



**Republic v Odera (Criminal Case 54 of 2018)  
[2023] KEHC 910 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 910 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 54 OF 2018  
PJO OTIENO, J  
FEBRUARY 17, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BENSON OLUTENDE ODERA ..... ACCUSED**

**JUDGMENT**

1. The accused, Benson Olutende Odera, was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence were given to have been that on the 16<sup>th</sup> day of August, 2018 at Mwikalikha village, Mwikalikha Sub location, Kisa location in Khwisero Sub-County within Kakamega County, the accused person murdered Simon Khabonekha Olutende. In the trial that ensued after entry of a plea of not guilty, the prosecution called an aggregate of four witnesses while the accused gave a sworn statement without calling any other witness.

**The Evidence**

2. PW1, Samwel Olutende, a son to the deceased testified that on 16/8/2018 he was at his farm uprooting peas when the accused person whose farm borders his began uprooting his boundary. He then went to inform the deceased who questioned the accused on why he was uprooting his son's boundary and that is when the accused pushed the deceased to the ground. The deceased then decided he would report the matter with the police. A few minutes later, he heard his daughter Gladys scream and rushed to his compound where he found Gladys had been cut above the mouth and was bleeding. She told him that the accused was responsible and that he had run to the bush. He again heard screams and when he rushed to the scene he found his father had been cut about three times on the head. They rushed him to the hospital but unfortunately he died on the way.
3. On cross examination he stated that he did not inquire from the crowd that had formed on what had happened to his father and that he did not see the accused at the scene.



4. PW2, James Butala Khabonekha, a son to the deceased testified that on 16/8/2018 he had screams from the home of PW1 and as he was heading there, he saw the accused running from the homestead holding a panga that had blood stains. On getting into the homestead he found Gladys, PW1's daughter with a panga cut on the head. He stated that he later received a report that his father had been killed whereupon he rushed to the scene and found that the deceased had panga cuts on the head and cheek.
5. On cross examination he stated that he did not know how the deceased came to receive the injuries. He further confirmed that his family had a boundary dispute with the accused though he refuted claims that that is the reason he took the stand.
6. PW3, Gladys Ongayo who is PW1's daughter and a granddaughter to the deceased gave evidence that on 16/8/2018 she watched from a distance of about 20 meters as her father, grandfather and the accused argued over a boundary. She saw the accused push the deceased to the ground and when PW1 wanted to intervene the deceased indicated that he would report to the police. She then went home and was sent to the shop by her step mother. As she headed to the shop, the deceased was pushing his bicycle ahead of her. On reaching the main road, the accused emerged from a tea plantation that was beside the road, stepped on the wheel of the bicycle and the deceased fell down. The accused then severally cut the deceased with a panga on the head. She started screaming and the accused started running after her claiming he will her. When she got home she found the door locked and the accused cut her with a panga on the upper lip. She started to scream and that is when the accused ran away towards the river.
7. On cross examination she stated that when the accused person emerged from the tea plantation, there was nobody else on the road.
8. PW4 No. 59986 PC Thomas Bii attached to the DCIO Khwisero sub county and the investigating officer in this matter stated that on 16/8/2018 he received information that a person had been killed at Khwisero village. Together with the deputy OCS they went to the scene where they were informed by members of the public that the deceased had been attacked by the accused. They then inquired from the relatives of the deceased on what had happened and recorded the statements of PW1, PW2 and PW3. He stated that the accused surrendered himself at the Mwisheshe AP camp.
9. On cross examination he stated that he did take note of the names or the statements of the members of the public who claimed that the deceased was attacked by the accused.
10. The postmortem report was produced by PW4 which indicated that the autopsy on the deceased was carried out on 21/8/2018 and that he had a deep cut wound below the cheek bone and multiple cut wounds over the scalp. The pathologist formed the opinion that the deceased died due to sudden cardio respiratory collapse following sudden, severe brain injury as a result of heavy and sharp force injury over the left side of the head.
11. With the closure of the prosecution's case, the court ruled that a *prima facie* case had been established against the accused person and he was thus placed on his defence.
12. When called upon to defend himself and to displace the evidence by the prosecution, the accused testified that on 16/8/2018 he was at Musoli market carrying luggage for people when PW1 and PW2 in the company of police officers arrested him. It was at the police station that he was informed that he was arrested in connection to the murder of the deceased yet no murder weapon was recovered from him. He denied having had any grudge with anyone including PW1 and PW3 including the alleged destroyed boundary whose owner was never disclosed.
13. At the close of the defence case, parties elected to offer oral submissions. Mr. Ondieki, counsel for the accused, submitted that the accused had given a full account of his whereabouts on 16/8/2018 and



that since the prosecution has not produced anything against the accused to link him with the death of the accused, the accused ought to be acquitted.

14. Ms. Chala, counsel for the state submitted that the evidence of PW3 who is an eye witness was the connection between the accused and the deceased's death and that the evidence when related with that from other witnesses proved the connection of the accused and the offence charged.

### **Issues, Analysis and Determination**

15. The offence of murder is defined in section 203 of the *Penal Code* to be committed when a person, with malice aforethought, causes death of another person by an unlawful act or omission.
16. Therefore, for the prosecution to sustain a conviction, all the three known ingredients contain in section 203 of the penal code ought to be proved beyond reasonable doubt. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the Court of Appeal reiterated the elements of the offence of murder to be the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought.
17. When those ingredients are applied to the facts and circumstances of this matter, the issues that come up and isolate themselves for determination are whether Simon Khabonekha Olutende is dead; whether his death was caused by the unlawful acts of commission or omissions; and whether the accused was propelled by malice aforethought.
18. It is in no doubt that Simon Khabonekha Olutende is dead as confirmed by PW1, PW2 and the autopsy report produced by PW7. PW1 indicated that the deceased died as they rushed him to hospital while PW2, on receiving information about the deceased being killed, he rushed to see him and indeed confirmed that he was dead. The post mortem report indicated that Simon Khabonekha Olutende is deceased and the cause of his death was sudden cardio respiratory collapse following sudden, severe brain injury as a result of heavy and sharp force injury over the left side of the head. The court thus holds that the first ingredient of the offence was proved beyond reasonable doubt.
19. On whether the death was positively linked to the unlawful acts of the deceased, the post mortem report and its conclusions leave no doubt that the death of the deceased was caused otherwise than by disease. The question then is who caused it? Was it the accused?
20. The only eye witness to killing of the deceased was PW3. At the time this court recorded her testimony, she was 18 years and a year had lapsed since the murder occurred. The deceased was her grandfather and the accused was a cousin hence both were familiar to her. In assessing the credibility of her recollection of events, I will look at the events leading up to the killing of the deceased. PW3 testified to have witnessed an altercation between PW1 and the accused over land boundary which the deceased attempted to resolve. This information was corroborated by PW1 and it therefore goes to show her credibility. PW3 narrated how the deceased was ahead of her pushing his bicycle while she walked behind him. She recounted how the deceased emerged from the tea plantation and cut the deceased with a panga on the head, severally. She narrated how the accused ran after her wanting to kill her and then cut her with a panga right above the lip. It was the testimony of PW2 that he saw the accused running away with a panga which had blood stains and when he rushed to the homestead of PW1 he found that PW3 had been cut. All the events by all these witnesses are well aligned and I find their testimonies to be truthful, cogent, honest and credible. It was that corpus of evidence that persuaded the court that a *prima facie* case had been laid hence the need for the accused to defend himself.
21. It was the defence of the accused that on 16/8/2018 he was at Musoli market doing the business of carrying luggage for people. It emerges that this could have been his trade but he was not specific when



he reported to that duty and what time he checked off so as to displace the evidence of pW1,2 & 3 who saw him at the scene of murder. He additionally never provided any independent evidence to confirm his whereabouts on the said date. further, the evidence of the investigating officer that the accused turned himself in at Mwisheshe AP camp was never challenged but reiterated in cross examination. Throughout the prosecution's case, there was never an allusion of the defence of alibi put forth at the very tail end. I do find that the testimony seeking to establish an alibi, was an afterthought and was too feeble to displace the otherwise cogent position established by the prosecution.

22. In *Victor Mwendwa Mulinge v R* [2014] eKLR the Court of Appeal while addressing alibi defence stated:

“... in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

23. Being guided by that established position of the law, I find the defence by the accused seeking to remove him from the scene to be an afterthought and otherwise not credible. To the contrary the court is satisfied that the evidence of PW1, 2 and 3 placed the accused at the scene and squarely connected him with the assault upon the deceased.

24. On whether the accused was actuated with malice aforethought in causing the death of the deceased, the court takes guidance from the court of appeal in its decision in *Nzuki v Republic* [1993] KLR 171 where the court observed as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the rest of which is always subjective to the actual accused:

- i. The intention to cause death.
- ii. The intention to cause grievous harm.
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. it does not matter in such circumstances whether the accused desires those consequences, to ensue or not in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder

25. To determine whether or not the killing of the deceased was premeditated by the accused, this court will look at the events preceding and leading up to the death and the acts said to have been committed by the accused against the deceased. The events began with a dispute where PW1 alleged the accused was altering his land boundary leading to the intervention by the deceased. When the deceased intervened he was pushed to the ground by the accused and he indicated as confirmed by PW1 and PW3 that he would go and make a report with the police. The deceased went and took his bicycle and it is not clear if he was heading to the police station and as he pushed it the accused emerged from the tea plantation



and viciously cut him severally. The post mortem report indicates that the deceased had multiple cut wounds over the scalp about 4 and deep cut wound below the cheek bone. He did not inflict just one or two panga cuts, but several. That conduct paints him to have been on a mission which to grievously harm, main if not outrightly kill the deceased. A mission that he devised by taking a panga with him and hiding in a plantation as he waited to attack the deceased. That the deceased was a defenseless 86 years of age who was slashed a couple of times leaves no doubt in the mind of the court that the intention was to kill him.

26. Accordingly, it is the finding of the court that the conduct of the accused, as demonstrated by the prosecution's case, was propelled by malice aforethought.
27. Having found that the deceased died as a consequence of unlawful acts of the accused in heinously attacking him while propelled by malice aforethought, the inevitable conclusion is that the prosecution has proved the case against the accused beyond reasonable double. He is therefore convicted for having murdered Simon Khabonekha Olutende, on the 16<sup>th</sup> day of August 2018. He did so contrary to section 203 as read with section 204 of the [Penal Code](#). He is convicted as charged.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17<sup>TH</sup> DAY OF FEBRUARY 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Mr. Ondieki for the Accused

Ms. Chala for the Prosecution

Court Assistant: Polycap

