



REPUBLIC OF KENYA



KENYA LAW
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**State v Otieno (Criminal Case E018 of 2022)
[2023] KEHC 177 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E018 OF 2022
RE ABURILI, J
JANUARY 23, 2023**

BETWEEN

STATE PROSECUTION

AND

JOEL ONDING OTIENO ACCUSED

JUDGMENT

1. The accused person herein Joel Onding Otieno is charged with 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 April 24, 2022 at around 2100hours at Ugambe Village, Kagonya Sublocation, North Ugenya Location in Ugenya Subcounty within Siaya County, the accused person murdered one Leonida Apuoya Anindo.
2. The accused pleaded not guilty to the Information for murder dated May 5, 2022 and the matter proceeded to full trial. The prosecution called four (4) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

3. PW1 Emmanuel Ochieng Opil testified that the deceased was his aunt. It was his testimony that on the April 24, 2022, a Sunday, he went to church then returned home where he stayed with his 100-year-old step-mother. He testified that at around 10 pm, he went to check on his aunt, the deceased, who lived with his nephew. PW1 testified that his aunt was alone that day because his nephew had gone to Kisumu. He further testified that she was on drugs so he went to check on her in the company of his grandchild, Fidel. That he carried a spotlight and that when Fidelis opened the house, which was a 2 bedroomed house, they got into the house and on reaching his aunt's bedroom, they found the herdsman, Joel Onding Otieno, half naked with no shoes, innerwear and no trouser and with only a shirt on. PW1 testified that Joel was coming from his aunt's bed which he, PW1, approached and



- found her lying across the bed with her legs hanging down and her dress drawn up. He testified that he saw some blood coming from her nose and realized that there was a problem as she was also gasping for her breath.
4. According to PW1, Joel sneaked out but PW1 raised an alarm and people responded immediately. He testified that they then lifted his aunt so as to prepare to take her to the hospital and suddenly, so much blood came from her mouth and nose before she died. He testified that the neighbours came and searched for Joel who had escaped. PW1 then informed the Village Elder who called the police who, only came to the scene in the morning. He further testified that he then proceeded to the home of the herdsman in Rue where his second wife also came from and as he drove towards Ugunja, he saw Joel walking by the road side so he stopped his car and raised an alarm and members of the public assisted Joel, tied him after which he drove him off to the police station at Segla.
 5. PW1 testified that at the police station, Joel was rearrested. He testified that the DCI Ukwala and OCS then took over the investigations and he took them to the scene where they processed the scene and removed the deceased's body to Sameday Classmate Mortuary at Segla. He further testified that a few days later, he attended the deceased's postmortem. He stated that he saw that the deceased had some bruises on her face and a broken hand. Pw1 testified that Joel had been his herdsman since the December 8, 2021. He identified him in court and stated that apart from this incident, he had not had any issue with Joel.
 6. In cross-examination, PW1 stated that the accused was well known to him as he had stayed with him for four months. He further stated that he went to visit his aunt at some minutes to 10pm. He further stated that he used the spotlight to see the house and to see Joel clearly. PW1 further stated that he asked Joel what he was doing there but Joel never answered. He stated that the accused by passed him as he went to check on his aunt
 7. PW2 Fidel Junior Owino, a student at Segla Township Secondary school in Form Three testified that PW1 was his grandfather and the deceased his great grandmother who lived in their home, but in a different house with Wickliffe Opil. It was his testimony that on the April 24, 2022 the deceased called him at about 7.30 pm and asked him to escort her to the toilet which he did. PW2 testified that he then went to check on the chicken but that the deceased called for help so he went back and escorted her back to her bedroom.
 8. PW2 testified that the deceased told her to close the door because she was not going to eat her dinner as she had eaten lunch. He testified that he closed her door then went to eat dinner at their kitchen. It was his testimony that as they were having their dinner, Joel came and tasted the food and said that it was bad so he threw it away and said that he was going to take alcohol. He testified that he then went to his grandfather's house and asked him to accompany him to his great grandmother's house so that they could give her medicine.
 9. PW2 testified that PW1 carried a spotlight and together, they proceeded to the deceased's house upon which he opened the first door and entered. It was his testimony that he saw clothes on the floor which he thought were his. He further testified that he opened the bedroom door and saw Joel inside and that his grandfather also got in and asked Joel what he was doing there. PW2 testified that Joel was half naked downwards and that Joel never responded. He testified that they saw his great grandmother with her clothes drawn upwards and struggling for breath with blood oozing from her mouth and nose on the bedsheets, from her nose. He testified that the deceased slept across the bed.
 10. PW2 testified that Joel picked his clothes and escaped. He testified that they looked for him as they had a spotlight but he was not there. He testified that he saw the accused well using the spotlight. It was his testimony that the accused left his shoes behind which he, PW2, learnt that he returned, picked



- them and left. He testified that the shoes that the accused left behind were the ones which he, PW2, had donated to him. He testified that he had known the accused for 3 months.
11. In cross-examination, PW2 reiterated that he had known Joel for 3 months. He stated that Joel used to assist in fetching water for their great grandmother. He stated that it was dark but they had a spotlight which they used to see Joel well and that they also spoke to him.
 12. PW3 Winfred Anyango Opil, testified that PW1 was her father and the deceased her grandmother. It was her testimony that on the April 24, 2022 at 10 pm, she was in the house when their father left to go and check on their grandmother. He testified that they went and returned with an alarm saying he had found Joel had strangled their grandmother.
 13. PW3 testified that she went and saw the deceased and returned to their house. She testified that she then saw Joel coming out of the house where he used to sleep carrying something like clothing then he went behind the house into the maize plantation and vanished. she stated that she went and informed her father who tried searching for him in vain. PW3 testified that there was electricity outside so she saw Joel well. She further testified that the following day, her father went to search for Joel, got him and took him to the police station. PW3 identified the accused in court by pointing him out in the dock.
 14. In cross-examination PW3 stated that she went to her grandmother's house after the incident.
 15. PW4 No. 234294 Police Constable Jacob Isaiah Masai, the Investigating Officer testified that he took over the file from Sergeant Abuyeka Ariwo who went on retirement from June 1, 2022. He testified that he had perused the file on what was done and understood it.
 16. He testified that on the April 25, 2022, Sergeant Abuyeka received information that someone had been killed at Sega so he left with Corporal Wanyonyi to the scene via Sega Police Station where one Joel Onding Otieno had been arrested and taken. PW4 testified that Sergeant Abuyeka arrested the accused and took him to Ukwala Police Station and visited the scene where they found the deceased, Leonida Apuoya Anindo had been removed to Same Day Classmates Morgue.
 17. PW4 testified that Sergeant Abuyeka investigated and recorded statements of 3 witnesses. He further testified that the accused was escorted to the Psychiatrist at Siaya and was found fit to plead. He further testified that a post mortem was done on May 27, 2022 at Same Day Classmates Mortuary at Sega by Dr. Duncan Nambuya who concluded that the cause of death was asphyxia by strangulation. The Postmortem Report was produced as PEX1 by consent.
 18. PW4 testified that he was a police driver and that the accused was known to him because he went to the scene of crime with Sergeant Abuyeka and drove the accused to Siaya Hospital for mental assessment. He testified that he never knew the accused prior to the incident. PW4 identified the accused in the dock.

The Defence Case

19. The accused testified on oath as DW1. He testified that on the April 24, 2022 at about 10 pm, he was in PW1's home where he was employed and that being a Sunday, he was not working as it was his off day. He testified that during the day, he went to do some casual jobs and returned at about 4 pm, showered and went to the kitchen and ate.
20. It was his testimony that at 5.30 pm, he left to go and take alcohol which he exceeded then returned and proceeded to the kitchen where Winnie and Junior were eating. He testified that they exchanged some words and his boss mama Nyandigo came and asked him why, whenever he was drunk, he disturbed in the kitchen before telling him to leave the kitchen or she invites her husband.



21. DW1 testified that he left and went to the house where he normally slept and found the door opened. He testified that his sleeping house was near the deceased's house. He testified that he entered the deceased's house as the door faces the door of the house where he slept in. He testified that the deceased was in darkness and asked him for water to drink which he fetched and took to her room on the stool. It was his testimony that he saw his boss coming using a torch and carrying a sword.
22. The accused testified that his boss normally beat him when he was drunk so he told him that on that day he would not beat him. The accused testified that his boss informed him that he had abused the people in the kitchen and that he had answered his wife badly while in the kitchen. The accused testified that he ran as his boss chased him using a sword and that he fell in the mud. He testified that he then removed his muddy trouser and left it in the deceased's house and took Junior's shoes and ran up to his aunt's house and helped them to milk cows but as he was returning to his work place, he met his boss who took him to the police and left him there.
23. The accused admitted that he was found inside the deceased's house as testified by PW1 and PW2. He testified that when he got into the deceased's house, he found her sleeping. He testified that he placed water on her stool and got out and that is when he met his boss. The accused denied killing the deceased. He testified that he never inflicted any injuries on her.
24. In cross-examination, DW1 stated that that was the first time he disagreed with the boy and the girl in the kitchen. He admitted that he took ugali and threw it away. He further admitted that he was drunk and that he was found in the deceased's house. He stated that he used to sit in that house of the deceased and even sleep on the chair. The accused stated that he used to drink alcohol but not daily. The accused further stated that he had fallen in the mud so he removed his clothes when he reached the deceased's house. He stated that he had removed his shirt and trouser and was only in his inner pants after leaving the kitchen. He further testified that he removed the clothes so that he could go wear others and return back to his drinking spree. He testified that he had his vest on.

Analysis and Determination

25. I have considered the evidence for the prosecution and the defence. The issue for determination is whether the prosecution has proved the guilt of the accused person for the offence of murder beyond reasonable doubt. To sustain a conviction on a charge of murder under Section 203 of the [Penal Code](#), the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:
 - a. The fact and the cause of death of the deceased.
 - b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - "actus reus."
 - c. That the said unlawful act of omission or commission was committed with malice aforethought - "mens rea."
26. The burden to prove all the aforementioned ingredients of the offence beyond reasonable doubt falls on the prosecution in all cases. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. *Miller v Minister of Pensions* [1947] All. E.R. 372. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused person at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.



27. The fact of death of the deceased was proved through the testimony of PW1, PW2 and PW3 all who saw the deceased's body at the scene where it was recovered by the police. PW1 testified that he attended the deceased's postmortem. The postmortem report on the examination of the body of the deceased was not been objected to nor controverted. The Doctor who conducted the autopsy formed the opinion that the cause of death was asphyxia by strangulation. Accordingly, the fact and cause of death ingredient of the offence was proved by the prosecution beyond reasonable doubt.
28. As to whether the death of the deceased was unlawfully caused, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* [2016] eKLR citing the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 where it was held that:
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or it 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.”
29. The deceased in this case was found to have died from strangulation. A death by strangulation seems to be very personal and, in most cases, unconsciousness may occur within seconds, and death within minutes. It is thus clear that the deceased's attacker had a clear intention of snapping life out of the deceased. The evidence before court points to an unlawful act that led to the death of the deceased who was of advanced age.
30. As to whether it was the accused person who unlawfully killed the deceased, PW1 testified that he went to check up on the deceased as he normally did and found the accused half naked with only a shirt coming from the deceased's bed, while the deceased had her clothes drawn upwards. He testified that he saw blood oozing from the deceased's nose and her struggling for breath. It was his testimony that the accused somehow managed to slip away from the scene but PW1 raised an alarm and the accused was subsequently caught the following morning.
31. PW2 corroborated PW1's testimony. He added that they were able to identify the accused as PW1 had a spotlight and further because in running away, the accused left behind his shoes, which PW2 whose evidence was firm and believable, had donated to him.
32. In his defence, the accused denied killing the deceased. He explained his half nakedness as being a result of PW1 chasing him and him falling in the mud. The accused however admitted that he was found in the deceased's house as alleged by PW1 and PW2. He was therefore the last person seen with the deceased prior to her death PW1 and PW2 arriving and her death almost immediately thereafter.
33. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before death was responsible for that death and the accused is therefore expected to provide any explanation as to what happened. Having been placed at the scene of the incident as the person who was last seen with the deceased before she died, the accused herein has a duty to explain how the deceased met her death.
34. Sections 111(1) and 119 of the *Evidence Act* provides that:
- “
- “ 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.”

35. In the case of State v F.O.O [2021] eKLR, it was held inter alia 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 accused 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.”

36. In the instant case, the evidence adduced by the accused himself who was not obliged to give any defence or self-incriminating evidence as explained to him in the ruling on whether he had a case to answer, but with a reserved right to adduce and challenge the evidence adduced by the prosecution against him failed to offer any explanation as to how the deceased might have met her death. The chain of circumstances emanating from the prosecution evidence point at the accused solely as the one who committed the unlawful act that led to the deceased’s death. His defense, in my mind, amounted to a mere denial. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused and no other person who unlawfully caused the deceased’s death.

37. As to whether the accused had malice aforethought when he unlawfully killed the deceased, Section 206 of the Penal Code provides that:

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 of any person who has committed or attempted to commit a felony.”

38. In *Republic v Stephen Sila Wambua Matheka* [2017] eKLR the Court interpreted section 206 of the Penal Code as follows:

“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. In the *Ogelo v Republic* [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of *Ernest Bwire Abanga Onyango v Republic* [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.”

39. The deceased died as a result of being strangled. The postmortem report shows that she sustained fracture of the neck of the left arm at the surgical neck of the humerus, she had bruises across the neck and behind the ears and bruises lateral to the right nostril. There can be no other reason for breaking the arm of and strangling an 100 year old save for purposes of killing her.

40. Motive for the killing is however irrelevant, although from the manner in which the witnesses PW1 and PW2 found the deceased, lying across her bed and her clothes pulled up, it is highly probable that the accused intended to rape the deceased who resisted and hence the struggle resulting in him breaking her arm and the bruising that she received. This is so because I find his defence on why he was found half naked in an old lady’s bedroom with her clothes pulled up unbelievable.

41. In *Republic v Lobo Lenaigero* [2010] Eklr, Maraga J (as he then was) stated that:

“Motive is the reason that makes a man do a particular act in a particular way. It exists for every voluntary act, and is often proved by the conduct of a person. See Section 8 of the *Evidence Act* Cap 80 Laws of Kenya. Motive is of course immaterial in proving one’s criminal responsibility. That is quite clear from Section 9(3) of the Penal Code which provides that:

“Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility”

Obviously with this provision in mind, in case of *Joseph Wambirwa Mwanthi –Vs- Republic*, Criminal Appeal No 63 of 2005 (CA Nyeri), the Court of Appeal stated that “Generally speaking, motive is not essential to prove a crime.”

However, as the same court said in *Lubambula Vs R* [2003] KLR 683 “Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.” In *David Kipkemboi Ngetich Vs Republic*, Nakuru Cr.



Appeal No. 276 of 2006 (CA) the Court of Appeal said its relevance “is to contextualize the circumstances in which the offence charged was committed.”

42. In this case, am satisfied that the prosecution proved beyond reasonable doubt that the accused had malice aforethought when he unlawfully killed the deceased.
43. In the end, I find and hold that the prosecution has proved all the elements of the charge of murder against the accused person herein beyond reasonable doubt. I find the accused person herein Joel Onding Otieno Guilty of the offence of murder as charged and he is convicted accordingly.
44. Sentence shall be pronounced after records and mitigation.

Dated, Signed and Delivered at Siaya this 23rd Day of January, 2023

R.E. ABURILI

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. E018 OF 2022

STATE.....PROSECUTION

VERSUS

JOEL ONDING OTIENO..... ACCUSED

RULING ON SENTENCE

1. The accused person has been convicted of the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The Prosecution submits that they have no records of criminal conduct on the convict hence he can be treated as a first offender.
2. The accused and his counsel Mr. Oduol have mitigated. The accused is a 24 year old young adult man. He is a first offender. He is remorseful and pleads for the court’s leniency in sentencing saying he never intended to kill the deceased and that he apologizes to her family members.
3. From the Postmortem Report dated April 27, 2022, the deceased was aged 100 years old. The accused was an employee who used to provide her with support as he was employed in the home by the deceased’s nephew, PW1.
4. The deceased suffered injuries involving fractures of the neck and left arm – humerus, bruises across the neck and behind the ears and one bruise lateral to the right nostril.
5. There was evidence of force used to strangle her and the fractures are indicative of so much force applied on her hence the accused cannot claim that he never intended to kill her yet at her age of 100 years and the fact that she had been ailing, she required tender care in her sunset years. The accused shortened the life of a lady who was already approaching sunset. He fast tracked her death which is not acceptable.
6. The Social Inquiry Report filed for Prebail assessment paints the accused as a polite man with no known criminal record. However, that he was only polite when sober but becomes easily irritated when drunk.
7. I have considered all the above mitigations and circumstances under which the offence was committed. I have also considered the age of the accused which is 24 years and the age of the deceased which was 100 years.



8. Punishment for Murder upon conviction is death as stipulated in Section 204 of the Penal Code. However, following the Supreme Court's decision in Francis Karioko Muruatetu v Republic[2017]eKLR, it is clear that the trial court has discretion in sentencing and in this case of Murder.
9. Having considered the mitigation of remorse by the accused person and the circumstances of the offence and his young age, I hereby exercise discretion and sentence the accused person Joel Onding Otieno to serve twenty (20) years in prison to be calculated from the date of his arrest on April 25, 2022 as he has been in custody since then. This is to accord with the provisions of Section 333(2) of the *Criminal Procedure Code*.
10. Right of Appeal 14 days explained.
11. I so order.

Dated, signed and Delivered at Siaya this 23rd Day of January, 2023

R.E. ABURILI

JUDGE

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