the deceased missing for a while but that although the accused promised to tell him, the accused escaped from his home.

50. The accused person admitted that he knew the deceased and gave an alibi defence that he was in Siaya when the death occurred. I have keenly considered that alibi defence alongside the evidence adduced by the prosecution witnesses. That alibi was raised during the defence hearing. The accused was under no duty to testify and or challenge the evidence adduced against him as he was under no duty to exonerate himself.



51. In the case of *Kimotho Kiarie v Republic* [1984] eKLR , the Court of Appeal stated that:
- “An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; *Said v Republic* [1963] EA 6. The judge erred in accepting the Senior Resident Magistrate’s finding in the alibi because the finding is not supported by any reasons. It is not possible to tell from the judgment of the Senior Resident Magistrate if the correct onus was applied and if the prosecution was required to discharge the alibi *Raphael v Republic*, [1973] EA 473. The defence of alibi was rejected for unrevealed reasons. That was a grave omission. The errors of law on the finding on identification and on the alibi are of such a nature that it is reasonably probable that without them the Senior Resident Magistrate would not have convicted the appellant. The accused person was under no duty to adduce evidence and challenge the prosecution’s case but having been the last seen with the deceased as testified by his grandmother who stated that when she was leaving, the deceased was crying from the house of the accused, the accused person failed to offer any explanation as to how the deceased met his death. Furthermore, the mosquito net found in the house of the accused hanging above his bed had blood which matched the DNA of the deceased.
52. The Court of Appeal in *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR further held that:
- “It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution.”
53. This was also stated in *Ssentale vs. Uganda* [1968] EA 365, 368 where [Sir Udo Udoma CJ] stated that:
- “...a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion...The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible.”
54. In *Isaiab Sawala Alias Shady v Republic* [2021] eKLR, H.A.Omondi J(as she then was in the High Court stated as follows and I concur:
- “My understanding is that the alibi defence must be raised at the earliest opportunity available, so as to have it subjected to test through cross examination of the witnesses and an accused cannot keep it under wraps like some sort of secret weapon to be used and the tail end of the prosecution case. The record clearly absolves the trial court from any error – indeed the court analysed the evidence and the place of the burden of proof. I am persuaded that the same was properly rejected.
55. In this case, I have considered that alibi defence and I am persuaded that it has been displaced by evidence adduced by the prosecution witnesses as analyzed herein. The accused person’s conduct too, after the incident raises questions. For example, why did the accused person escape from his home upon the deceased’s brother asking him on the whereabouts of the deceased and why would the accused escape when he was tracked down in Siaya. Additionally, why would the accused upon running away



from home now be known by a totally different name from that which is his real name. The accused explained that he relocated to Siaya there for entertainment purposes and that he ran away from the police because he did not have an entertainment permit. Those statements are not believable and are incapable of belief by this Court. The accused's person's alibi was, in my view, an afterthought and not credible and amounted to a mere denial. I reject it for the reasons stated above.

56. I thus find that the prosecution proved that it was the accused person who unlawfully caused the deceased's death.
57. Finally, as to whether the accused had malice aforethought when he killed the deceased, the essential ingredient for the offence of murder is malice aforethought. The circumstances which constitute 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.”
58. 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. 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.
59. In the instant case, the post-mortem report presented by Dr. Muchana showed that the deceased had sustained multiple fractures on the arm and legs which injuries had led to severed blood vessels in both forearms that led to severe blood loss. There is no doubt that the deceased's attacker was intent on not only causing him grievous harm, but eliminating him all together. I thus find that the prosecution proved malice aforethought against the accused person beyond reasonable doubt.
60. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person herein beyond reasonable doubt.
61. I find the accused person Bernard Omondi Alias Mzungu alias Nelly Omondi Chore Guilty of the offence of murder as charged, under section 203 of the Penal Code and I convict him of the said offence. Sentence shall be pronounced after records and mitigation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF NOVEMBER, 2024



R.E. ABURILI
JUDGE

