



**Republic v Ochieng & another (Criminal Case E005 of 2022)  
[2023] KEHC 21988 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21988 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE E005 OF 2022  
PJO OTIENO, J  
AUGUST 23, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MICHAEL OCHIENG ..... 1<sup>ST</sup> ACCUSED**

**ELIZABETH AKINYI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Michael Ochieng’ and Elizabeth Akinyi (‘accused persons’) are charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 21<sup>st</sup> day of June, 2022 at Sun-Rise Sub-location in Ekwanda Location, Luanda County within Vihiga County, the accused persons jointly and unlawfully killed Adrian Otieno.
2. The accused persons pleaded not guilty to the charge and to prove its case, the prosecution called a total of six witnesses. The first to take the stand was FO, a minor aged 11, for whom the court conducted vire dire examination. Upon the court being satisfied on his understanding of the importance of being truthful testified without being sworn and told the court that he lived with his grandmother who was neighbors with the accused persons. It was his evidence that the 1<sup>st</sup> and 2<sup>nd</sup> accused who are father and step-mother to the deceased would respectively cane the deceased because he was habitually wetting his bed. They would keep him in the bathroom from morning to evening and take turns in giving him food. He stated that on the day the deceased died, the 1<sup>st</sup> accused informed his father that the deceased was unwell and so the two accused persons rushed the deceased to hospital where the doctors said he was already dead. He claimed that the accused persons used to beat the deceased severally and that he had injuries on his legs, back and head. He claimed that the deceased used to go to school but eventually stopped.



3. On cross examination by Mr. Otsyeno, counsel for the 1<sup>st</sup> accused, the witness stated that the two accused persons rushed the deceased to the hospital on a motorbike and that he was in the team that rode the bike in their company. He stated that he did not confirm if the deceased was alive as they rode to hospital and that he saw the accused persons beat the deceased with a bamboo stick on several occasions and that the bathroom where they kept him had no door.
4. On cross examination by Ms. Lumallas, counsel for the 2<sup>nd</sup> accused, PW1 stated that the deceased was not put in the bathroom every day. On reexamination by Ms. Chala for the prosecution, he stated that the deceased sat on the motorbike where he held him while the 2<sup>nd</sup> accused sat behind him.
5. PW2, Imelda Aketch Odhiambo a clinician at Chulaimbo Hospital testified that on 22/6/2022 she received the accused persons together with two boys a teenager and a younger one at about 8PM. When she examined the younger boy he had no life and on further examination she noted he had a septic wound on the occipital region, penetrating wound all over the face, superficial septic wound at the back, right lower limb had an open wound exposing the bones and fresh cut wound on the lower left limb. She concluded that the child was a victim was a victim of habitual battering. The medical report was produced as PEXH1. When she inquired about the injuries the accused persons informed her that it was from an accident and upon further inquiry the 2<sup>nd</sup> accused informed her that it was the 1<sup>st</sup> accused that had battered the deceased and this prompted her to call the police who then took the body.
6. On cross examination by Mr. Otsyeno she stated that she examined the deceased on 21/6/2020 but did not note in the report that the injuries had been from a road accident involving a motor bike.
7. On cross examination by Ms. Lumalas she stated that the deep cut wound would be from sharp objects while the superficial wounds would be from blunt objects. Upon re-examination she stated that the wounds were not consistent to an accident but habitual battery.
8. PW3, Beatrice Amuri Namwayi, an aunt to the 1<sup>st</sup> accused, testified that on 22/6/2022 she received information that the 1<sup>st</sup> accused's son had died and that he had been arrested. She then went to the hospital where she identified the body of the deceased for purposes of post mortem. She stated that the 2<sup>nd</sup> accused was step mother to the deceased.
9. On cross examination by Mr. Otsyeno, she stated that she had not seen the deceased for a considerable period before the fateful day and that she had not seen the deceased with wounds while he was alive. On cross examination by Ms Lumalas she stated that she did not know the 2<sup>nd</sup> accused before the incident but she had heard that the 1<sup>st</sup> accused had married a new wife.
10. PW4 was No. 55647, CP David Omar, stationed at Maseno Police Station who gave evidence that on 21/7/2022 he was at the station when at about 2150hrs he received a distress call from Chulaimbo County Hospital and together with four other officers they rushed to the hospital where they were informed by the security guard that a man had escaped from the hospital. They then entered the ward where they found the body of the deceased lying on the table with a big wound on his head and multiple deep cut wounds on the body. She interrogated the 2<sup>nd</sup> accused who informed him that the deceased had died at 5PM and that they had taken him to the hospital when he was dead. They were then informed that the 1<sup>st</sup> accused had been spotted at the gate and when they went to arrest him he jumped into a river though they were able to arrest him. He then confessed to having committed a wrongful offence and pleaded for forgiveness. They concluded that the deceased had been tortured and proceeded to arrest the accused persons, placed them in custody and removed the body of the deceased to the mortuary.



11. when cross examination by Mr.Otseyno he refuted claims that the 1<sup>st</sup> accused was beaten at Maseno Police Station and upon cross examination by Ms. Lumalas he stated that the 2<sup>nd</sup> accused was arrested because of what she said about the torture of the deceased by the 1<sup>st</sup> accused.
12. PW5, Dr. Dickson Mchana a consultant pathologist at Kakamega County Hospital testified that he did an autopsy report on the body of the deceased and produced the autopsy report which was marked as PEXH 2. He stated that on examining the body of the deceased he appeared to have poor nutrition, he had widespread wounds at different stages of healing on the scalp, at back of the trunk and lower limbs ranging between 8x5cm to 3x5cm. He further had more recent strike abrasions involving all 4 limbs and the back ranging from 4x0.4cm to 3x4cm and there was no evidence of medical intervention. Internally, the body organs were pale a sign of shock and the brain was swollen. He formed the opinion that the cause of death was circulatory collapse secondary to extensive soft tissue injuries following assault.
13. PW6, No. 03454 Sgt. Lenox Barasa of DCI Luanda and the investigating officer testified that on 22/6/2022 he was assigned the case, interviewed the suspects and proceeded Chulaimbo Hospital where he met with the officer who treated the deceased and recorded her statement. He then headed to the mortuary and later to the neighborhood of the deceased where only PW1 was co-operative and recorded his statement. He took photographs of the deceased which he produced and were marked as PEXH 3,5 & 6 and the certificate as to photographic print was marked as PEXH 7. He later received an autopsy report and decided to formally charge the accused persons with the offence of murder. He claimed that a sister to the 1<sup>st</sup> accused by the name of Janet recorded a statement to the effect that he stayed with the deceased until the age of 4 when he was taken up by the accused persons.
14. On cross examination by Ms Lumallas he stated that Janet had indicated in her statement that the deceased had scars and wounds on the skin but the same were treated.
15. His evidence marked the close of the prosecution case and the court ruled that a prima facie case had been established against the accused persons and they were thus placed on defence.
16. The 1<sup>st</sup> accused testified as DW1 and gave sworn evidence where he stated that he was a bodaboda rider and that on the material day he had gone to look for grass for the cows and on returning he found the 2<sup>nd</sup> accused had tied the deceased's mouth with a cloth and on asking why, the 2<sup>nd</sup> accused explained that the deceased was making noise and that she was disciplining him. He touched the deceased's body and it was cold and the 2<sup>nd</sup> accused began crying that she had caused the death of the child. Since he was not sure if the child had died they rushed him to hospital. He stated that the deceased used to live with his sister and they had taken him up two months prior. He refuted claims of caning the child and stated that it was the 2<sup>nd</sup> accused who would cane the deceased for wetting his bed. He claimed to have seen the injuries on the deceased's body a week to his death.
17. On cross examination by Ms Chala, he stated that he did not take the deceased to hospital for the injuries but applied ointment on the wounds. He detailed that he would leave the house at 6AM when the deceased was asleep and return at midday to find the deceased basking next to the bathroom whereby he would ask him to go to his grandfather's house to watch TV.
18. On cross examination by Mr. Mulama for the 2<sup>nd</sup> accused, he said that he saw the 2<sup>nd</sup> accused beat the deceased once and that he also did punish the deceased when he hit another child with a stone.
19. On reexamination he stated that he had punished the deceased by canning him on the legs.
20. When questioned by the court, he stated that the deceased was brought back by her sister on 20/2/2022 with no injuries. He claimed that all was well until a month later when the deceased began to wet his



bed and the 2<sup>nd</sup> accused punished him by pinching him on the cheeks. When he asked his sister about the wetting, the sister informed him that he never did that when she lived with the deceased.

21. The testimony of DW1 marked the close of the 1<sup>st</sup> accused's case.
22. The 2<sup>nd</sup> accused testified as DW2 and gave sworn evidence and stated that she started living with the 1<sup>st</sup> accused the beginning of January, 2022. She claimed that the 1<sup>st</sup> accused's wife and mother to the deceased took the deceased from the sister's house and brought him to the 1<sup>st</sup> accused. On 15/5/2022 she was in the house with the deceased who was always crying. She gave him porridge which the 1<sup>st</sup> accused never wanted her to give the child since he was always wetting his bed. She after laid the deceased to sleep and continued with the chores only for the 1<sup>st</sup> accused to return and discover that the body of the deceased was cold. They rushed him to hospital where they said he was dead with the 1<sup>st</sup> accused informing his father that he had killed the deceased. She claimed that the 1<sup>st</sup> accused occasionally beat the deceased with a bamboo stick and even recounted an incident where the 1<sup>st</sup> accused took the deceased's food and gave it to the other children. She further confirmed that on the day they took the deceased to hospital he had injuries on the head, back and legs and that they were inflicted by the 1<sup>st</sup> accused.
23. On cross examination by Mr. Otsyeno she refuted claims of beating the child.
24. On cross examination by Ms Chala she stated that the deceased stopped going to school after month of taking him in because of his injuries. She claimed that they would only feed him breakfast and lunch and the 1<sup>st</sup> accused never allowed him to have dinner because he would wet his bed.
25. On reexamination by Mr. Mulama she stated that it was the 1<sup>st</sup> accused who discovered that the deceased had died.
26. The testimony of DW2 marked the close of the defence case and the parties proceeded to file their respective submissions.

### **Submissions by The State**

27. It is their submission that they have proved the elements of the offence of murder against the accused persons in that a post mortem report was produced which confirmed the death of the deceased. They claim that the accused persons were positively identified by PW1 to be the persons who would occasionally beat up the deceased and make the deceased sit in the bathroom for hours. On whether this actions led to the death of the deceased the prosecution submits that it was the evidence of the doctor that the deceased had multiple deep and superficial cut wounds on the body and scars an indication of habitual battering. They claim that the scars and wounds on the body of the deceased and him being denied food leads to the conclusion that the accused persons had the common intention to cause grievous harm to the child. To expound on common intention, they place reliance on the court of appeal decision in *Dickson Mwangi Munene & another v republic* (2014) eKLR where the court held as follows: -

“...where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence.”



### **1<sup>st</sup> Accused Person's Submissions**

28. It is his submission that prior to the 2<sup>nd</sup> accused moving in to stay with the 2<sup>nd</sup> accused, the deceased lived happily with his parents without any injuries. He claims that it was the evidence of PW1 that the deceased was beaten for wetting his bed and since it was the 2<sup>nd</sup> accused who would wash the deceased's beddings, she was the one who would beat the minor when the 1<sup>st</sup> accused was not at home which injuries led to the deceased's death.

### **2<sup>nd</sup> Accused Person's Submissions**

29. It is her submission that PW1 testified that he saw bruises and injuries on the deceased though there was no evidence given that the 2<sup>nd</sup> accused caused the death of the deceased. She claims that PW3, Fredrick Onduk, testified that it was the 1<sup>st</sup> accused who beat the deceased and denied him food. She claims that she gave a clear account of what transpired on that fateful day and that it was the 1<sup>st</sup> accused who would beat the child and that she was unable to take the deceased to hospital due to her lack of employment.

### **Issues for Determination**

30. The offence of murder is defined in section 203 of the [penal Code](#) as follows;
- “ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
31. Therefore, for the prosecution to sustain a conviction, all the ingredients contained in section 203 of the [penal code](#) ought to be proved beyond reasonable doubt.
32. That said, the issues that arise for determination by this court are as follows;
- Is Adrian Otieno deceased?
- a. Was the death of the deceased occasioned to by unlawful acts or omission by the Accused?
  - b. Did the accused persons kill the deceased?
  - c. Whether the accused persons were actuated with malice afore thought in causing the death of the deceased

### **Whether Adrian Otieno is deceased?**

33. The death of the deceased has been confirmed by i) PW2, a clinical officer at Chulaimbo Hospital, who received the deceased from the accused persons ii) PW3, an aunt of the deceased who identified the body of the deceased for post mortem and iii) PW5 who conducted the post mortem of the body of the deceased. The death of Adrian Otieno is also confirmed by the post mortem report dated 30/6/2022.

### **Whether his death was occasioned to by unlawful acts or omission?**

34. The right to life is protected and guaranteed under Article 26 of the Constitution of Kenya, 2010 and any action that tends to take the life of another is unlawful.
35. According to the evidence of PW5 and the post mortem report, Adrian Otieno died due to circulatory collapse secondary to extensive soft tissue injury following assault and this makes the actions leading to the death of the deceased not only unnatural but also unlawful.



### Did the accused persons kill the deceased?

36. According to PW5, Dr. Dixon Mchana who conducted an autopsy on the body of the deceased, the deceased, a minor, died due to assault. The nature of the injuries was described by the doctor as widespread wounds at different stages of healing on the scalp, at back of the trunk and lower limbs ranging between 8x5cm to 3x5cm. He further stated that the deceased had more recent strike abrasions involving all 4 limbs and the back ranging from 4x0.4cm to 3x4cm.
37. Who then inflicted these injuries? It is not disputed that the deceased, a minor, was living with the 1<sup>st</sup> and 2<sup>nd</sup> accused persons that is his father and step mother respectively for about two months preceding his death. Prior to him moving in with his parents, the deceased had lived with his aunt, PW3, and according to PW3 and the accused persons, the deceased had no injuries when PW3 surrendered him to his parents. This is to mean that the deceased suffered the said injuries while at the care of the accused persons. As to identity of the person that habitually caned the deceased, it was the evidence of PW1, who lived in the same compound with the accused persons and the deceased that;
- “He would be caned because of relieving himself on his bedding. He would be kept in the bathroom from morning to evening.....i saw the deceased get beaten severally by both mother and father.”
38. On cross examination he stated that he saw the accused persons beat the deceased severally with a bamboo stick.
39. It was also the evidence of the 2<sup>nd</sup> accused that the 1<sup>st</sup> accused would beat the deceased because he used to wet his bed. The 1<sup>st</sup> accused testified that he was informed by PW3 that whilst living with the deceased he never used to wet his bed. Why the change? Was the child being subjected to trauma and this led to him wetting his bed? That we do not know.
40. I believe that every child has the right to parental care and protection as envisaged under Article 53 (1) (e) of the Constitution of Kenya, 2010 which provides;
- “Every child has the right - to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”
41. This right has been echoed in Article 19 of The African Charter on The Rights and Welfare of The Child which stipulates that;
- “every child is entitled to parental care and protection and shall wherever possible reside with his or her parents.”
42. I believe the most reasonable action to be taken by a parent in this instance would be to at least try and wake up the child at night for a call and then return them to bed instead of subjecting him to torture. It is a provision of the constitution under article 25(a) that the freedom from torture and cruel, inhuman or degrading treatment or punishment may not be limited.
43. The injuries on the body of the deceased were inflicted while the accused was in the custody of the accused persons, the accused stopped going to school and was always at home, PW1 saw the accused persons beat the deceased, there is therefore no doubt in mind that it was the accused persons who beat the deceased and inflicted him with the injuries that led to his death.



## Whether the accused persons were actuated with malice afore thought in causing the death of the deceased

44. Section 206 of the [Penal Code](#) defines Malice aforethought 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.”

45. The principle of malice aforethought was illuminated by the court of appeal in [Nzuki v Republic](#) [1993] KLR 171 where it was 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. (See *Hyman v DPP* [1975] AC 55).”

46. Malice aforethought can also be inferred from the circumstances leading up to the death of the deceased. The deceased was a minor and according to PW5 he appeared malnourished. The 2<sup>nd</sup> accused admitted that the 1<sup>st</sup> accused denied the deceased food because he used to wet his bed. I can only imagine how frail the deceased was. To again beat up a frail child, and obviously defenseless, continually for a period of almost two months and strike abrasions on his body is atrocious.



47. The 2<sup>nd</sup> accused testified that the deceased was always crying. What was to be expected from a child with untreated wounds?
48. I have looked at the images produced by PW6 and marked as PEXH 3, 5 & 6, and I am lost for words. For the deceased to have suffered such extensive and deep cut wounds on the head, limbs and back, only mean and infer one thing; the accused persons did not care about the life of the deceased and the consequences of the assault upon the minor. With that extent of assault, the only reasonable inference the court draws is that they intended to cause him grievous harm if not kill him. Looking at the head injury as captured in the photographs produced, especially on the head, it is not unimaginable the extent and severity of pain the child went through in the hands of caregivers including a biological parent.
49. PW1 cogently testified that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons would beat up the deceased and this demonstrates common intention to inflict grievous harm on the deceased within the meaning of section 21 of the *Penal Code* which defines common intention to be;
- “When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”
50. In conclusion, the Court finds that the death of the deceased was occasioned by the joint unlawful acts of commission by the two accused person and that those acts were accentuated by malice aforethought. Accordingly, the prosecution sufficiently proved the charge of murder against the accused persons beyond reasonable doubt for which reason the two are hereby convicted as charged.

**DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 23<sup>RD</sup> DAY OF AUGUST 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:-**

Ms. Chala for the Prosecution

Mr. Otsieno for the 1<sup>st</sup> Accused

Ms. Lumallas for the 2<sup>nd</sup> Accused

Court Assistant: Polycap

