



**Republic v Oduor (Criminal Case E012 of 2023)
[2024] KEHC 16193 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E012 OF 2023
WM MUSYOKA, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

HUMPHREY OPIYO ODUOR ACCUSED

JUDGMENT

1. The accused, Humphrey Opiyo Oduor, faces a murder charge. It is alleged that, on 27th May 2023, at Sidende Sub-Location, Malanga Location, Nambale Sub-County, within Busia County, he murdered Peter Ofura Barasa, contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. He denied the charges, and a trial ensued, where 6 witnesses testified.
2. PW1, Patrick Amani Waswa, was telephoned by a person, using a mobile telephone line belonging to the deceased, informing him that the deceased was at the gate to his house. When he went out to his gate, he found the deceased lying there, unresponsive, dead. His body had injuries. He alerted the authorities, who came and removed the body. He did not know the accused person, and he did not see him at his gate, when and where he found the deceased lying dead. PW2, Philip Wesonga Sikuku, was an uncle of the deceased. He was not present when the deceased was killed, but was alerted that he was lying dead at the gate of PW1. He did not know the accused. He noted that the accused had blood on his head.
3. PW3, Victor Otsieno Omondi, did not know the deceased, but was acquainted with the accused, as he was his neighbour, and he had bought a mobile phone from him. He, PW3, was later arrested over that phone, on the basis that it belonged to a person who had been killed. He told the police that he had bought it from the accused, who was subsequently arrested. He said that he was not aware, when he bought the phone, that its owner had been killed. PW4, Julita Akuku Wanyama, was a spouse of PW3. She was at home with PW3, when the accused came, and the 2 left together, before PW3 came back and informed her that the accused wanted money from him, in exchange for a phone.



4. PW5, Dr. Nabuya Dancan, a medical officer, performed a post-mortem on the body of the deceased. The body had a skull fracture on the frontal and left parietal region, with lacerations on various parts of the body. He opined that the head injury caused the death, and had been inflicted by a probable sharp object.
5. PW6, Police Constable Francis Otieno Nyadero, was the investigating officer. He detailed what he did in the course of the investigations. He explained that he arrested PW3, as he had the phone belonging to the deceased, who informed him that the accused had sold it to him, although he did not make a formal confession. He arrested the accused, who confirmed that he had sold the phone to PW3. He said that he had arrested the person who had been seen last with the deceased, but he released him for lack of evidence. He said that he had no evidence to establish that the phone belonged to the deceased. He stated that the person, who stole the phone, called the family, to alert them of the whereabouts of the deceased, but he had no call logs to prove that. He could not tell whether the phone had the fingerprints of the accused.
6. I put the accused on his defence, on 13th May 2024. He testified on oath, and called no witnesses.
7. He stated that he did not know the deceased, and that he was not at the scene of the alleged murder. He denied selling the phone to PW3, and that he saw the phone for the first time in court. He stated that he knew PW3, as a neighbour, but asserted that he never sold a phone to him. He denied being involved in the killing of the deceased, and he said that he did not know how he was killed.
8. The accused has filed written submissions. He argues that the entire case is built around circumstantial evidence, and cites *Abdala Wendo vs. Republic* [1953] EACA 166. He submits that no case had been made out against him, for the murder of the deceased.
9. The elements, for 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 the accused caused the death with malice aforethought.
10. On the death, there is ample proof that the deceased died. PW1 and PW2, who were his relatives, testified to seeing the dead body of the deceased, and to witnessing the body being removed from the scene by the police, for conveyance to the mortuary. PW5 conducted post-mortem on the dead body of the deceased. PW6 was present at the post-mortem exercise.
11. On the cause of death, the evidence of the medical officer of health, PW5, is crucial. He testified that the body had a skull fracture on the frontal and left parietal region, with lacerations on various parts of the body. He opined that the head injury caused the death, and that the injury was caused by a probable sharp object.
12. On the role of the accused in the causation, the available evidence does not point to the accused and the deceased knowing each other prior to the incident, and the only connection was a phone recovered from PW3, said to belong to the deceased, which PW3 said came to his possession, upon it being sold to him by the accused. Other than that, there is no direct evidence of the involvement of the accused in the death.
13. So, did the accused have any role in the causation? Did he have any role in the infliction of the injuries that caused the death? The accused denied causing any of those injuries. He stated that he did not even know the deceased, and denied selling the phone to PW3. Is his testimony believable? The starting point should be with the phone. Did it belong to the deceased? Was there a connection between it and the deceased? No tangible evidence was adduced on this. No evidence was tendered to establish that the deceased had bought it, as no receipt in his name was produced. His relatives, PW1 and PW2, were not confronted with the phone placed before the court, for the purpose of identifying it as belonging



- to the deceased, in any event, his brother, PW1, testified that he did not know the phone belonging to the deceased well.
14. The phone, that was produced in court, was traced to PW3, according to PW5. In his testimony, PW5 merely said that they traced the phone to PW3, and went to wherever he was, and arrested him. He led no evidence on the process that he used to trace the phone to PW3. He made no reference to any IMEI number. He led no evidence on how he established that the phone belonged to the deceased. He provided no forensics recovered from that phone, that connected the same to the deceased. He alleged that it was the same phone that was used to call PW1, to alert him that the deceased was lying at his gate, but he provided no call logs, to establish that, indeed, the call had been made from that phone. No evidence was provided that the telephone number given by PW1, as the one belonging to the deceased, was indeed his, and that the SIM card for that line was used on the mobile phone produced in court. PW5, as the investigator, provided no proof, whatsoever, that the mobile phone, that he produced in evidence, ever belonged to the deceased.
 15. As there was no proof that that phone was connected to the deceased, whatever might have transpired, between PW3 and the accused, over it, would provide no foundation, upon which conclusions could be drawn, that that particular phone was connected to the death of the deceased. Whether the accused, or PW3, had possession of the phone, produced in court, would be of little relevance, to the extent that there was no evidence that that phone was connected to the deceased in any way. The fact that the 2, the accused and PW3, engaged in a sale exchange of that phone, if at all, would be neither here nor there, so long as no proof was provided that the same belonged to the deceased.
 16. The conclusion, I draw, therefore, from these facts, is that the accused person had no role in the causation, of the death of the deceased. The circumstantial evidence, allegedly arising from his alleged possession of the phone in question, which he allegedly sold to PW3, is very weak, for purposes of supporting a case for the conviction of the accused, given that the prosecution has not established that the said phone belonged to the deceased.
 17. The last consideration should be whether the accused 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. This is usually 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. These four would suffice for the purposes of this discussion.
 18. The question then is, were the injuries inflicted on the deceased so inflicted with an intention to kill him, or with an intention to cause to him a bad injury, or were they caused recklessly and indifferently, or was the intention to commit some sort of felony? The killer blow was the fracture to the skull. There is ample case law that an injury caused to the skull, which houses a vital organ, the brain, would be deemed, should it cause death, to have been so inflicted with the intention of causing the death. The injury in this case was to the skull. A blow, to that area or region of the body, must have been calculated and intended to cause death, or to cause a very bad injury. I am persuaded that the death was caused with malice aforethought.
 19. None of the witnesses, presented by the prosecution, were present when the injuries were inflicted. PW1 and PW2 saw the deceased after he had already expired. The deceased died before he could give a narration, to the witnesses, of what had transpired. The case is, therefore, built on circumstantial evidence, as I have indicated above. It is trite that circumstantial evidence must inexorably point to the guilt of the accused, for there to be a conviction founded on it. Is that the case here? No. There was



no evidence placing the accused at the scene where and when the fatal injuries happened. Secondly, there was no evidence that the deceased and the accused knew each other, and were seen together that day, or shortly before the deceased was found dead. Thirdly, and finally, no forensics were presented connecting the accused to the death. Overall, there was no evidence, whatsoever, to connect the accused to the death of the deceased, for it to be said that he caused the death with malice aforethought.

20. Overall, it is my finding and holding that the offence of murder has not been sufficiently proved, against the accused person herein, and I do hereby find him not guilty, and acquit him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya, of the murder of Peter Ofura Barasa, contrary to section 203, as read with section 204, of the Penal Code. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 19TH DAY OF DECEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Mayaba, Ms. Chepkonga, Mr. Mumo and Mr. Onanda, instructed by the Director of Public Prosecutions, for the State.

Mr. Newton Enos Shihemi, Advocate for the accused person.

