



**Republic v Ouna (Criminal Case E025 of 2021)  
[2022] KEHC 3128 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3128 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E025 OF 2021**

**JR KARANJA, J**

**MAY 24, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ASSUMPTA SANDE OUNA ..... ACCUSED**

**JUDGMENT**

- [1] The accused, Assumpta Sande Ouna, is charged with Murder, contrary to S.203 as read with S.204 of the *Penal Code*, in that on the 5<sup>th</sup> December 2021 at Bwangangi village, Odiado location, Samia – Busia County, murdered Livingstone Ochieng Ouma.
- [2] The case for the prosecution was that the accused was the second wife of the deceased while Delina Auma Odenge (PW 1), was the first wife.  
  
On the material date, the accused and the deceased are said to have engaged in a domestic brawl which resulted into physical confrontation between them and injury to the deceased who was thereafter taken to hospital but passed away while undergoing treatment. The accused was suspected of having inflicted the fatal injury. She was arrested and eventually charged with the present offence.
- [3] The defence case was a denial and a contention that the accused did not assault and injure the deceased as alleged. Instead, in the process of being intoxicated and chasing the accused away from the matrimonial home the deceased fell down on several occasions and injured himself. The accused contended that there was construction going on at the scene and at one point the deceased fell down and collided with a brick such that he injured himself. The accused contended and maintained that she did not fight with the deceased, neither did she assault him on the material date.
- [4] The basic issue for determination by this court was whether the deceased was murdered and if so, whether the accused was responsible for the offence.



In law, murder is defined as the killing of a person with malice aforethought or the unlawful killing of a person that does not fall into the category of manslaughter or infanticide.

S.203 of the *penal code* provides that:-

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

- [5] S.206 of the *penal code* provides for circumstances under which malice aforethought may be deemed and these include where there is an intention to do grievous harm to any person.

The evidence of the prosecution through the deceased’s first wife, Delina Auma Odeye (PW 1), the deceased’s brother, George Ooko Ouna (PW 2) and the deceased’s son, Stanley Ochieng Bwire (PW 3), clearly indicated that the death of the deceased was either as a result of an act which was not premeditated or planned or was as a result of a fatal accident occasioned by the alleged intoxication of the deceased at the material time.

- [6] It is deducible from the foregoing narratives that the deceased was not murdered but was unintentionally killed as a result of an unlawful act by another person or accidentally by his own reckless and disorderly conduct.

The cause of death would be a crucial element in establishing whether the death of the deceased was occasioned by an unlawful act or was by misadventure or purely accidental. It is a key ingredient in the offence of murder and is normally determined by a medical doctor.

- [7] In essence, the cause of death is an official determination of conditions resulting in death. In that regard the evidence of Dr. Gibson Mchana (PW 5), was most vital. He indicated that he carried out a post mortem less than ten (10) days after the death of the deceased and compiled the necessary post mortem form (P.Ex 2) which showed that the actual cause of death was internal bleeding secondary to abdominal trauma following assault.

- [8] This evidence by the doctor remained substantially undisputed and was not in any event discredited by any other contrary opinion. It’s effect was clearly to debunk the narrative or theory put forward by the defence that the deceased’s fatal injury was accidental and was occasioned by the deceased’s intoxication and disorderly conduct which resulted in a violent domestic brawl with the accused, his second wife.

- [9] It would therefore follow and was indeed proved by the prosecution that the death of the deceased was as a result of an unlawful act of assault committed against him by an individual. The fact that the domestic brawl was not disputed by the accused and that it pitted her and the deceased to the exclusion of any other person it would be safe for this court to opine that the accused occasioned fatal injury to the deceased.

- [10] Although the evidence by the accused as corroborated by that of her son (PW 3) strongly indicated that the deceased instigated the brawl and precipitated its violent nature the accused nonetheless used excessive force against the deceased and must therefore be held accountable for the consequences of her unlawful act which resulted in the unfortunate death of the deceased.

- [11] As indicated in the postmortem report, the abdominal area of the deceased rather than any other area bore the brunt of the accused’s excessive force against the deceased.

However, it was evident that the accused did not intend to kill the deceased and may have used excessive force as a defensive reaction to the deceased’s transgression against her.



[12] The prosecution witnesses (PW 1, PW2 and PW3) were clearly inconsistent and contradictory with regard to the actual events which occurred at the scene of crime. Indeed, a brick (P.Ex 1) was touted by the prosecution as the suspected murder weapon yet the defence with support from Stanely (PW 3) indicated that the brick was at the scene as part of the materials at the scene for usage in a construction venture.

[13] Also, George (PW 2) gave the impression that he was at the scene from the beginning of the brawl between the deceased and the accused, but it turned out that he arrived at the scene and found the brawl at an advanced stage.

The evidence of the deceased's first wife (PW 1) indicated that the deceased made a "dying declaration," but it was unreliable devoid of any probative value as she was not certain as to when and where the declaration was made.

[14] Basically, the inconsistencies and contradictions indicated hereinabove or alluded to by the defence were immaterial in watering down the prosecution case and disproving the contention that the deceased was assaulted and occasioned fatal injury by the accused.

In sum, the prosecution succeeded in discharging its burden of proof against the accused, but only with regard to the offence of manslaughter rather than murder.

In the premises, the accused is found guilty of manslaughter contrary to S.202 (1) of the [penal code](#) and is convicted accordingly.

**J.R. KARANJAH**

**J U D G E**

**[DATED & DELIVERED THIS 24<sup>TH</sup> DAY OF MAY 2022]**

