



**State v Ombiro (Criminal Case 10 of 2018)  
[2023] KEHC 26805 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26805 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE 10 OF 2018  
RE ABURILI, J  
DECEMBER 18, 2023**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**CALEB OMBATI OMBIRO ALIAS SIMBA ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person Caleb Ombati Ombiro alias Simba is charged with the of 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 28th September 2016 at carwash area, Kisumu East sub-county within Kisumu County, the accused person murdered one Edderline Achieng Ater.
2. The accused person pleaded not guilty to the charge against him and the matter proceeded to trial.
3. The prosecution summoned a total of ten (10) witnesses in support of its case which is summarised herein below.

**The Prosecution's Case**

4. PW1 Dr. Dixon Mchana Mwaludindi testified that he carried out the post-mortem on the deceased's body on the 3<sup>rd</sup> November 2016 at the Aga Khan Hospital mortuary. He testified that two witnesses identified the body, Silvanus A. Kagoso and Nemwel Ombati. PW1 testified that the deceased's body had dry blood in the nostril and ears and further that there was no evidence of recent medical intervention.
5. PW1 testified that internally, the body had minimal food in the stomach and that there was a huge clot under the skull from the right side just behind the ear line. It was his testimony that there was a linear fracture on the skull, on the right coming to the base of the skull coming through the right ear, that



- there was a bruise in the brain, bleeding above and below the cover of the brain and bleeding into the brain. He testified that the brain was swollen.
6. PW1 testified that as a result of examination, he formed the opinion that the cause of death was severe head injury secondary due to blunt force trauma. He testified that he performed the post-mortem with Dr. Solomon Sara, who represented the family of Nemwel Ombati, which family of the accused asked that they be allowed to have a doctor on board. PW1 produced the post-mortem report as PEX1.
  7. In cross-examination, PW1 testified that Dr. Sara did not append her signature to the report as she was only representing the family. He further stated that at the time of the post-mortem, both she and him concurred that the cause of death was a severe head injury. PW1 stated that prior to conducting the post-mortem, he spoke to those who came to identify the body but they did not reveal that the deceased had had a history of epilepsy.
  8. PW1 further stated that a fall could have the kind of injuries that were present in the deceased but it would have to be from a height. He further stated that if the deceased knocked herself on the bedrest, the injuries could have resulted but the force would have to be massive. If she fell down with a thud, the injuries could be possible.
  9. It was PW1'S testimony in cross-examination that a small blunt force applied at the base of the skull where the neck starts, could be fatal but that such a force could not cause the person to bleed from the nose or ears as they were not connected but that such a force could result in blood clots. He stated that the body had blood clots on the skull but not on the neck. It was his testimony that there was a fracture extending from the back of the skull and that the nostrils and ears had blood clots, attributable to internal bleeding in the brain.
  10. PW1 stated that before he started the post-mortem he was not informed that the deceased had had a miscarriage two days before the death. He stated that the deceased's reproductive system was intact. PW1 further stated that the x-ray done on the deceased was done 8 months prior to the post-mortem and did not have any bearing on the results of the post-mortem as the injuries were to her head which had no connection to her right shoulder. PW1 stated that on the 25<sup>th</sup> March 2016 the deceased had an MRI on the brain as she complained of persistent headaches and the subsequent report showed a normal brain MRI.
  11. In re-examination, PW1 testified that the MRI report had no bearing on the deceased's cause of death.
  12. PW2 Silvanse Ater Kagose testified that on the 28<sup>th</sup> October 2016 at about 11.00am, he was within Luanda market when he got a call from one Monica Ogutu who informed him that his daughter Edder was dead. He testified that Monica used to call Edder 'his daughter.'
  13. It was his testimony that he went home and informed his relatives then proceeded to Aga Khan Hospital where the deceased's body was. He testified that he saw the deceased's body at the mortuary where he noticed a bleeding spot at the back of the head, just behind the right ear.
  14. PW2 testified that he was informed by his son that the cause of the deceased's death was from a fall. He further testified that he attended the post-mortem examination wherein the doctor stated that the cause of death was excessive trauma, which caused the skull to break in 2 areas. It was his testimony that his son was not present when his daughter met her death. PW2 testified that from the onset of the post-mortem, it was obvious that death was not due to a mere fall as was evident from the cracks on the skull.
  15. He testified that his relationship with the deceased was good and that she had told him that she thought that marriage was good, but hers was a mess as there was pressure from the spouse, the accused herein, on financial matters. PW2 testified that initially, he related well with the accused but 4 – 5 months



- prior to the deceased's death, they could hardly talk. He testified that the deceased had peptic ulcers and he realised that the accused who was a medical staff, injected her with an addictive drug, pethidine and morphine that were meant to reduce the deceased's pain. He testified that such medicine can never be given outside the hospital.
16. In cross-examination, PW2 stated that he heard that the deceased suffered some convulsions due to the drugs and that the convulsions started in late 2015, when she met the accused who was her husband. She stated that he was aware that hospitals were administering pethidine to the deceased and that pethidine was only prescribed when she was in hospital after being operated on.
  17. PW2 further stated that he did not know that prior to her marriage, the deceased had any condition. He stated that she was married on 18<sup>th</sup> April 2015 and that after the marriage, she suffered a miscarriage. He further stated that he was aware that Dr. Jowi was attending to the deceased for her convulsions.
  18. In re-examination, PW2 stated that in all documents presented to him by the accused, there was none that showed the deceased had a pre-existing injury on her head or that the convulsions led to Edder falling down.
  19. PW3 Beryl Awuor testified that on the 28<sup>th</sup> October 2016 she reported to work and called the deceased, her sister, who informed her that she was busy but promised to call her back but did not. She testified that on the 27<sup>th</sup> October 2016, which was the deceased's birthday, the deceased updated on her Facebook page that her family seemed to have forgotten her birthday so on the 28<sup>th</sup> October 2016, PW3 tried calling her to apologise.
  20. She testified that she did not meet her on that day and that at 12 noon she went to the deceased's place after receiving news from their younger brother Bob Tobias Kagosi that the deceased had passed on. It was her testimony that at the deceased's place, she found people outside and that inside her bedroom, the deceased lay down on the floor with her head facing towards the bathroom door. She testified that she saw an injury at the back of her head but could not remember on which side.
  21. PW3 testified that at the house, she noticed blood spots around the body, like something smeared on the ground. She testified that she touched the deceased's body and confirmed that she was dead. She testified that she had lived with the deceased in Migosi Estate and later in Lolwe between 2011 to early 2015 and that the deceased was living with her husband and their younger brother in the house where her body was found.
  22. It was her testimony that the deceased used to have ulcers and that in 2014, she saw her fainting after which there were other episodes of fainting but not so frequent. She testified that on one occasion, she drove her to the hospital at night. PW3 testified that the deceased and her husband started staying together in 2014 and that their relationship was that of a happy couple. She testified that on one occasion, she found the deceased crying and that the deceased informed her that the accused had slapped her. She denied knowing how the couple managed their financial affairs. PW3 identified that accused in the dock.
  23. In cross-examination, PW3 stated that the deceased injured herself after a fall and that she broke a shoulder bone. She further stated that on the 28<sup>th</sup> when she arrived at the deceased's home, the accused was lying with his face facing down on the bed and his feet off the bed. She stated that the deceased had an injury at the back of the head and not on the middle of the head which injury was visible as there was a swelling on it.



24. PW4 Bob Kagose, the deceased's younger brother testified that in 2014, he lived at Lolwe with his sisters Edderline Kagose and Everline Kagose and that on the 3<sup>rd</sup> April 2015 Edder, the deceased informed him that she was getting married to Mr. Caleb Ombati, the accused herein.
25. He testified that after the marriage, he continued living with Edder and further that the deceased's relationship with the accused was a happy one like newlyweds. He testified that sometime in 2016, the deceased revealed to him that she was pregnant but a few days later, his sister Beryl informed him that the deceased had had a miscarriage due to the drugs she took.
26. PW4 testified that on the 28<sup>th</sup> October 2016, he woke up at about 6.30am and heard the deceased quarrelling with her husband in their bedroom. He testified that the quarrel lasted about 30 minutes and that he could not tell whether there was any physical confrontation. It was his testimony that when the quarrel ended, the accused came out to the sitting room and started using his laptop and that the deceased left for work at about 9am. He testified that he left the house after that as he wanted to go to school to finish some assignment.
27. PW4 testified that at around 10.30am, he got a call from the accused inquiring as to where he was and that he informed him that he was at school after which the accused hang up. He testified that at around 11am, the accused called him saying that he should rush to the house immediately which he did and at the gate, he saw an ambulance. He testified that at the doorstep, he met the accused who told him that his sister had died. He testified that he went to the bedroom and saw her lifeless body on the floor with her head resting on a pillow that had some blood stains.
28. PW4 testified that some little blood stains were on the floor. He testified that he asked the accused whether he had informed their parents of the deceased's passing to which the accused answered in the negative but bought him credit to call and inform the parents. It was his testimony that when he got to the house, he found neighbours plus the nurses who came with the ambulance and that one nurse informed him that the deceased had fallen on the back of the head and injuring herself. He testified that as he spoke to the nurse, the accused was in the sitting room breaking up the glasses and the Television so he started keeping the equipment in the bedroom.
29. He testified that he saw the accused throw down his phone and the deceased's phone which went under the bed in the next bedroom. He testified that he secured the items, collected the two phones, and put them on a dressing table in the master bedroom. It was his testimony that the police came later at about 12.30pm and talked to the nurses after which the deceased's body was taken to Aga Khan Hospital.
30. In cross-examination, PW4 stated that Edder and Caleb were a happy couple but not until the time of her death. He further stated that Caleb and Edder did not have children and that Edder had told him that the doctors told her to stop taking the drugs she used to take as the drugs, one of which was pethidine, were the reason for the miscarriage. PW4 further stated that the deceased had a miscarriage in the week that she died
31. In re-examination, PW4 testified that the deceased informed him that she was going to get married on the 3<sup>rd</sup> April 2015. He testified that he was present when the deceased collapsed at Car Wash but that he was not present when her medication was prescribed.
32. PW5 Valentine Onyango Ogwen, a registered nurse testified that on the 28<sup>th</sup> October 2016 at 10.50am she was at th Red Cross Offices in Kisumu when she received a call from on Samuel Odhiambo, an ambulance driver who informed her that they were required to rescue and evacuate a patient who had collapsed.



33. She testified that they proceeded to the scene after receiving directions from the accused and that on arrival, at the gate, they found the accused. It was her testimony that she rushed into the bedroom, where she found one Dr. Amenyi standing next to a lady lying on the floor. She testified that she noticed nothing unusual in the bedroom and that there was no blood. She testified that the lady lying down wore Jeans and a lady's T-shirt and that there was a pillow placed to support her head.
34. PW5 testified that they started attempting to revive her, but discovered that there was no pulmonary activity. It was her testimony that she attempted the resuscitation for 30 minutes but was not successful so they informed the accused that he had lost his wife and the accused became very emotional and She testified that she called for assistance and some men standing outside, including a watchman came to hold him down. She testified that she returned to the bedroom as they held the accused down and went to remove the Cardia monitoring equipment from the deceased after which she phoned the police who arrived after a short while but left saying that the family would handle the matter and they left. It was her testimony that she found a swelling on the back of the deceased's head but saw nothing else.
35. In cross-examination, PW5 stated that when she got to the mortuary is when she saw blood coming out of the deceased's ears and nostrils. She stated that the falling down may have caused injury depending on the force. PW5 further stated that the accused had informed her that the deceased had been sick for the last 3 days. She further stated that while at the scene, there were no visible weapons and further that the deceased's body had no defensive marks. She further stated that the police visited the scene when she was still there and that she did not see the police take any photos or do any testing for finger prints.
36. PW6 Vera Aluoch Ogola testified that as at 2015, she worked at the deceased's house having started on 13<sup>th</sup> September 2015 and that she worked for the deceased for a year. She testified that the deceased lived with her husband, the accused, and her brother.
37. It was her testimony that initially, Edder and the husband lived happily but later the relationship was not good as they used to quarrel, although not much. She testified that she never saw them fighting. She testified that she did not know what they used to quarrel about as they did so behind the locked door of their bedroom.
38. PW6 testified that the accused was occasionally harsh and that the deceased did not have any health challenges. She testified that the deceased used to take medicine which her husband gave her, but that the deceased never asked to be injected. She stated that she witnessed the deceased being given an injection against her will.
39. In cross-examination, PW6 stated that the deceased used to be injected in the bedroom. She stated that when the deceased died, she had not been working there for a month and as such, she did not know the events of 28<sup>th</sup> October 2016. She stated that she could not recall any disagreement between herself and the couple over her alleged sale of sugar to neighbours and that she was the one who decided to leave the work as the accused did not like her cooking.
40. PW6 stated that she never witnessed any fight between the deceased and the accused and Caleb. She stated that the deceased would be given injections on the back of her hand, sometimes in the bedroom and other times in the sitting room. She stated that whilst she worked for the deceased, the deceased was not sickly. She stated that she never saw the deceased collapsing and that she never called any neighbour to assist her after falling.
41. PW6 stated that the deceased's mother called her and informed her of the deceased's death and told her to come record a statement though she did not tell her what to say but rather informed her to tell the truth to assist the case. She reiterated that she was never told what to state in her statement to the police.



42. PW7 Salome Achieng Adem, a medical doctor testified that in 2016 she lived in Kisumu Car Wash area. She testified that on 28<sup>th</sup> October 2016, at about 10am, she was at Kisumu District Hospital (now Kisumu County Hospital) conducting a ward round, seeing patients when she got a distress call from the accused requesting her to get an ambulance to his house as his wife had collapsed in the house. She testified that she did not have any ambulance contact so she suggested that he should get a taxi, whilst waiting for an ambulance so he sent her the contact of a taxi driver and boarded a motorcycle to his house.
43. It was her testimony that when she got to the house at about 10.30am, she was directed to the bedroom where she found the accused's late wife lying on the floor in the bedroom on her back. She testified that she did not seem to be breathing but when she checked closely, she noted that she had no pulse but she was still breathing.
44. PW7 testified that she proceeded to do chest compression and after a few minutes, the ambulance arrived with monitors and medication for resuscitation. She testified that with the assistance of an assistant from the Red Cross Ambulance, they connected the monitors which revealed that the lady had passed on and that she broke the news to the accused. It was her testimony that Valentine, the Red Cross lady, called the police who arrived at the scene in a few minutes and released the body to be taken to the mortuary after they did a quick investigation. She testified that she left the scene and travelled to Ugenya, as per her schedule.
45. She testified that when she got to the bedroom, the lady was lying on the floor, with a pillow supporting her head. She further testified that she did not notice anything else in the room which could arouse her curiosity. It was her testimony that she had known the accused and his deceased wife for approximately one year before the incident after she moved into the neighbourhood and that the two appeared to have a very good relationship. She testified that never within her hearing, did they ever quarrel. She testified that she had attended to the wife, medically, once at Avenue Hospital and once at Kisumu County Hospital.
46. PW7 testified that the deceased was periodically sick, and was addicted to pethidine and further that she was receiving medication from Dr. Prof. Jowi so she attended to her when she went for a re-fill of medication.
47. In cross-examination, PW7 stated that the deceased was addicted to pethidine though she was not aware of how the deceased became addicted. She stated that she was once called from her house by the deceased's house help Vera, that the deceased had convulsed but when she got there, the convulsions had stopped.
48. PW7 stated that in the course of general body convulsions, it is very possible to fall down as the person has no control of how or where they fall or of their own safety. She stated that she heard that the deceased once fell and dislocated her shoulder. PW7 stated that on the material date, she saw an injury on the back of the deceased's head and that it was possible that the injury sustained was caused by a fall. She stated that when she entered the bedroom, she did not see any blood on the floor or on the body of the deceased and further that she examined the deceased but did not see any blood. She stated that the wound she saw was not at the back of the ear.
49. PW7 stated that she did not hear, see or witness any violence between the deceased and the accused and that the deceased considered herself lucky to have the accused as her husband as he was very supportive in the middle of all her medical condition. She stated that the injury she saw was a closed fracture i.e. one where the overlying skin was intact.
50. In re-examination, PW7 testified that she did not know the deceased's cause of death.



51. PW8 Edward Agutu Ogola testified that on the 28<sup>th</sup> October 2016 at 9am, he was between the Airport and Kisian junction, heading to Uyoma when he got a call from the accused, his friend who was crying saying that his wife was dying and that he should rush to his house. He testified that he made a U-turn and drove straight to the accused's house, in Car Wash area around Bridge. It was his testimony that when he reached the house, he found a police Land Cruiser from Kondele Police station parked by his door as well as an ambulance from AAR parked by his door.
52. PW8 testified that he walked into the accused's sitting room where the accused was on the floor crying and when he tried talking to him, the accused pointed at the direction of the bedroom. He testified that he went towards the bedroom and tried to open the door, but there was resistance and a police officer opened the door and told him 'Ngoja kidogo' then closed the door again. He testified that he waited for about 10 minutes by the door and when the door was finally opened, 3 police officers, a lady and a gentleman from AAR came out from the bedroom.
53. It was his testimony that Dr. Achieng Adem who was the accused's neighbour also came out from the room and he then entered the bedroom where he saw the accused's wife lying on the floor with her head rested on a pillow. He testified that a boy aged between 19 and 21 was lying on the floor crying and that he later learnt that the boy was a brother to the deceased. It was his testimony that there was a stream of blood coming from the pillow on the floor.
54. PW8 testified that he was there for 2 – 3 minutes and then returned to the sitting room. He testified that in the bedroom there was a bed, a dressing table with mirror and that the deceased's body was on the floor and her brother was lying on the floor crying. He testified that he also saw pieces of a broken phone but did not notice any other blood. He testified that the group held discussions and the police then said that it was okay to collect the body as it was not a police case.
55. It was his testimony that they eventually managed to have the deceased's body taken to Aga Khan Hospital mortuary. He testified that the accused was his very good friend having known each other since 2012. He testified that he knew prior to the unfortunate incident that the accused's wife was constantly sick as he had visited her in hospital where she was admitted.
56. In cross-examination PW8 stated that had known Caleb since 2012. That they to visit each other and that Caleb and the wife had the best relationship anybody would wish to have. That he never saw them quarrel.
57. PW9 Griffins Ochieng Odindo testified that the deceased was his colleague at Kisumu Medical and Education Trust where she worked in the Finance department and he in the HR department. He testified that on the 28<sup>th</sup> October 2015, the deceased went to the office at 7am and as she was feeling sick, she did not join them for the morning brief and so he went to check on her. It was his testimony that the deceased said that she wanted to be taken back home to be treated by her husband so he requested one of their drivers, Peter Gworo, to take her home which he did and returned and reported that he had left the deceased with her husband.
58. He testified that at 12.45pm, he received a call from their CEO who informed him that he should find out what had happened to the deceased so he drove to her house and met her husband who was wailing saying that she was dead. PW9 testified that the accused took them into his bedroom where he found the deceased motionless next to the dressing table. He testified that he did not see any injury on her and that her brother was present. PW9 testified that a Red Cross Ambulance arrived and took her body to Aga Khan Hospital then he returned to the office.
59. In cross-examination, PW9 stated that the deceased used to be an active person but that on that morning, she was lying on her desk and looking sick. He stated that he suggested that she be taken to



- hospital because he saw her sick looking yet they had a medical insurance cover. PW9 stated that the deceased had been sick before while at work though he did not know the kind of sickness she suffered from. He recalled an incident when the deceased collapsed in the office and was taken to hospital.
60. In re-examination, PW9 testified that he was not present when the deceased collapsed while in the office but that he was only called from a meeting.
  61. PW10 No. 70207 PC Jeremiah Sakiti testified that he received a complaint from Silvance Ater Kagose, the father to the deceased, of a death on 28<sup>th</sup> October 2016 that the deceased died out of foul play. It was his testimony that initially, the report made was that the deceased hit her head on a dressing table, was injured on the head and died. He testified that they started fresh investigations and recorded fresh statements from witnesses who told them what they knew about the deceased.
  62. PW10 testified that they met the 2 doctors who did post-mortem on her body to ascertain the cause of death. He testified that the report of the mortician revealed that the deceased was hit on her head, which force was massive and not caused by a mere fall, that the injuries she sustained were such that she could not move an inch. He further testified that they interrogated relatives, neighbours and workmates who knew both the deceased and the accused and also looked into her medical history.
  63. He testified that the doctor concluded that the deceased was hit using massive force and not a fall. He testified that the deceased had a history of convulsing but she was on medication for that condition. PW10 produced a report of 16<sup>th</sup> September 2016 from a doctor showing that the deceased was on pain management treatment as P. Exhibit 2. He testified that the management followed a road traffic accident and that the report was meant for her employer to show that she was undergoing psychotherapy. It was his testimony that after concluding investigations, they arrested the accused person and charged him with murder.
  64. In cross-examination, PW10 stated that there had been an initial investigation into the death of the deceased but the investigations were not complete and thus the file remained open. He stated that they commenced further investigations following a complaint by the deceased's father. He further stated that during his investigations, he discovered that the deceased suffered convulsions and that prior, she had been taken for rehabilitation at a centre in Milimani though he did not know why she was being rehabilitated though it was alleged that the deceased was a drug addict.
  65. PW10 admitted that he did not visit the scene of murder nor did he see a sketch. He stated that he took over investigations about one month after the death of the deceased. He further admitted that the accused gave them some documents relating to the deceased's medical history but that he was investigating the cause of death of the deceased, not her medical history.
  66. PW10 stated that the documents the accused brought were not relevant as to the cause of the deceased's death. He further stated that it was alleged that the deceased convulsed, fell down and hit herself on the dressing table but according to the doctor, the deceased was hit with a blunt force from above or the same level and hence the fall alone would not cause the kind of injuries that the deceased sustained.
  67. He stated that the deceased's body was already removed from the bedroom into the sitting room when the police arrived. He testified that had the deceased fallen on her own, the injury would not have been as massive as it was. He further stated that the issue of convulsions was not important as it was not the cause of death of the deceased.
  68. In re-examination, PW10 testified that the cause of death was blunt force to the head of the deceased. He further testified that the allegation that the deceased died from a fall came from the accused and that the Neuroscience Centre Report was availed to them by the accused person. PW10 testified that



he charged the accused because investigations revealed that the deceased was alone with the accused, they had quarrel and that the cause of death was pointing towards foul play. He testified that he did not hide the history of convulsion because it was in evidence.

69. The prosecution then closed its case.

### **The Defence Case**

70. The accused person was placed on his defence and he elected to give a sworn testimony.

71. It was his testimony that he had been married to the deceased for a period of about one and a half years prior to her death during which time the deceased was ailing on and off and that she developed seizures during their courting. He testified that the deceased had several episodes of convulsions and that three stood out. He testified that the first one was a day to the date he was to go and pay dowry in February 2015 when at 8.00pm, she convulsed and fell on a shoe rack and injured her shoulder necessitating surgery as she had a fracture in her shoulder. The accused testified that the 2<sup>nd</sup> incident was on 26<sup>th</sup> October 2016 a day before her birthday on 27<sup>th</sup> October 2016 when the deceased had sent him to the supermarket to buy foodstuffs and on his return, he saw a dress like the one she had worn that day near a construction site in their neighbourhood. He testified that she found the deceased lying down and so he went closer and allowed her to cool down then he was assisted and took her to the house. It was his testimony that this was 2 days before she died on 28<sup>th</sup> October 2016.

72. The accused testified that he had sought for medical attention in different hospitals and that the deceased had been found to have secondary seizure disorder and an MRI was recommended. The accused produced the report dated 8<sup>th</sup> April 2016 from Neurosciences Centre as DW Exhibit 1.

73. The accused testified that he had a very good relationship with the deceased and her family and that the relationship became sour after the deceased's death following a burial dispute filed by PW2, his father in-law saying he was not legally married to Edder though the dispute was determined and a consent entered into allowing him to bury the deceased. The accused produced the court proceedings as DW Exhibit 2.

74. He testified that on the 28<sup>th</sup> October 2016, the deceased went to work although she had lost her pregnancy on the 24<sup>th</sup> October 2016 and thus she had not gone to work. He testified that he woke up and prepared her to go to work by ironing her clothes and making breakfast for her. It was his testimony that he then escorted her to the gate where she took a rider and went to work as he remained in the house doing some assignments. He further testified that Tobias was in the house.

75. The accused testified that between 10am – 11am, the deceased walked into the house as the door was open and when he asked her why she had returned early, she said that it was because he was at home, she wanted to give him company and they decided on watching a movie together. The accused testified that they agreed she goes to change as he was doing a presentation but a few minutes after she entered the bedroom, he heard a fall. He testified that he rushed into the bedroom and found her fallen on the ground/floor jerking and that the laundry basket had fallen on her. He testified that the deceased had trousers on but had now removed one leg of the trouser. He further testified that the deceased had opened drawers of the wardrobe and dressing table. He testified that he removed the basket from her.

76. The accused testified that as the deceased was convulsing, he called out for Tobias who never responded so he went and knocked his bedroom door because he used to wear earphones but did not find him in his room. He testified that he called him on phone and learnt that he was in Maseno. He testified that he went back to the bedroom where the deceased was and noticed that her head was towards the



wardrobe adjacent to the dressing table and realized that she had no sign of injury so he raised her head up and put a pillow under the head.

77. It was his testimony that he realized that she was taking too long to recover from convulsions so he called a neighbour who was on locum and requested her to look for an ambulance for him and come which she did and on her arrival, she gave him the number of the responding ambulance so that he could give them directions to the scene. He testified that the ambulance and paramedics arrived and did all they could to stabilize her but he was told by the ambulance nurse that his wife was no more.
78. The accused testified that when the ambulance came, he called Tobias again and told him there was an emergency so he came very quickly. He testified that he did not quarrel with his wife that morning. It was his testimony that Tobias wanted to call his parents using the deceased's phone but he gave him credit instead because the deceased's phone has a password hence he could not use it to call.
79. In cross-examination, the accused stated that he and the deceased had known each other for 3 years before the wedding and that the convulsions started before they got married. He stated that he did not remember even a single day when they had a disagreement. He further stated that when the deceased returned from work, she appeared okay. The accused stated that he realized there was a problem when the jerking stopped but she never recovered and that he got into the bedroom when he heard a bang. He stated that because the deceased had many convulsions, they used to allow her to recover. He further stated that he called an ambulance because he could not carry her to hospital. He reiterated that he could never have hit the deceased even in the wildest of his thoughts. He further stated that he found her lying on her back with the laundry baskets lying on her legs. He stated that nothing was lying on her head.
80. In re-examination, the accused testified that he was not aware whether the police recovered any weapon used to hit the deceased. The accused further informed the court that the deceased had released their house help two months prior to the incident. He further testified that he was arrested in relation to the incident in May 2018.

### **Defence Submissions**

81. It was submitted on behalf of the accused that the evidence led against the accused person was purely circumstantial. Mr. Ochieng Counsel for the accused person submitted that the accused was in the house when the deceased died and the cause of death was blunt trauma to the back of the head. He further submitted that the same doctor in his evidence raised doubts as to what could have led to the death of the deceased other than acts of the accused person agreeing that a fall could have caused the injury if the fall force would have been massive.
82. It was submitted that the principle laid out in the case of *Kipkerring v Republic* on circumstantial evidence had not been met and that the accused had explained what might have happened and ought to be acquitted. Mr. Ochieng further submitted that PW 4 did not know the language or words used in the alleged quarrel. He submitted that the charge was an afterthought and that the accused did not delay to seek help.



## Analysis and Determination

83. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel. The accused faces a charge of murder contrary to section 203 of the Penal Code. That section defines murder as follows:

“ Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”

84. The prosecution has to adduce evidence to establish that the accused caused the death of the deceased by an unlawful act which lead to her death. The prosecution must prove that the accused's action was motivated by malice. The essential ingredient for the offence of murder is malice aforethought. The circumstances which constitutes malice aforethought are described under Section 206 of the Penal Code 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.”

85. The first issue for consideration is proof of death. In the instant case, there is no dispute of the deceased persons' death. This was confirmed by PW2,3,4,5 & 7 who tried to resuscitate the deceased at the scene, as well as PW8 & 9. Further, the evidence of PW1, Dr. Muchana who carried out the postmortem on the deceased persons and after the examination, reached the conclusion that the cause of death was severe head injury due to blunt force trauma. Accordingly, it is my opinion that the prosecution has satisfied this element beyond reasonable doubt.

86. The next question is whether the death of Edderline Achieng Ater was caused by an unlawful act or omission. Article 26 (1) of the Constitution guarantees every person the right to life. The postmortem report prepared by PW1 revealed that the deceased's cause of death was severe head injury due to blunt force trauma. The doctor also found that there was a massive force of contact that was involved at the back of the deceased's head to cause the injuries she sustained. These, if caused by an individual, then in my view amount to an unlawful act as no-one has the right to deprive another of their life. However, if the fall was accidental or through a convulsion due to a medical condition as testified by the accused person, then there can be no unlawfulness in the death of the deceased. I shall revert to this issue later.



87. The other question is whether it was the accused who unlawfully caused the deceased persons death. None of the prosecution witnesses saw the accused person kill the deceased. In essence, the prosecution case was based on circumstantial evidence.

88. In *Abamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

89. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
- iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

90. In this case, none of the prosecution witnesses witnessed the deceased’s death. PW4, the deceased’s brother, testified that on the material date the deceased had a quarrel with the accused for about 30minutes from 6.30am after which she left for work. This was contradicted by the testimony of PW9, the deceased’s colleague who testified that on the material date, the deceased arrived at the office at 7am. PW4 also testified that there were bloodstains on the floor where th deceased’s body was found, a fact that had been stated by his sister PW3 who testified that she noticed blood spots around the deceased’s body.



91. PW5 and PW7, the nurse and doctor neighbour who attempted to resuscitate the deceased however both testified that there was no blood at the scene when they arrived. PW5 testified that she noticed blood coming out of the deceased's ears and nostrils at the mortuary.
92. The prosecution's case hung on the testimony of PW1, Dr. Muchana, who carried out the post mortem and arrived at the conclusion that the deceased's death was caused by severe head injury due to blunt force trauma. He further noted that a massive force of contact was involved at the back of the deceased's head to cause the said injuries. In his testimony, PW1 was adamant that a fall could not cause the said injuries. However, in cross-examination, PW1 stated that a fall could result in such injuries but that it would have to be from a height and further that if the deceased had knocked herself on th bedrest, the injuries could have been sustained but the force of the knock would have had to be massive. He further stated that if the deceased fell down with a thud, the injuries would have been possible.
93. Juxtaposed against this evidence of PW1 was the accused person's defence that he heard a fall and on getting into the bedroom where the deceased had entered a few minutes earlier to change her clothing, he found that she had fallen down and knocked her head after a convulsion episode. The accused testified that the deceased had gone to change her clothes so that she could come back and they watch a movie as he remained in the sitting room working on his presentation when he heard a fall from the bedroom and on checking, found the deceased had fallen on the ground/floor jerking and that the laundry basket had fallen on her. The accused gave a history of episodes of convulsions that the deceased had suffered over time and the subsequent injuries sustained.
94. I have considered all the above and it is my view that the accused person was sincere and forthright in the testimony that he put forward.
95. In his evidence, the accused demonstrated that as a result of the convulsions, the deceased would at times sustain severe injuries such as a fractured shoulder necessitating surgery, a fact that was repeated by her father PW2 and the deceased's siblings PW3 and PW4. It is also noteworthy that no weapon was recovered from the scene that might have been used by the accused so as to cause the injuries sustained by the deceased and which led to her death.
96. PW1 testified that the injuries sustained by the deceased could have been possible if she fell from a height. In my view, if the deceased fell onto a shoe rack and fractured her shoulder necessitating surgery, it was also possible for her to fall on to the bedside wardrobe and sustain the injuries that resulted in her death. I opine that falling as a result of a convulsion would be from a height as the individual would have been standing prior to the fall and suddenly, lost control or balance of their body.
97. Further, it is not clear, and it has not been made clear as to why the charges brought against the accused herein were brought a year and eight months after the incident if, as it has been testified by the investigating officer, that the deceased's father PW2 raised complaints over the deceased's death immediately after the incident.
98. PW10, th investigating officer further testified that he charged the accused person as he was the last person to be seen with the deceased. Sections 111(1) and 119 of the [Evidence Act](#) provides as follows:

“ 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.”

99. In this case, based on the evidence presented before the court, it is my view that the accused’s defence offered an explanation as to how the deceased might have met her death. The prosecution failed to adduce sufficient evidence to the contrary or even to poke holes, during cross-examination, into the accused’s defence.
100. Taking all the evidence presented before this court by both parties into consideration, it is my view that prosecution failed to cogently and firmly establish circumstances under which the accused’s guilt could be inferred by this court and further that the circumstances presented herein through testimonial evidence failed to cumulatively align and form a chain inexplicably pointing at the accused exclusively as the deceased’s killer.
101. The accused testified how he loved the deceased and could never harm her a fact that had earlier on been reinforced in the testimonies of PW7 who testified how the deceased had shared how she was lucky to have the accused as a husband as he cared for her despite her sickness as well as the testimony of PW8 who testified that he had never seen a relationship better than that of the accused and the deceased.
102. I am thus inclined to find that the prosecution failed to prove their case against the accused herein beyond reasonable doubt as the one who caused the deceased’s death.
103. In the end, I am unable to find that the death of the deceased herein was unlawfully caused or that the accused person was directly or indirectly involved in the death of the deceased Edderline Achieng Ater. There is thus no need to consider the element of malice aforethought.
104. Accordingly, I find the charge of murder against the accused person is not proved to the required standard of beyond reasonable doubt. I find the accused person herein Caleb Ombati Ombiro alias Simba not Guilty of the charge of murder and I proceed to acquit him of the said charge. Unless otherwise lawfully held, Caleb Ombati Ombiro is hereby set at liberty forthwith and the sureties are hereby discharged. Any security deposited into court to be released to the sureties forthwith.
105. This file is closed.
106. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023**

**R.E. ABURILI**



**JUDGE**

