



REPUBLIC OF KENYA



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**State v Otieno (Criminal Case E025 of 2023)
[2024] KEHC 15314 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E025 OF 2023
RE ABURILI, J
NOVEMBER 27, 2024**

BETWEEN

STATE PROSECUTION

AND

BENJAMIN OMONDI OTIENO ACCUSED

JUDGMENT

Introduction

1. The accused person 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 3rd July 2023 at around 1800hrs in Mbalawandu village West Karateng sub-location in Kisumu West sub-county within Kisumu County murdered one Marion Atieno Ochieng. The accused person pleaded not guilty to the charge against him and the matter proceeded to trial.
2. The prosecution called a total of thirteen (13) witnesses in support of its case which is summarised herein below.

The Prosecution's case

3. PW1 Fred Otieno Odhiambo the Assistant Chief, West Karateng Sub-location testified that on the 3rd July 2023 at around 6pm, he received a phone call from Mr. Allan Israel, a teacher, that the body of a school girl was found on the road 100m from Palawangu Secondary. He testified that he went to the scene and found the body in the uniform of a Kwoyo Mixed Secondary School so he called Mr. Collins Owuor her principal. PW1 testified that he called Maseno Police who came to the scene and removed the body to the mortuary then recorded his statement at Maseno Police station. It was his testimony that he observed the body that had stab wounds on the neck. PW1 testified that the body was of Marion. In cross-examination PW1 testified that he came to know the suspect after the incident and that he had never received any complaint against the accused although he came from his locality.



4. PW2 Patrick Ayieke a retired teacher at St. Georges Secondary testified that on the 3rd July 2023 he was at home between 5.30pm when he heard wailings from his neighbourhood and proceeded to establish what had happened from a passerby who told him that his niece Marion Atieno had been killed.
5. It was his testimony that he went to the scene and saw her body lying in blood with stabs on the neck after which he returned to his home and send his daughter Sherlyne Regina to go and remove the calf from the field. He testified that he then heard her scream saying she had seen someone in the shrubs who was familiar but covering his eyes with eye pad, with shaggy hair waxed, in a red short and with a knife. He testified that he went to where she was but the person escaped despite his efforts to get hold of the person.
6. PW2 testified that Sherlyne was affected by the incident and was hospitalized for 2 weeks. He testified that he later learnt that the person who was hiding with a knife was Benjamin Omondi, the accused herein. In cross-examination PW2 testified that he learnt after the arrest that the accused was the person Sherlyne saw.
7. PW3 Mary Achieng Oluoch testified that the deceased was her niece and the accused a neighbour. She testified that she used to sleep with the deceased in the same house with the deceased sleeping in the sitting room. It was her testimony that on the 2nd July 2023, a Sunday night, before midnight she heard something like water pouring into the house and switched on the light from her bedroom and came to the sitting room. She testified that she found that it was Petrol which was poured from the window and that it had been pored on the deceased and her other child.
8. PW3 testified that she called Mama Benjamin, their neighbour who came with Baba Benjamin and Benjamin. She testified that she explained to them and as they never saw anybody Benjamin and his parents went away and left them to sleep but they had no peace that night. She testified that in the morning of 3rd July 2023 she saw that the children were disturbed but nonetheless went to school. She testified that she went to report to the village elder Olango and Assistant Chief of what had happened and also went and reported at Maseno Police station.
9. PW3 testified that she returned home at 5pm or thereabouts when she was approached by Maureen whose mother sells charcoal saying that a scholar had seen Marion bleeding on road. She testified that they went to the scene and found Marion dead with stab wounds and in a pool of blood. It was her testimony that the Assistant Chief was called and the police also arrived and removed the deceased's body to Masaba Hospital. She identified the accused as the Benjamin she was referring to.
10. In cross-examination PW3 testified that she had known Benjamin as a neighbour's son for long since she was married in that home. She testified that she had never had or heard of any feud with him or with his family.
11. PW4 Wonder Apondi Ominde a student at Kisumu National Polytechnic testified that on the 3rd July 2023 at 5pm she had returned from school when her 2 children told her that they heard someone wailing near the road. She testified that she went there and found her niece lying in a pool of blood in her full school uniform. PW4 testified that she called her husband who came and called the police from Maseno Police station who came to the scene and took away the deceased's body. It was her testimony that her and her husband were Marion's guardians.
12. PW4 testified that they found Marion's school bag (school bag –faded blue/black (PMFI 1) at the scene which the police took away. She testified that the next day, the police came to their home with a black jacket. She testified that the police were interrogating Benjamin's mother. PW4 identified the accused as Benjamin.



13. PW5 Gladys Kerubo Nyariga the Deputy Principal, Kuoyo Secondary School, Kisumu West testified that on the 3rd July 2023 after midterm she reported to school early and after students did cleaning, they went to Assembly where he noticed some students including the accused were unkempt so he summoned them to the staffroom and punished them. She testified that she gave him work to arrange firewood in the kitchen area then released him back to class. It was her testimony that classes went on until 5pm when students went home and she also left school.
14. PW5 testified that the following day on 4th July 2023 she reported at 7am and at 9am, Benjamin went to the teacher on duty and asked for a leave out saying he was unwell. It was her testimony that the leave out sheet was brought to him to sign and rubber stamp which she did after which he left to seek medication. She further testified that at 9.30am, a DCI officer came to school asking for Benjamin.
15. PW6 Rosemary Oduo testified that on the 3rd July 2023 at around 5pm her phone rang while she was at home and on her way to Mbalawandu Church to get good network, she saw Benjamin and Marion pass but did not greet them. She testified that she went home and shortly heard screams and on-going to check where screams were coming from, she saw Marion dead. It was her testimony that Benjamin is a child from her village whom she had known since he was born. She identified Benjamin as the accused in the dock.
16. In cross-examination, PW6 testified that when she saw Benjamin and Marion, they were talking as they walked away towards home. She testified that she had no disagreement with Benjamin or his family and that she had known him for many years.
17. PW7 Brian Odhiambo Otieno testified that on the 4th July 2023 in the morning after the brutal murder of Marion Atieno, he went to her uncle's homestead where he found other family members. He testified that Tito Ombima, a friend suggested that they go to the crime scene to look for evidence so he Tito, Michael alias Rasta and Owino Durim went to the scene across the shamba where the girl was killed.
18. It was his testimony that they passed Mzee Ayieke, a neighbour's home who told them that his daughter saw the perpetrator who threatened her with a knife and he followed a path. It was his testimony that they followed the path and saw a black jumper after which Tito called the Assistant Chief who told him that they remain at the scene. He testified that shortly, the Assistant Chief came with the police and they recovered the black jumper.
19. In cross-examination PW7 testified that from the crime scene to the place they found the black jacket was about 200 metres apart. He testified that Mr. Ayieke told them that his daughter saw the perpetrator who threatened her and further that Michael – Rastar picked the jacket from the ground.
20. PW8 Wycliffe Odhiambo Olango testified that on the 2nd July 2023 at around 11pm he received a telephone call from the mother of Benjamin, Karen, who told him that his sister in-law, Mary Oluoch (PW 3) had been attacked at night and petrol poured in her house. He testified that he went to the house of Mary Oluoch and she told him what had happened.
21. It was his testimony that in the morning of 3rd July 2023 he went to his uncle's place to explain to him what had transpired the previous night and stayed there until evening at about 5.30pm when he received a call that Marion was dead. He testified that he returned to his uncle's home to tell him what he had been informed after which he went to the scene and found Marion already dead and that her body was removed to the morgue by police from Maseno.
22. It was his testimony that on the 4th July 2023 at about 9.00am, officers from DCI came and as they investigated, Brian Odhiambo called one of the people who was with them saying a jacket had been



- traced near the scene which the police went and recovered the jacket and brought it. He testified that Brian searched on Facebook and found Benjamin's profile wearing the said jacket that his mother and brother were asked about the jacket and they both said that the jacket belonged to Benjamin.
23. It was his testimony that on 10th July 2023 he went to Masaba Hospital and identified the body of Marion to the doctor for post-mortem.
 24. PW9 Beatrice Achieng Otieno testified that she was a teacher at Kuoyo Mixed Secondary School. She testified that on the 3rd July 2023 she was the class teacher of Marion Atieno when she noticed her in class wearing a mask at 10am and on asking her why she wore a mask yet corona was over she said nothing much though she looked fatigued and disturbed yet she used to be jovial.
 25. It was her testimony that in the afternoon she was in class and she left school at 5pm with all other students as they are a day school. She testified that at night she saw in their WhatsApp group that one of their girls had been killed and it turned out to be Marion. She reiterated that that morning, Marion was disturbed unusually and she even asked her if she was pregnant and she laughed it off.
 26. In cross-examination PW9 testified that she had known the accused since 2021 after corona when the accused was admitted to the school and that he was a quiet boy with no discipline issues.
 27. PW10 No. 241252 Inspector Gideon Osundwa, a Forensic Documents examiner for 6 years working at the National Forensic Laboratory based at DCI Laboratory Nairobi testified that he was in court on my behalf of his colleague PC Audrey Otieno who was away on maternity leave.
 28. He testified that On 17th July 2023, the following exhibits were forwarded to their laboratory for analysis together with an exhibit memo dated 16th July 2023 (PMFI 3) under escort of No. 111023 PC Nicholas Maweu.
 - i. 'A' an exercise book containing the questioned handwritings.
 - ii. 'B' A letter written to the suspect by the deceased.
 - iii. C1 – C4 Letters written by the deceased.
 - iv. 'D' known handwritings of the deceased.
 - v. 'E' known handwritings of the suspect Benjamin Omondi.
 - vi. 'F' A document bearing specimen handwriting of the suspect.
 29. It was his testimony that the exhibits were received on 17th July 2023, issued with a unique Lab No.653/2023 and that the request on the exhibit memo was to ascertain whether the questioned handwritings on 'A' written in black ink were made by the same author when compared with the writings on 'B', C1 – C4 and the known handwriting on Exhibit 'D'.
 30. PW10 testified that the sets of handwritings were subjected to analysis by PC Audrey Otieno and she came up with the opinion that the handwritings were made by the same author. It was his testimony that the second request was to ascertain whether the questioned handwritings in 'A' written in Blue Ink were made by the same author when compared with specimen handwritings on 'F' and the known handwritings on the exhibits marked 'E'.
 31. He testified that these sets of handwritings were subjected to analysis and PC Otieno opined that the handwritings were made by the same author. He testified that in this analysis, the officer considered individual characteristics which enabled her to reach the conclusions: -



- i. The form of writing in each set.
 - ii. The general pen movement.
 - iii. Natural pen lifts.
 - iv. Pen pressure.
 - v. Pen speed.
 - vi. General character constructions.
 - vii. General character resemblance.
32. He further testified that upon Forensic Analysis, PC Audrey Otieno compiled a forensic report and appended her signature on 17th July 2023, which report was verified by a team of 4 other experts. It was his testimony that in her analysis, PC Audrey Otieno used a special machine – Video Spectral Comparator (VSC 6000) that helps identify characteristics 1-8 above through magnification. He produced the report as P. Exhibit 1.
33. In cross-examination PW10 testified that the machine VSC 6000 is only used to aid the expert in the analysis as the opinion was done by the expert following a forensic analysis which is scientific. He testified that in his experience, no two people can have the same handwriting and further that fading of handwritings will not affect the results of the analysis. He further testified that only a small portion of C3 is faded and otherwise the whole document is very clear.
34. PW11 Dr. Thaddeus Masana carried out the deceased's post-mortem testified that he was requested to ascertain the cause of death of Marion Otieno on 3rd July 2023 when she was attacked by a well-known person on her way from school and stabbed on her neck.
35. He testified that on the 10th July 2023 at Masaba Hospital mortuary at 8.30am he examined the body and found that it was a female African about 15 years of good nutrition, good nutrition, well built, 1.5cm. That the body was well preserved by embalming and rigor mortis was present.
36. Dr. Masana testified that externally, there were parlour marked on periphery and general mucosa, multiple penetrative and lacerative wounds, nine of them noted on anterior, lateral and right side of the neck, deeply causing laceration of the jugular and coroted vessels on the neck. He testified that the respiratory system lungs were pale and that the heart and great vessels were empty with minimal content of blood.
37. It was his testimony that the neck had lacerations due to penetration wounds and as a result of his examination he formed the opinion that the cause of death acute severe haemorrhage due to multiple penetrative wounds to the neck. Dr. Masana testified that he issued Death Certificate No. 1511880, signed the postmortem Report and dated it 10th July 2023 and collected blood sample for further analysis and handed to DCI officer. He produced the report as P. Exhibit 2.
38. PW12 Polycarp Lutta Kweyu, a Principal Chemist at Kisumu Government testified that a report of Government Analyst which he prepared acting on request of PC Nicholas Maweu of DCI Kisumu West in respect of the 9 samples submitted on 10th May 2023 for analysis.
- i. A black school tie marked 'A'.
 - ii. A black laptop bag marked 'B'.
 - iii. A black track suit jacket 'C'.



- iv. A knife with a plastic orange handle marked 'D'.
 - v. A pair of black shoes size 7 'E'.
 - vi. A black trouser with a black belt marked 'F'
 - vii. A black bag – back pack 'G'
 - viii. Blood sample of Marion Atieno (deceased) 'H'
 - ix. Bucal swab of Benjamin Omondi 'I'
39. It was his testimony that they were to carry out DNA analysis to determine the presence and origin of the evidential biological material and that his findings were: -
- i. Item 'G' – Black pack bag was heavily stained.
 - ii. The laptop bag 'B', the knife, 'D', Trouser 'F' were moderately stained while the shoes 'E' was lightly stained.
 - iii. All the stains tested positive of blood of a human being.
40. PW12 testified that he generated DNA profiles from the samples, compared them and concluded as follows: -
- i. The DNA profile generated from blood stains on laptop bag 'B', Shoes 'E', Trouser 'F' and bag pack 'G' are identical and matches the DNA profile of Marion Atieno, deceased.
 - ii. The DNA profile generated from item 'D' the knife, matched the mixed DNA profile Marion Atieno (deceased) and Benjamin Omondi (Accused).
 - iii. DNA profile generated from 'A' tie and the jacket 'C' are identical and matches the DNA profile of Benjamin Omondi, the accused.
41. PW12 produced the DNA Report as P. Exhibit 3. It is dated 3rd August 2023.
42. PW13 No. 111026 PC Nicholas Maweu the investigation officer testified that on 3rd July 2023 at about 7pm he had gone home when he was called by his DCIO and briefed to visit a scene of murder reported by Area Assistant Chief via a phone call where it was reported that a student's body was found at the scene lifeless.
43. He testified that he went to Mbalawandu at the scene and found a body of a student lying lifeless on a footpath in a pool of blood. He testified that the body had stab wounds on the neck. He testified that they removed the body to Chulaimbo – Masaba Hospital Mortuary. It was his testimony that the following day they revisited the scene and also went to the deceased's home and found mourners and proceeded with some young men proceeded to search the area and subsequently recovered the black jacket.
44. PW13 testified that he returned to Marion's home and placed the black jacket on the ground and asked mourners present, one by one, to pass by and see if they could tell whether they had seen anyone wearing that jacket. He testified that one lady appeared to recognize the jacket so he called him aside and she eventually showed him a picture of a young man who was wearing the same jacket. It was his testimony that the young man he saw in the photos wearing the recovered jacket is the accused person.



45. PW13 testified that they proceeded to the accused's home but did not find him as he was in school but that they recovered black shoes, a black tie, a school trouser all blood stained, a simcard plate bearing the same serial number as the simcard they had recovered from the scene of murder. He further testified that they also recovered 'love' letters written by the accused to the deceased and the deceased would also respond as well as a booklet which they both used to write in.
46. It was his testimony that they also recovered other 'love' letters written by the accused Benjamin to Marion in which he had threatened to kill her. He testified that when the accused was brought to them from school and asked him if he knew the jacket, the accused said it was his. It was his testimony that the accused had a cut on his right hand which he revealed was from the knife which he used to cut Marion. He further testified that the accused revealed that he had hidden his knife in the thicket where he led the IO and they recovered it. PW13 testified that they arrested the accused.

The Defence case

47. The accused person gave a sworn testimony in which testified that on the 3rd July 2023 he left school in the company of the deceased but that they parted ways and each of them headed to their homes. He testified that as he was on his way looking for rabbits he heard screams and when he went to check he saw Marion lying down bleeding with a stab on the neck. He testified that he went to sleep and the following day he went to school from where he was later arrested. The accused testified that he had a cut on his finger because a wire cut him when he was repairing a fence.
48. In cross-examination the accused admitted that he was with the deceased on the evening she passed and that it took around 20 minutes after they had parted to hear screams. He testified that he did not know how blood got on his school bag or on his school trousers.
49. DW2 Victor Owino from Kuoyo Secondary School testified that the last time he saw Marion was when they were having lunch in school and she had a sweater which Benjamin had given him during half term. She was my school mate.
50. DW3 Lucas Otieno, the deceased's older brother testified that he was present when the DCI was collecting items from his brother's house. He testified that the deceased and the accused were dating but that he had never seen the accused and the deceased disagree.

Analysis and Determination case

51. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel. The accused faces a charge of murder contrary to section 203 of the Penal Code. The section provides 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”
52. The prosecution has to adduce evidence to establish that there was death, the cause thereof, that the death was unlawfully caused, that the accused is the person is the person who unlawfully killed the deceased and that he had malice aforethought. The standard of proof is beyond reasonable doubt on all the elements of murder stated above.
53. As to the deceased's death, PW1, PW2, PW3, PW4, PW6 and PW8 testified that they saw the deceased's body at the scene and further PW8 testified that he identified the deceased's body prior to the post-



mortem being carried out. The fact of the deceased's death was placed beyond doubt by the post-mortem report produced by PW11, Dr. Masana testified that he concluded that the deceased's cause of death acute severe haemorrhage due to multiple penetrative wounds to the neck.

54. 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.”

55. As stated above, there is no doubt that the death of the deceased was caused by the injuries that she sustained on the chest as was detailed in PEX 2. There is no evidence showing that the injuries found on the body of the deceased 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. Accordingly, I find and hold that the death of the deceased was caused by an unlawful Act.

56. As to whether it was the accused who unlawfully caused the deceased person's death, none of the prosecution witnesses was present when the deceased met his death. Admittedly, the prosecution case against the Accused person primarily rests on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, 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.” See also *Musili Tulo v Republic Cr. App. No. 30 of 2013*.

57. The Court of Appeal 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) e KLR 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] E.A 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.”

58. In this case, various strands of evidence connected the Accused with the death of the deceased. The prosecution led evidence to the effect that the accused was the last person to be seen with the deceased. PW6 testified that he saw the accused with the deceased walking as she sought for network to make a call and after a few minutes heard screams on rushing to where the screams emanated found the deceased lying down dead with stab wounds on the neck. The accused himself admitted that he was the last person to be with the deceased prior to her death.
59. The aforementioned notwithstanding, the following evidence adduced linked the accused to the deceased's murder. PW13 testified that they recovered a black jacket from a thicket near the scene of the crime which turned out to be the accused person's. Further, the blood stains on the laptop bag, Shoes, Trouser and bag pack all recovered from the accused's house as confirmed by the witness for the accused who was his brother, matched the deceased's DNA profile and also the knife that the accused guided the police to recover had the mixed DNA profile of the deceased and the Accused, further corroborating PW13's testimony that the accused informed him that he had cut himself with the same knife that the deceased had been stabbed with.
60. There was also the P Exh.1, the Forensic Document Examiner's Report that showed that the documents presented to them that included threatening letter from the accused to the deceased were authored by the accused person.
61. Juxtaposed against this was the accused person's defence denying killing the deceased but admitting that he was the last person with the deceased prior to her death. DW2 and DW3 did not in any way aid in the accused's defence.
62. 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



she 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 her death.

63. 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.”

64. 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.”

65. 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.”

66. 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.”

67. In the present case, and from the evidence of PW6 and the accused himself, it is the accused who was the last person ‘to be seen’ with the deceased. The deceased was subsequently found dead lying on the ground with stab wounds to the neck. The accused person was under no duty to adduce evidence and challenge the prosecution’s case. However, the evidence adduced irresistibly points to the accused as the person who unlawfully killed the deceased and although motive is not necessary, in this case, the motive is clear. It was love gone sour.

68. I thus find that the prosecution proved that it was the accused person who unlawfully caused the deceased’s death.

69. Finally, as to whether the accused had malice aforethought when he killed the deceased, 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.”

70. 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. what can be deduced from section 206 (a-e), 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.

71. The post-mortem report presented by Dr. Muchana showed that the deceased had sustained multiple stab wounds to the neck puncturing the jugular vein and the carotid artery. These are the major suppliers of blood to the brain and head and by attacking the deceased on the neck severally (9 times) the accused was well intent on causing the deceased grievous harm which would eventually make it impossible for her to survive the ordeal.
72. I thus find that the prosecution proved malice aforethought on the part of the accused person beyond reasonable doubt.
73. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt.
74. Accordingly, I find the accused person Benjamin Omondi Otieno guilty of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly.
75. Sentence shall be after record and mitigation.

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

R.E ABURILI

JUDGE

