



**Republic v Omusolo (Criminal Case E006 of 2022)
[2023] KEHC 27049 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E006 OF 2022
WM MUSYOKA, J
DECEMBER 20, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SIMON OSANGIR OMUSOLO ACCUSED

JUDGMENT

1. The accused herein, Simon Osangir Omusolo, 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 the night of 16th May 2022, at Kakemel Centre, Teso North Sub-County, within Busia County, he murdered Caroline Asirang, hereafter referred to as the deceased.
2. 6 witnesses testified for the Republic.
3. PW1, Nelson Obwana, was a brother of the deceased. He was alerted to a commotion at the home of the deceased, and when he got there, he found the deceased lying dead on a veranda, and her daughter, PW4, in a separate room groaning and semi-conscious. Both were bleeding from their heads. PW4 was rushed to hospital. When he went to report the matter to the police, he found the accused there. PW1 did not witness the incident which caused the death, and the injuries to PW4. PW2, Eunice Amtesa Enodo, heard screams at the home of the deceased. She rushed there. She found the deceased lying dead on a veranda, and her daughter, PW4, screaming from a bedroom. She rushed and reported the matter to PW1. She stated that she found the accused standing on a veranda. PW3, David Wafula, was the medical officer who performed post-mortem examination on the body of the deceased. He noted a bruise on her left side of the neck. The neck was swollen, and an artery had fractured. There was internal haemorrhage due to the neck injury, and he concluded that that was what caused her death. He opined that the nature of the injury he noted could not have been caused by a fall.



4. PW4, Viola Hanito Omasacho, was the daughter of the deceased. She stated that the accused hit the deceased with a stone on the neck. The accused also injured the witness on the head, with a hoe. He then locked her and the deceased in the house, and left. PW5, No 55706 Police Sergeant Samuel Kibiwott Kiprop, investigated the case. He got information on the incident, and went to the scene. He found the body of the deceased lying on a veranda, with an injury on the neck, which was swollen. He found PW1 and PW2 at the scene. He was informed that PW4 had been injured, and had been rushed to hospital. He also got information that the accused had surrendered himself to the police. He removed the body to the mortuary, and visited PW4 in hospital. He said that the police did not have a report that it was PW4 who had hit the deceased with a stone. PW6, Godwin Khamala Waliama, was an analyst, from the Government Chemist. He was presented with a stone and fingernail samples from the deceased, to do a deoxyribonucleic acid (DNA) analysis. He established that the blood on the stone matched with the DNA on the fingernails, and both belonged to the deceased.
5. I found the accused to have a case to answer, and I put him on his defence, in a ruling that I delivered on 13th October 2023. The defence hearing happened on 1st November 2023, before me.
6. The accused testified as DW1. He stated that he and PW4 had a disagreement, and she lifted a hoe to strike him with it, whereupon he hit it, and she fell. PW4 then threw a stone at him, which hit the deceased on the neck, and he closed the door, locking PW4 inside her bedroom. He said that PW4 was inside the house, while he and the deceased were on the veranda, and that the stone was inside the house. He then decided to go and report to the police. The police said it was a domestic dispute. He was arrested. He said that PW2. He said that he had called a boda boda, to take the deceased to hospital. The boda boda operator came, but he did not take the deceased to hospital. He said that he saw PW1 at the police station 15 to 20 minutes after he arrived there. He said that he had no reason to kill the deceased.
7. Dennis Ong'ali testified as DW2. He said that he was the boda boda operator that the accused had called to take a patient to hospital. When he got to the scene, he witnessed the incident. He saw PW4 lift a hoe, to hit the accused with it, but the accused knocked it from her hold. She then picked a stone, and threw it at the accused, but it hit a woman who was lying on the veranda. He did not intervene, he left instead. He said that the accused had asked him to come over to take a patient to hospital. He said that PW4 came out of the house with a stone, and attempted to hit the accused with it. She said she did not meet any other person at the scene. He said that he did not want to assist, as it was a family matter. He said that he did not see the person who was hit with the stone, he only heard her voice, saying that she had been hit with the stone.
8. Both sides submitted in writing.
9. 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.
10. On whether the deceased died, I have the evidence of PW1, PW2 and PW4, who were relatives and neighbours of the deceased. I also have the evidence of the accused himself. PW5, a police officer, went to the scene, and saw the body. They all stated that she died, and they saw her dead body at the scene. PW3 was the medical officer, who conducted post-mortem on the body. He noted an injury on the neck. He opined that the neck injury caused internal haemorrhage, which ultimately caused the death.
11. Did the accused inflict injury on the deceased, and, if so, did that injury cause the death? The circumstances under which the death happened were very highly contested. Both PW4 and the accused were at the scene at the material time of death. The 2 disagreed, and there was an altercation between them, apparently over how the deceased was to be taken for medical treatment. According to PW4, the accused took a hoe, and attempted to attack her with it, they wrestled over it at the veranda of their



house, where the deceased was lying. PW4 let go of the hoe, and the accused hit her with it on the head, and the deceased ordered her to get into the house which she did. While inside the house, she saw the accused attack the deceased with a stone, on the neck. When she sought to venture out to assist the deceased, the accused locked her inside the house. Then she screamed. The accused padlocked the house and left. According to the accused, it was PW4 who attempted to attack her with the hoe, and he managed to disarm her. Then PW4 picked a stone, intending to hit him with it, but it fatally hit the deceased instead. He called a witness, DW2, who testified along similar lines.

12. Which of these 2 narratives is believable? PW2 testified that she responded to screams from that home, which she attributed to PW4, consistent with the testimony of PW4. She found both the accused and PW4 at the scene, but she did not mention seeing DW2. She did not witness the assault, nor the altercation between the accused and PW4. Could it be that she came to the scene after DW2 had left? DW2 himself said that he did not see PW2. DW2 did not intervene, and he did not go for help, or raise alarm, but PW2 did. PW2 sought out PW1, who came to the scene. PW4 was allegedly injured in that fracas. She said it was the accused who injured her with a hoe. PW1 said the injury was so bad that he found PW4 bleeding and semi-conscious, and she had to be rushed to hospital where she was admitted. PW4 said that she lost consciousness, and came to the following day. PW2, the accused and DW2 did not talk about PW4 getting injured. Was PW4 injured, if so, who caused her injury, and at what point? Why did the accused and DW2 not take any measure to get help for the deceased and PW4?
13. The 2 narratives are on all fours in most respects, except who threw the stone. According to PW4, it was the accused who hit the deceased with it. The accused had just had a quarrel and altercation with her, PW4, and not with the deceased, according to PW4, and the deceased had intervened to separate them. After separating them, that was when PW4 alleged that the accused attacked the deceased. According to the accused, it was PW4 who hit the deceased with the stone, accidentally, as she said stone was aimed at him, and not the deceased. It was just the 2 of them at the scene, apart from the deceased. It is, therefore, a case of the word of PW4 against that of the accused. DW2 claimed to have witnessed the fracas, but I wonder why he chose not to intervene or seek help. PW4 did not attempt to explain the possible motive of the accused in attacking the deceased. The accused was said, by PW2, to have been in good terms with the deceased, and to have generally nursed her during her illness. Whatever the case, I am not satisfied that the prosecution proved that the accused caused the death of the deceased, for a doubt was raised, from the defence, that there was a possibility that the death could also have been caused by PW4. There was no proof beyond reasonable doubt that the killer blow was from act by the accused person.
14. The burden was on the prosecution to establish that the accused murdered the deceased, and specifically that the killer blow came from the accused. I have no evidence of that, as I have 2 versions of what transpired, both of which sound plausible. To eliminate any doubt, the prosecution ought to have led evidence on the report that the police received from the accused, when he presented himself at the police station, after the incident. Did he report that he had killed the deceased? Or that she had died of an act perpetrated by PW4? Or she died of a self-inflicted injury, occasioned, say, by a fall? Medical evidence should have been led on the injuries alleged to have been sustained by PW4. It was alleged that she was badly hurt, and was found semi-conscious by PW1. Curiously, PW2 did not say a word about the condition that she found PW4 at. Evidence on the extent of the injuries on PW4 would have been crucial, to demonstrate whether or not she was capable of throwing the killer stone, given those injuries. That would have eliminated the possibility that she might have been the one who threw that stone.
15. The next consideration is whether the death was caused with malice aforethought. What constitutes malice aforethought is defined in section 206 of the [Penal Code](#). It would be a direct intention to cause death; or an intention to cause grievous harm, which results in the death; or an intent to commit a



felony; or an act done with the knowledge that it could cause death, or grievous harm, which could result in death. Having found that a doubt was raised, as to who had inflicted the killer blow, and having found that there was no proof beyond reasonable doubt that the death of the deceased was caused by the accused, the issue of malice aforethought should not arise.

16. In view of everything stated above, it is my finding that the prosecution has not established or proved beyond reasonable doubt that the accused person herein, Simon Osangir Omusolo, murdered the deceased herein, Caroline Asirang. Consequently, I do hereby find the accused herein not guilty of the murder of Caroline Asirang, contrary to section 203 of the *Penal Code*, as read with section 204 thereof, and I, accordingly, acquit him, under section 306 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. The accused shall forthwith be set free from remand custody, if he be in custody, unless he is otherwise lawfully held. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 20TH DAY OF DECEMBER 2023

WM MUSYOKA

JUDGE

Advocates

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

Mr. Oreda and Mr. Oketch, Advocates for the accused person.

