



**State v Okoth (Criminal Case E002 of 2020)  
[2022] KEHC 3397 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3397 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E002 OF 2020  
RE ABURILI, J  
APRIL 26, 2022**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**NICHOLAS WADHALA OKOTH ..... ACCUSED**

**JUDGMENT**

1. The accused person Nicholas Wadhala Okoth is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) (cap 63 of the Laws of Kenya). The particulars of the Information dated October 26, 2020 are that on the 15th day of October 2020 at around 2000hrs-2200hrs in Nyasigongo/Sirinde Kaugagi Udeda sub-location, South West Alego location in Siaya sub-county, he murdered one Joshua Cleophas Ouma.
2. The accused person pleaded not guilty to the charge. The prosecution called eight (8) witnesses in support of their case against the accused which evidence is summarised below.
3. PW1 No.235616 Chief Inspector Fridah Karegi the outgoing OCS Siaya Police Station testified that on October 22, 2020 at around 10.44 hours in the morning, she was called to record a confession from the accused. She testified that she took the accused through the confession rules after which the accused stated that he understood the same.
4. It was her testimony that she informed the accused of the charge he was facing, of his right to have a representative and the accused chose Lorine Akinyi Wandera to be present. She further testified that she asked the accused of his preferred language and he selected Kiswahili and also that she asked him if he needed a translator and he said yes so they got one David Pambo to act as the accused's interpreter.
5. PW1 testified that she informed the accused that he was a free person and further inquired from him as to whether he had been threatened or coerced to give a confession to which the accused responded



- in the negative. It was her testimony that the accused waived his right to a lawyer after which she spent 3 hours with him and gave him 30 minutes to rest.
6. PW1 testified that she inquired from the accused as to whether he had any medical issue to which the accused stated that he had none except that on his arrest he had been beaten by a mob but had been taken to hospital by the police and had been discharged. She further stated that the accused's representative, Lorine Akinyi, was present as she recorded the accused's statement as well as Loraine's statement.
  7. It was her testimony that the accused signed against all questions and answers in her preliminary preparation of recording of the confession. She further testified that she ensured that the accused was comfortable before she recorded his confession in the English language as interpreted by David Pambo who signed a Certificate of translation. PW1 produced the accused's confession as PExhibit No. 1
  8. In cross-examination, PW1 stated that she was aware before she took the accused's confession that he had endured mob injustice. She further stated that she brought in an interpreter because the accused said he understood Kiswahili better and preferred Kiswahili to Luo. It was her testimony that the translator wrote a Certificate saying it was translated in the Luo language and that this was because the accused person's grandmother was also present and she asked for a Luo interpretation.
  9. PW1 reiterated that Mr. Pambo was present throughout the session and that he signed the certificate of translation. She stated that she did not have a Kiswahili version of the English statement and further that Lorine Akinyi was present and she recorded her presence, but that Loraine did not sign as a third party representative. PW1 stated that she only recorded Loraine's identity card number and not other particulars like her relationship with the accused.
  10. It was PW1's testimony that she did not indicate to the accused his preferred language. She stated that the statement was 4 pages in length and that it took three hours to record the statement though she did not record the time of stopping or ending the record.
  11. In re-examination by Mr. Kakoi, PW1 stated that she was aware that the accused was beaten by the mob before his arrest and the police rescued him and took him to hospital. She further stated that the accused had healed by the time he recorded his confession.
  12. Upon questioning by the court PW1 stated that the translator was only supposed to sign on the certificate, not on preliminaries. It was her testimony that she did not give the accused the option of writing his own statement because he said he was comfortable with her writing. She further stated that she wrote the name, ID. Number and telephone number of the third party Loraine Akinyi which were sufficient particulars.
  13. PW2 Dr. Gabriel Wekesa Juma testified that he conducted an autopsy on the body of Joshua Cleophas Ouma on October 21, 2020 at 2.30 pm at Siaya Referral Hospital Mortuary. It was his testimony that the deceased was an African male adult. On the post mortem changes noted, there was rigor mortis and brain liquefaction. Externally, the body lay supine and had multiple cut wounds, 3 on the face, 2 on the forehead and one of the right side of the head all measuring 3 cm long. That the skull had crepitus (bone shaking) and was unstable. Dr. Juma further testified that there was a closed distal left femoral (skull) fracture. He testified that the genital area had been mutilated by a sharp object and was in pieces.
  14. PW2 testified that on examination of the Genito-urinary system, the genital organs were chopped off and glans left. He further testified that on the head, there were multiple commuted skull fractures on the face, frontal and parietal areas of the head and further that the skull was unstable whereas the nervous system had brain liquefaction, frontal haematoma with some areas of liquefaction. He found the spinal cord and column were normal.



15. PW2 testified that as a result of the autopsy, he concluded that the cause of death was due to severe head injury (blunt and sharp combined) and he issued Death Certificate No. 1557408. He produced the postmortem report dated October 21, 2020 as PExhibit 2.
16. In cross-examination, PW2 testified that he was a medical officer and a general practitioner. He further testified that he carried out an autopsy with information that the deceased was found dead on October 17, 2020. He stated that the deceased had frontal haematoma so there was internal head bleeding. It was his testimony that there was no manifestation of defensive injuries which would have been on hands.
17. PW3 Opondo Dedan Rutha, a minor was taken through voire dire examination and found understanding of the meaning of an oath and telling the truth and thus was allowed to give evidence on oath. It was his testimony that on October 16, 2021 at about 5 pm he was with Jacktone walking looking for food for rabbits when they decided to follow a shortcut route through the home of the deceased. He testified that Jacktone was on a bicycle while he walked ahead.
18. PW3 testified that on their way, they saw the deceased lying beside the flowers and Jacktone told him that the person was dead and that they should go tell people. It was his testimony that they went to the nearby home and found Nicholas and informed him of what they had seen, that they had seen Ouma dead but Nicholas told them not to tell anybody about the dead man because that was a police case.
19. He further testified that he was also looking for chicken so they went and he bought chicken after which they parted ways with Jacktone. PW3 testified that he never told anyone of what he had seen and so the following morning, he woke up and went to look for food for rabbits with his friend Erick. He testified that they passed the same place where he had seen the deceased and saw him still lying there and that Erick went and told his father who started screaming and people gathered to see the deceased.
20. PW3 testified that he knew Nicholas and that his home was not far from their home. He testified that he also knew the deceased. PW3 identified Nicholas as the accused in the dock.
21. In cross-examination, PW3 stated that he was not induced, threatened or promised anything when he recorded his statement at the Police Station. He further stated that he had also known the deceased for some time as he was a farmer in the village. He further stated that he had no blood relation with the accused. It was his testimony that on 16.10.2020 they were not in school that evening as they had returned from school.
22. PW3 stated that the distance from the home of the deceased to that of Nicholas is about 20 metres. He stated that he did not know the wife of the deceased but that the deceased had children and mostly that he lived alone with his child in his home. He further testified that when they saw the deceased lying down, they did not check on him to know if the deceased had injuries.
23. He further stated that the deceased was near a home where they found Nicholas sitting on a bench with Stella, a lady from that home. PW3 further stated that Stella never heard what they told Nicholas. It was his testimony that Jacktone told Nicholas that, "we have seen a dead body by the path" and Nicholas informed them that they should not tell anyone because it was a police case and that he was not involved in that death so they ought to not tell anyone.
24. PW3 testified that he never told his mother and grandmother whom he lived with what he had seen on the road as he was busy that evening. He testified that the following morning, which was a Saturday, he left home at about 8 – 9 am with Erick and Ian and found the deceased's body still on the path. It was his testimony that they never met anyone on their way (witness soft but firm). He stated that on that morning, he was not with Jacktone whom they had parted with the previous evening. He reiterated



- that Eric, who was older than him, went and informed his father about the body while he collected food for the rabbits and returned home.
25. PW4 Eric Odhiambo Otieno, a minor was also found understanding of the nature of an oath and fit to give a sworn statement. He testified that on the morning of October 17, 2020, he left his home and proceeded to Dedan's home as he wanted them to go and get food for rabbits. It was his testimony that he found Dedan at his home fetching water and that Dedan informed him that the previous evening as he and Jacktone were passing by the home of Ouma on their way to get food for rabbits, they found Ouma lying down and proceeded to a nearby home where they found Nicholas who told them not to tell anyone about it because it was a police case.
  26. PW4 further testified that they went to the scene where he moved closer and saw Ouma lying down. He stated that they left and he went to tell his father who screamed and accompanied him to the scene. It was his testimony that he was also in the company of Ian and that Jacktone also came.
  27. PW4 testified that the body was near the home of the deceased. He stated that he did not see the accused at the scene. He further stated that on the morning of October 17, 2020 when his father screamed, many people gathered. He also stated that the deceased was his relative as he called him Uncle - 'Baba'. He further stated that he was not with Dedan on October 16, 2020.
  28. In cross-examination PW4 stated that he gave his statement at Uranga Police Station and that he was alone with the writer of his statement though he could not remember her name. He further stated that he was never threatened or promised anything to write his statement which he gave in Kiswahili.
  29. He further reiterated that on October 17, 2021, a Saturday, he never went to school but went to Dedan's home whom they nicknamed 'Baba'. He stated that he found Dedan with Ian so they went together to look for food for rabbits but when they found the deceased on the path, they did not go to look for the rabbit food.
  30. PW4 testified that at the scene they found a torch, cooking oil and onions. He stated that he saw blood at the scene and further that there was dry blood on the head of the deceased. He stated that after informing his father, he came to the scene screaming which attracted other people. It was his testimony that he knew Stella who lived next to the deceased's home. He stated that he did not see her at the scene on 17.10.2020. He stated that the homes of accused and deceased were about 50 metres apart and that they were neighbours.
  31. PW5 Lucas Otieno Makunda testified that the deceased Cleophas Ouma Joshua was his cousin while the accused was his cousin's son. He further testified that the deceased was an uncle to the accused.
  32. PW5 testified that on October 15, 2020 at about 9 pm, he heard screams from the deceased saying he had been robbed. PW5 testified that the deceased was walking towards his homestead then went silent. He testified that on the October 17, 2020 he had gone to a funeral when his son called him to return home urgently saying Cleophas had been murdered in front of his house. He stated that he came and found him dead. He further stated that people suspected the accused whom he had gone with at the funeral in question.
  33. PW5 testified that they took the deceased's body to the mortuary and on Sunday, the accused was brought to the home of the deceased and when the police asked him why he killed his uncle, he said it was because of land dispute. He further testified that he knew the accused was quarrelling with the deceased all the time



34. PW5 testified that the deceased and accused used to live a cat and mouse life. He further testified that the accused used to steal chicken and other household items from the deceased and the deceased used to complain that whenever he used to lock his house, he found it broken into.
35. PW5 testified that at one time, the accused assaulted the deceased who lost his teeth. He further testified that in 2013 he was very close to the deceased who used to tell him all the things the accused used to do to him. PW5 further testified that the accused announced in the village that he wanted to be rich but that he could only achieve this if he killed his uncle, the deceased, PW5 and PW5's brother who was a witness in this case.
36. PW5 testified that the accused stated that after killing him he would get a car while if he killed PW5's brother, he would get a tipper. It was his testimony that the accused told him that if he killed a woman and cut off her breasts and buttocks, he would be rich and further that he wanted to kill Ann Otieno and Peter Otieno. He testified that the accused stated so at night when he, PW5 was with Ann Atieno.
37. PW5 testified that he went to the accused and asked him why he wanted to kill them to be rich to which the accused responded by saying that he had been drunk and that is why he was talking like that. He further testified that every time the deceased's house used to be burgled and he could inform PW5 and that as a clan, they used to sit and discuss the issue of the accused assaulting his uncle.
38. It was his testimony that the accused was an orphan as his parents died when he was 5 years old. He further testified that the accused was raised by his grandmother and his uncles. PW5 further stated that the accused married from their home but he used to demand for land from his uncles yet he had land where he was born.
39. PW5 testified that on October 21, 2020 he went to the mortuary and identified to the doctor the body of the deceased Cleophas. He proceeded to identify the accused in the dock and stated that he had known him since he was born.
40. In cross-examination PW5 stated that the accused used to have issues with the deceased and that the deceased used to complain that the accused used to steal from him. He admitted that he never found the accused ready handed stealing. He further stated that the deceased used to drink and when drunk he used to shout loudly. He also stated that the accused also used to drink alcohol.
41. PW5 stated that the accused's grandmother gave him a portion of land where he constructed a house. It was his testimony that when the accused was arrested and brought to the home of the deceased, he was present and the accused said he killed the deceased because of land issue. He further testified that he had his statement in Kiswahili but could not tell in which language it was written and further that the statement was not read back to him.
42. PW5 testified that the accused was beaten by a mob who were asking him why he killed the deceased and he was saying it was because of land. He further testified that he could not remember when the mother of the accused died but that she was buried in Usonga where she was married. He reiterated that the accused and his siblings were brought up by their grandmother at his home. He stated that the accused later went and build a house in Usonga but he lived at his grandmother's home.
43. In re-examination, PW5 stated that in his statement he said that the deceased was responsible for the family land and he was against the accused living there because the accused was of bad character.
44. PW6 Peter Otieno Onyango testified that on October 17, 2020 in the morning while he was on his farm, his son Erick came and informed him to go and see Ouma had been killed. He stated that he went to the home of Ouma and found Ouma his brother dead. He testified that he the deceased's private parts cut off and the head smashed with an axe. He stated that he screamed and people came.



45. It was his testimony that his nephew Nicholas had gone for a funeral at Senje, so they went to look for him as they suspected him but were not successful so they returned and found the deceased's body taken to the mortuary. He further testified that at night they saw Nicholas who then started running away upon being cornered. He further stated that on Sunday, Odhiambo was on his way to Nyadorera when he met the accused and came with the accused up to the home of the deceased where they interrogated him and the accused admitted killing the deceased.
46. PW6 testified that prior to this date, the accused had told them that he would kill Ouma because Ouma was defaming him by saying that he steals his items. He further stated that the accused assaulted Ouma and removed his teeth and also broke his hand. It was his testimony that the deceased was his first cousin as their fathers were brothers. He testified that the deceased lived alone as he was a widower whose children were not in the home.
47. He further testified that he visited the deceased daily. He also testified that the accused and the deceased lived close, separated by a fence and that the accused lived on land owned by his grandmother. He reiterated that the accused did not live well with the deceased. PW6 testified that Nicholas used to demand for land forcefully from the deceased and threatened to kill the deceased.
48. It was his testimony that he was aware that the accused threatened to kill the deceased, PW5, Anne Atieno and himself. PW5 testified that the accused used to talk when he was drunk saying he must cut off their genitals so that he can be rich to buy saloon car, tipper and other vehicles. He testified that they thought the accused was just drunk whenever he spoke those things and did not anticipate him killing anyone until he killed Cleophas.
49. PW6 testified that the accused was very harsh so no one would move closer to him to question him. He further stated that the deceased used to drink alcohol and could shout over his stolen items. He further identified the accused in the dock and stated that he had known him since he was a baby as he was his uncle.
50. In cross-examination PW6 stated that the accused used to threaten to kill them but they never reported him to the police because they did not realize that he was serious. He further stated that the deceased used to drink alcohol but was not a drunkard and that the accused also used to drink.
51. It was his testimony that he recorded his statement at the police station in Kiswahili which he signed though it was not read back to him and was written in English. He stated that he was present when Nick was brought by the people who had assaulted by him inquiring why he killed the deceased to which the accused admitted killing the deceased.
52. PW6 reiterated that he knew Nicholas since he was a child and that this was the first incident where the accused was arrested though he had assaulted the deceased severally, removing his teeth and breaking his hand. He further stated that the accused had land issue with the deceased. He stated that the grandmother to the accused gave him land where he constructed but the land was family land. He further stated that the deceased used to cultivate part of the land that the accused's grandmother used to till and that she did want Ouma to till that land although it was family land.
53. PW7 No. 66783 CPL Simon Likonyi gazetted vide G. No. 10284 of December 15, 2006 testified that on November 17, 2020, at about 12.30pm while he was at the crime scene office, Siaya, he was requested to accompany PC Koresi to Sirenda village Kaugagi Udenda sub location to attend to a scene of alleged murder.
54. PW7 testified that on arrival, they found a large crowd and Police Offices securing the scene. He stated that he was shown the body of a Male Adult lying dead in front of his door in a white sheet with red



- flowers lying on its back facing upward in a pool of dried blood. He further stated that part of the head had decomposed since there were presence of maggots and that the head had multiple injuries.
55. It was his testimony that he saw injuries to the mouth and noted that the deceased's private parts had been chopped. He stated that besides the deceased was a delight and that he took several photographs at the scene namely;
- i. Photograph 1 & 2 general view of the scene taken from two different angles.
  - ii. Photograph 3 a big closer view of the deceased body covered in a sheet.
  - iii. 4<sup>th</sup> Photograph closer full length view of the deceased lying on his back while facing upwards.
  - iv. 5<sup>th</sup> Photograph – a big closed up lower view of the deceased.
  - v. 6<sup>th</sup> photograph – big closed up view of the chopped off private parts of the deceased.
  - vi. 7<sup>th</sup> photograph is a big closed facial view of the deceased for identification purposes.
56. PW7 testified that the photographs were printed under his supervision and the films secured with no interference. He further stated that he prepared a report on 9/11/2020. He produced the 7 photographs as PEX 3 (a), (b), (c), (d), (e), (f), (g) and the report as PEX 3 (h)
57. In cross-examination PW7 reiterated that he was gazetted vide G. No 10284 of November 15, 2006 as a Crime Scene officer, a position he had served on from 2003. He testified that his report did not indicate the name of the camera but it was a Niko.
58. PW8 No. 86706 PC Joash Koriese testified that he was the Investigating officer in this matter. He further testified that on October 17, 2020 at about noon he was at Siaya Police Station when a report was received of a dead body at Sirende village. It was his testimony that they proceeded to the scene in company of many officers including PW7, a scene of crime expert and they reached the home of Joshua Ouma and found him lying dead outside his homestead. He further testified that they also found a huge crowd plus some officers from Uranga Police Post and the area assistant chief at the scene where the scene of crime officer took the photographs as they spoke to the area assistant chief. He testified that PW5 who is related to the deceased was also at the scene.
59. PW8 testified that they gathered some information from villagers at the scene who mentioned some suspects after which they removed the body of the deceased to Siaya Hospital Mortuary for postmortem and investigation. It was his testimony that on October 18, 2020 at about 8.40 am they received information of a protest at Uranga area and that a suspect's house had been set on fire and that the suspect was being subjected to mob injustice. He testified that the suspect was rescued and taken to Siaya County Referral for treatment and on being discharged was booked at Siaya Police Station under OB No 19/18/10/2020 at 1330hrs as Nicholas Okoth Wadhala.
60. He further testified that the suspect had been booked the previous day upon their return from the scene vide OB No 18/10/2020. He further stated that on October 19, 2020 he went to court and obtained detention orders vide Misc. E12/2020 to enable them conclude investigations into the death of the deceased. It was his testimony that they proceeded to the scene with the suspect with Police escort for the suspect to show them the genital organs of the deceased which he had said were in a cassava plantation but were unable to trace them. He further stated that they were unable to trace the murder weapons as the suspect's house had been rased down with fire and everything destroyed.
61. PW8 testified that they recovered statements of witnesses at Uranga Police Station and that on the October 21, 2020 a postmortem on the body of the deceased was done by PW2. He further stated that



on October 22, 2020 PW1 recorded a confession from the suspect. It was his testimony that he did not participate in the recording of the confession. He further testified that subsequently, the accused was charged and then taken for mental assessment on October 27, 2020 and found fit to plead.

62. PW8 testified that on 2/11/2020 the accused was formally charged in court. He further identified Nicholas as the accused before court and further stated that the murder weapon and genitals of the deceased were never recovered.
63. In cross-examination PW8 stated that there was no eye witness to the murder but that there was circumstantial evidence. He stated that he did not witness the mob injustice meted on the accused. He further stated that the confession was taken after the beating by the Mob. PW8 further testified that apart from the confession, PW3 & PW4 met the accused who warned them not to say anything about the dead body of the deceased saying it was a police case and that if they said anything about him and he was jailed, he would murder them once he was out of jail.
64. It was his testimony in cross-examination that the accused had on two occasions assaulted the deceased and even broke his arm and was frequently stealing items from the deceased's house and further that the deceased and accused also had land issues and that the character of the accused was wanting so he was chased away from his home and given a place by his grandmother to settle which put him on a collision course with his uncle, the deceased herein.

### **Defence Case**

65. The accused gave a sworn statement in which he reiterated that he was aware of the charge against him which charge he denied. He further stated that on the October 15, 2020 he was on the farm at Misingo Island where he stayed till noon when he returned home and remained in the homestead going about his usual chores.
66. He testified that on October 16, 2020 he left home for a funeral at Seje which was two hours' drive away as his aunt had died and returned home the same day at 6pm. He stated that on October 17, 2020 they left for Bama to remove the body of his aunt after which they took the body home. It was his testimony that he returned home in the morning, showered then returned to the burial.
67. The accused testified that while at Seje, he heard people saying that Ouma Joshua had been killed and that he was the suspect which made him annoyed so he proceeded home and on arrival saw his houses being destroyed so he entered the maize plantation and watched his houses being burnt.
68. It was his testimony that he stayed in the maize plantation until 7.30pm then walked away, found an empty church and slept there. He testified that he was going to Uranga Police to report when some youths accosted him saying they were looking for him and prevented him from going to the police, saying he should go home and resolve the issue which was a small one. The accused testified that he boarded their Motorcycle and they rode up to home then started hooting as if a dead body had arrived as people emerged with pangas and clubs. He testified that his uncle told them not to kill him at his home but that they should take him to his late Uncle's house and kill him there.
69. The accused testified that they reached his uncle's home where he saw the chief, assistant chief and other people who started beating him up. He further testified that one of them bought petrol and poured on him then lit fire and he started burning. He stated that he burnt his legs although he pulled off his trousers. It was his testimony that the chief called police from Siaya Police Station whose arrival prompted the mob to disperse but the police told them not to escape and not to harm him but the mob insisted on having the accused killed. He further testified that the police took him to the District Hospital at Siaya where he was treated before being taken to the Police cells on the same day.



70. It was his testimony that while at the Siaya Police Station, a male police officer, PW8, called him out and he went to his office where PW8 read out to him a big bible and told him that when he goes to court he should admit that he killed the deceased. He further testified that PW8 had a stick which he hit the accused's head wounds but the accused testified that he refused to admit that he killed the deceased so he was returned to the police cells.
71. The accused testified that the following day he was called at the office of the OCS where he met his grandmother Jennifer Awino, aunt Achieng and Sister Akinyi. He stated that a male police officer who removed him from the cell told him he killed so he should also be killed. It was his testimony that he was forced to sign some documents but refused. He denied that the signature on the confession document was his. He further stated that he did not record any statement at the police station and that after his grandmother, aunt and sister left he was returned to the cells.
72. The accused denied receiving any documents to sign. He further stated that they were communicating in Kiswahili and that nobody spoke to him in Dholuo. The accused admitted knowing Eric Odhiambo and Dedan Odhiambo who he also denied meeting or threatening them. It was his testimony that Lucas who is his mom's step brother lied to court as he did not assault him in 2016. He further stated that he never had any quarrels with his late uncle and that he never had a land dispute with his uncles.
73. It was his testimony that he was born in Alego Usonga and went to live with his uncles at Kaugagi when he was 6 years after his parents died. He stated that he was the first born of four children and having been neglected by their paternal relatives, their grandmother took them in and brought them up. He testified that their paternal uncles took all their possessions. He further stated that he went to school up to class six because his grandmother could not afford to pay fees.
74. The accused testified that his grandmother gave him a small portion of land about two acres where he built his house and that his late uncle was happy with him but his other brothers' were unhappy that he was a girl's son so he ought not be given land at their home to settle there. He stated that he had no quarrel with him and that he never planned to kill the deceased since he was given the land and had lived there for one year after he married. He reiterated that he had no idea who killed his uncle.
75. In cross-examination the accused stated that when his grandmother gave him land, his late uncle had no issues with him or her and that only his other uncles had issues with him. He stated that the land he was given was separate from his uncle's land. He stated that he his uncle's live elsewhere. He also stated that he had no issues with the witnesses who testified including Dedan and Eric.
76. The accused further stated that he never complained that he was tortured by the police and Koriese was not asked if he tortured him. He further stated that he was being forced to sign the confession but he refused. He further testified that he never heard PW1 being asked whether she forced him to sign the confession. He testified that Akinyi is his sister and that he never called her but found her in the Police Station when he was removed from the police cells. The accused also denied that he heard the OCS say he elected the people to be present during the confession.

### **Accused's Submissions**

77. Citing rules 4 (1) (c) on coercion or threat of an accused and rule 4 (2) on recording a confession from an accused who shows signs of physical injuries or torture it was submitted that the alleged confession under the *Evidence (Out of COURT Confessions) Rules*, 2009 did not meet the threshold provided in the said rules.



78. It was further submitted that the alleged confession did not comply with rule 7 that requires the officer recording the confession to inform the accused of the option to write his own statement in his preferred language or to have the recording office record it.
79. Reliance was placed on the case of *R v Elly Waga Omondi* (2015) eKLR where a confession that did not meet the threshold of the *Evidence (Out of Court Confessions) Rules, 2009* was deemed inadmissible.
80. It was further submitted that the certificate produced by the scenes of crime officer did not indicate the specification of the machine that took the photos and as such the said certificate did not meet the necessary requirements in section 106B of the *Evidence Act* and further as laid down by the Court of Appeal in the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR.
81. It was submitted that the evidence against the accused was circumstantial and that the suspicion however strong could not lead to an automatic conviction as was held in the case of *Joan Chebichii Saw v Republic* [2003] eKLR.

### Analysis and Determination

82. To sustain a conviction on a charge of murder under section 203 of the *Penal Code*, the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence: -
- a. The fact and the cause of death of the deceased.
  - b. The fact that the said death was caused by unlawful act of omission or commission
  - c. That it was the accused person who caused the unlawful death of the deceased.
  - c. That the said unlawful act of omission or commission on the part of the accused was with malice aforethought.
83. The death of the deceased was proven beyond reasonable doubt by the testimonies of PW3,4,6 and 8 all who saw the deceased's lifeless body at the scene. It was further proven by the testimony of PW7 who took the crime scene photographs. The cause of death of the deceased was confirmed through the evidence of PW2 who conducted the postmortem on the body of the deceased and concluded that the deceased's death was caused by severe head injury as a result of both blunt and sharp traumas.
84. On whether the deceased's death was caused by an unlawful act or omission, there was no eye witness to the incident leading to the death of the deceased. The prosecution relies on circumstantial evidence. What constitutes circumstantial evidence has been the subject of judicial consideration in several cases. In *Sawe v R* [2003] KLR 364 the Court of Appeal held.

- “1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.



...  
...  
...

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

85. In *Abanga alias Onyango v R* CR. A NO.32 of 1990(UR), the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“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 guilt of the accused; (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.”

86. In this case, the evidence adduced by PW1 was that the accused confessed to killing the deceased and that she subsequently took down the accused’s confession in line with the *Evidence (Out of Court Confessions) Rules*, 2009.

87. The accused disputes making any confession and states that after his rescue from the mob that wanted to lynch him following the alleged murder of the deceased that the mob linked to him, he was taken to hospital and then to the police cells. He further stated that when he was taken to the police station, where he was told to confess by the investigating officer but he refused and that subsequently, PW1 presented a document to him of his alleged confession for him to sign but he refused. It is worth noting that the Confession statement was never disputed by the accused person prior to its production by the prosecution. After PW1 testified and referring to what she did on respect of the confession, she told the court that: I wish to produce the accused person’s confession statement as recorded by me on October 22, 2020”. The defence through counsel Mr. Mshindi stated: “I have no issue or objection with the production of the accused person’s confession statement made on October 22, 2020.”

88. Had the accused person objected to the production of the confession statement, the court would not have allowed the production of the said statement as it did. The court would first have subjected the proceedings to a trial within a trial to ascertain whether the confession as referred to by the PW1 was given voluntarily and or taken in accordance with the (*Confession-Out of Court Rules*).

89. In his submissions, the accused person’s counsel stated that the alleged confession did not comply with the *Confession Rules* as it was obtained from an accused who showed signs of physical injuries or torture having been exposed to mob justice and further that it did not comply with rule 7 that requires the officer recording the confession to inform the accused of the option to write his own statement in his preferred language or to have the recording officer record it.



90. The rights of an accused under the *Evidence [Out of court confession] Rules* of 2009 are set out in Rules 4 (1) to (3) as follows:-

- “(1) Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person-
- (a) has stated his preferred language of communication;
  - (b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;
  - (c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
  - (d) is informed of his right to have legal representation of his own choice;
  - (e) is not deprived of food, water or sleep;
  - (f) has his duration, including date and time of arrest and detention in police custody, established and recorded;
  - (g) has his medical complaint, if any, adequately addressed;
  - (h) is availed appropriate communication facilities; and
  - (i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.
- (2) The recording officer shall not record a confession from any accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.
- (3) The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party’s particulars and relationship to the accused person.”

91. The evidence of PW1 must be considered against the background of these provisions and rules. Generally viewed, PW1’s evidence is consistent with due observance of Rule 4. Two issues dominated the accused’s submissions, not evidence, regarding the authenticity of the confession, namely the accused’s alleged coercion and visible physical appearance suggesting torture on the accused as contained in rules 4 (1) (c) and 4(2) and the recording officer’s failure to inform the accused of his option to write his own statement in his preferred language or to have the recording officer record it as contained in rule 7.

92. The Accused’s evidence was that he never recorded any statement at the police station, or that the signature on the statement is not his and that PW8 read him a big Bible and told him to come to court and admit the offence and that he was taken to an office and forced to sign some documents but that he refused. From my observation of the accused and the testimonies of the prosecution witnesses, in my humble view, that testimony is not truthful. He also alleges that PW1 never gave him any documents to sign and that he was assaulted or tortured to confess



to the murder. Had this been the case, the accused could not have told this court on his first appearance that he was beaten by a mob. Further, the issues of force or torture were not put to PW1 or PW8 during their cross-examination.

93. As I have stated, as at that time, the confession statement had already been produced in evidence as an exhibit without any objection and therefore no trial within a trial was conducted by the court on admissibility of the said confession statement. That is not to say that the confession statement remained unchallenged but that the court did not have the opportunity to test whether the confession was taken voluntarily or on accordance with the confession rules, at the very initial stage of the proceedings before admitting the statement as an exhibit for the prosecution.
94. It is undeniable that the accused experienced mob injustice before the police rescued him. I also note that the confession was taken October 22, 2020, about one week after the deceased's death had occurred and about 4 days after the accused had been arrested. Surely, if the Accused had just come from a torture session when brought to PW1, some evidence of sorts should have confronted PW1 and/or a complaint would have been raised by the Accused to the recording officer. I note that when the accused appeared before this court on October 26, 2020 for the first time, I observed that both his hands were in plaster paris and on my asking him what had happened to his hands, he responded: "I was beaten by a mob."
95. Secondly, the defence did not suggest to PW1 that the said witness while speaking with the accused recorded her own "things", and apparently failed to read back the statement to him, before asking him to thumb print the same. The Accused did not state, despite the evidence by PW1 to the contrary, that he made any complaint concerning a session of torture immediately prior to being taken to PW1's office.
96. As regards the second attack on the confession, Rule 7 provides that:

Where the confession is to be recorded in writing, the recording officer shall inform the accused person of his option to write his own statement in his preferred language or to have the recording officer record it.
97. It is notable that in the confession recorded by PW1, the accused stated that the rules had been read to him in a language he understood, that is Kiswahili, and he was fine with proceeding with PW1 taking his confession down. Throughout these proceedings, the accused intimated to court that he understood Kiswahili and the court ensured that the court interpreter for Kiswahili was available to interpret any material spoken or written in English or other language.
98. Further, the accused made submissions to the effect that there was no need for a translator as the accused understood Kiswahili and this voided the confession. In my humble view, this was explained away in the testimony and cross-examination of PW1 who testified that the interpreter Daniel Pambo was not for the benefit of the accused but for the benefit of the accused's grandmother who was present and only understood luo language.
99. Having carefully reviewed the available evidence, I am satisfied that the Accused's confession was taken in accordance with the [\*Evidence \(Out of Court Confession\) Rules\*](#) and was admissible under section 26 of the [\*Evidence Act\*](#).
100. However, the accused having repudiated his confession during his defence and not during the production on the said confession statement, I must assess that repudiation. In the case of [\*Patricio Njiru Kirangi & another v Republic\*](#) [2005] eKLR, the appellants challenged their



confessions produced before the High Court in the Court of Appeal. The confessions were the basis of the convictions against them. Dismissing the appeal, the Court of Appeal cited the case of *Tuwamoi v Uganda* [1967] EA 84 where it was held:

“A trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

101. In this case, the accused’s confession is very detailed especially regarding the accused’s itinerary on the 15<sup>th</sup> and 16<sup>th</sup> October 2020 and even the souring relationship between the accused and the deceased over the accused being given land by his grandmother. The question is, would PW1 have made up these intricate details considering the accused’s testimony that he made no statement at the police station.
102. The confession even contains the contents of the deceased’s hand on the fateful night namely, a delight lamp. Further to this the testimony of PW3 and PW4 who saw the deceased’s body and informed the accused who curiously told them not to tell anyone about it as it was a police case and yet the accused still neglected to inform the police of the body near his home.
103. PW5 also testified of the accused’s outburst that he would kill his uncles so as to get rich and that if he killed a woman he would cut off her breasts and buttocks and upon the deceased’s body being discovered, PW2 who carried out the postmortem revealed that the genital organs were chopped off. These matters corroborate specific statements in the Accused’s confession in that regard.
104. Taking all these into consideration, I find that all the material points and surrounding circumstances of the confession cannot but be true and all point towards the accused as the one who caused the deceased’s unlawful death.
105. On whether the unlawful death was caused by malice aforethought, malice aforethought is defined in section 206 of the *Penal Code* as:
  - “(a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
  - (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
  - (c) An intent to commit a felony.
  - (d) An intention to facilitate the escape from custody of a person who has committed a felony.”



106. For the offence of murder and proof of malice aforethought in *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, Eastern Court of Appeal observed:
- “In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”
107. Some of the compelling evidence to infer malice aforethought is to be found in *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the court held:
- “The question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”
108. In the instant case, it is clear from the nature of injuries sustained by the deceased and as brought out in PEx 2 by PW2, Dr. Juma specifically on the multiple skull fractures and cuts the deceased suffered as well as the chopping off of his genitals that the intention of the accused was not only to cause the deceased grievous harm, but to eliminate him completely as the injuries were fatal from the onset. To this extent, I am satisfied that malice aforethought has been proved against the accused person by the prosecution beyond reasonable doubt.
109. The prosecution having proved all the elements of the charge of murder beyond reasonable doubt, I find and hold that the accused person Nicholas Wadhala Okoth is guilty of the offence of murder as charged, He is accordingly convicted for the offence of murder.
110. Sentence will be after records and mitigation.

**DATED, SIGNED AND DELIVERED AT SIAYA IN OPEN COURT THIS 26<sup>TH</sup> DAY OF APRIL, 2022**

**R.E. ABURILI**

**JUDGE**

