



**Republic v Onyango (Criminal Case E011 of 2022)
[2023] KEHC 25728 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E011 OF 2022
WM MUSYOKA, J
NOVEMBER 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

NOVAN OSAVA ONYANGO ACCUSED

JUDGMENT

1. The accused herein, Novan Osava Onyango, is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya, the particulars being that on 18th August 2022, at Madola market, Butula Sub-County, within Busia County, he murdered Silas Odhiambo.
2. 4 witnesses testified for the Republic.
3. PW1, Collins Odhiambo, was walking with the deceased and PW2, when they met the accused, and a fight broke out between the deceased and the accused, and he saw the accused stab the deceased on the chest with a screwdriver. PW2, Carlos Oduor, was with PW1 and the deceased. They met the accused, who picked a fight with the deceased, in the course of which he saw the deceased fall, and upon checking established that he had been stabbed with a screwdriver. PW3, No. 78872 Paul Ngesu, was the investigating officer. PW4, Dr. Teddy Timon Tuva, carried out an autopsy on the body of the deceased. He established that the deceased had a stab wound on the chest. He opined that death was caused by shock to the heart, caused by the penetrating wound to the pulmonary artery, caused by a sharp object.
4. I found the accused to have a case to answer, and I put him on his defence, in a ruling that I delivered on 24th July 2023. The defence hearing happened on 17th October 2023, before me.
5. The accused testified as DW1. He was the lone defence witness. He testified that he met the deceased, PW1 and PW2, who attacked him, and in the course of the fight with them, he and the deceased fell,



and the deceased was pierced by a screwdriver that he, the accused, was carrying with a shaving machine that he was taking to a repairer.

6. The parties submitted in writing.
7. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, it was with malice aforethought.
8. On whether the deceased died, I have the evidence of PW1, PW2 and PW3. They were with the body of the deceased at the scene. PW4 conducted autopsy on the body of the deceased, and produced the post-mortem report. The cause of death was said to be shock to the heart, secondary to the penetrating wound to the pulmonary artery, caused by a sharp object. PW1 said he saw the accused stab the deceased. PW2 did not witness the stabbing, but he saw the deceased and the accused fight, upon which the deceased fell, and it was after that he established that he had been stabbed. The accused acknowledged that fight or struggle with the deceased, that the latter fell, and was injured by a screwdriver that the accused had. There is some connection between the accused and the death. The question will be was it the accused who caused the fatal injury, and, if he did, whether he had malice aforethought.
9. It is common ground that the deceased died of an injury caused by a screwdriver. It is also common ground that it was the accused who had the screwdriver. It is also common ground that the death happened shortly after the deceased and the accused were involved in a scuffle. PW1 said he saw the accused stab the deceased. PW2 did not witness the stabbing, but saw the fight, and saw the deceased fall, after which he established he had been stabbed with a screwdriver. The accused said the deceased fell on a screwdriver that he, the accused, was carrying. He denied stabbing him. Who is to be believed? PW1 who allegedly saw the stabbing? PW2 who saw the deceased fall in the course of scuffling with the accused, after which he established that he had been stabbed by a screw driver? The accused who said that the deceased fell on a screwdriver which was amongst items that he was carrying? The testimony of PW2 appears to tally with that of the accused in certain respects. Both agree that the deceased fell. PW2 said he did not see the stabbing, and established that it had happened after the fall; while the accused denied stabbing the deceased, but said the deceased fell, onto a screwdriver which was amongst his items.
10. So, was the deceased stabbed, or did he fall on a screwdriver, which injured him? These 2 versions, the one by PW1, and the other by PW2 and the accused, need to be scrutinised more closely. PW1 said after the 4 met, a fight erupted. The accused rushed to a nearby shop and came back with a screwdriver, he found the deceased standing and stabbed him. That would suggest that the 2 were not fighting then. The version by PW2 was that it was in the course of the fighting that the deceased fell, and he discovered he had been stabbed with a screwdriver. It was during cross-examination that PW2 said that the accused left the scene for a while, then came back, and resumed his fight with the deceased, and it was after that the deceased fell suddenly. There could be inconsistencies, or lack of free flow in the narratives by PW1 and PW2, but what clearly emerges is that the deceased fell suddenly, and his fall had something to do with the accused. PW1 was positive that he saw the stabbing, while PW2 was positive that the 2 were fighting when the deceased fell suddenly, after which he established that he had been stabbed with a screwdriver. Both PW1 and PW2 spoke of the accused leaving the scene and coming back. According to PW1, he saw the accused come back with a screwdriver and stab the deceased with it. According to PW2, he did not see the accused person come back with any screwdriver, but he saw him resume his fight with the deceased, and then the deceased fell suddenly. It could be that PW1 and PW2 were not viewing the deceased from the same angle, and so the 2 of them could not see the same thing. What is common is that the accused did something to the deceased, which caused him to fall



suddenly. The sudden fall would be consistent with a sudden stabbing on the chest. I would take the claim, that the screwdriver stabbed the deceased perchance, upon his falling on it, as an afterthought.

11. So, if the accused stabbed the deceased, did he do it with malice aforethought? The elements of malice aforethought are set out in section 206 of the Penal Code. They include an intention to kill, an intention to cause grievous harm, and knowledge that the act causing injury could cause death or grievous injury. The act, from which intention or knowledge, in this case, has to be inferred, is that of stabbing. It was to the chest. It was just one act of stabbing. It was with a sharp object. It caused death almost instantaneously. The chest houses vital organs of the body. Anyone who aims a sharp object at the chest of another, where those vital organs reside, must be deemed to intend to cause the death of that person, or to intend to cause him grave injury, or to have knowledge that such a strike on the chest could cause death or grave injury. Coupled with that is the act of the accused fleeing the scene, to the shop, and coming back armed with a screwdriver, after which he fatally attacks the deceased with that weapon. The act of arming himself could be construed to mean that he had formed an intention, to either kill the deceased with the weapon, or to cause him a very bad injury. It is my finding that there was malice aforethought.
12. In view of everything stated above, I do hereby, find the accused person herein, Novan Osava Onyango, guilty of the offence of the murder of Silas Odhiambo, contrary to section 203 of the *Penal Code*, as read with section 204 thereof, and I, accordingly, convict him, under section 322 of the *Criminal Procedure Code*, Cap. 75, Laws of Kenya. For the purposes of sentencing, let the Busia County Director of Probation and Aftercare Services prepare a pre-sentence report, within the next 14 days. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF NOVEMBER 2023

WM MUSYOKA

JUDGE

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Ouma, Advocate for the accused person.

