



REPUBLIC OF KENYA



KENYA LAW
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**State v Opudo (Criminal Case E002 of 2021)
[2022] KEHC 10210 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIIYA
CRIMINAL CASE E002 OF 2021**

**RE ABURILI, J
JUNE 29, 2022**

BETWEEN

STATE PROSECUTION

AND

KEVIN OWUOR ABITH ALIAS OPUDO ACCUSED

JUDGMENT

1. The accused person Kevin Owuor Abith alias Opudo is charged with 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 January 6, 2021 at Uhwaya village Got Agulu sub-location in West Yimbo location in Bondo sub-county within Siaya County, the accused murdered one WILLYS OWOUR OWOUR
2. The accused person pleaded not guilty to the charge against him and the matter proceeded to full trial. The prosecution called six (6) witnesses in support of its case while the defence called two witnesses.

The Prosecution's Case

3. PW1 Dr Juma Wanjofu Daniel a medical officer working at Bondo Sub County Hospital testified that an autopsy report was done on January 13, 2021 on the body of Willis Owuor Owuor at Bondo Sub County Hospital morgue. He testified that the general observation was that the body was of a male, naked, of African race, 59 years, mild malnutrition, physique- thin body height of 176cm. He further testified that the post mortem changes were that the body was well-preserved in formalin and that there was presence of rigor mortis on extremities. He testified that the time of death was less than 48 hours before the preservation.
4. It was his testimony that externally, there was shortening and deformed right lower limits, evidence of an old fracture of the femur and that there were blood stains on the face but no bleeding from the ear or nose bilaterally.



5. He testified that there were no injuries noted on the chest, abdomen and extremities but there was an incomplete ligature mark horizontal around the upper portion of the neck while the head revealed a normal scalp with no haematoma and the skull was intact.
6. PW1 testified that the nervous system showed massive left temporal parietal subdural haematoma-blood collection 10 x 8 cm with compression of the brain matter and that other systems were not exposed.
7. PW1 testified that the possible cause of death was massive subdural bleeding secondary to suspected blunt trauma to the head. He testified that he signed Death Certificate No. xxxxxx and stamped the postmortem report which he produced as PEX1.
8. In cross-examination, PW1 testified that the head/skull and scalp were intact and that the inner vessels bled in the brain even if there was no external injury shown.
9. PW2, Felix Okoth, the deceased's son testified that the accused was his cousin. He testified that he lived with his father in the same house together with his younger siblings SO aged 6 years old and CA aged 10 years.
10. It was his testimony that on the January 6, 2021 at about 10pm while they were in their house with their late father, they heard Opudo, whom he identified as the accused in court, knocking on their door. He testified that he heard Opudo call his father as he knocked on the door and that his father opened the door for Opudo who entered the house. PW2 testified that Opudo was drunk but he sat in their sitting room and started talking with his father for a while then PW2 heard him say he was going to sleep. He testified that Opudo used to sleep at his uncle, George Ataro's house which was slightly far from their house and not in the same homestead, a five minutes' walk away.
11. PW2 testified that Opudo then left their house and his father locked their door but after a few minutes PW2 heard footsteps outside of a person walking towards his grandmother's house. He stated that dogs started barking so his father told them to get out and find out what was happening as there were some furniture that they had kept in their grandmother's house that could be in danger.
12. PW2 testified that in the company of his father and siblings they went out towards their grandmother's house where they found Opudo. He testified that his father had a phone with a torch light which he lit at Opudo and he, PW2, saw Opudo who was standing outside the house and had removed furniture – chairs from the house. It was his testimony that Opudo had broken the door which was wide open.
13. PW2 testified that his father had a walking stick as he was disabled after breaking his legs following an earlier assault. He testified that his father told Opudo not to take away the furniture and the two started exchanging words. He stated that his father held Opudo's clothes at the chest and Opudo held his father's clothing and pushed him causing his father to fall and hit Opudo using his walking stick. It was his testimony that Opudo then attacked the deceased and beat him up.
14. PW2 testified that when they left their house for his grandmother's, his father was using two walking aids, one with metal and the other, wooden. He testified that his father was given the walking aids from Hospital and that on that night, he was using one crutch and a walking stick. He stated that his father used the wooden stick to hit the accused, Kevin.
15. It was his testimony that Kevin then took the metallic crutch which his father had and used it to hit the deceased's legs severally. PW2 further testified that the accused also strangled the deceased, hit him on the abdomen and stepped on his chest. He testified that he tried to rescue the deceased but Opudo pushed him so he went and called Pamela "Nyalego" a neighbor, but they did not respond so he returned to the scene and found Opudo still assaulting the deceased.



16. PW2 testified that they screamed then Peter went to the scene and separated Opudo from the deceased and told Opudo to leave. It was his testimony that Opudo pretended to be leaving but returned after Peter had left. That the accused stood on the deceased's head as he continued assaulting him. It was his testimony that he told his father to stand they go to the house but he could not respond so he and his siblings left for the house. He further testified that his father called him saying he wanted water so PW2 went, fetched water, took it and poured it on his father's head and also gave him some to drink.
17. PW2 testified that he tried to tell his father to rise up so that they could go to sleep in their house but he did not respond so PW2 and his siblings went back to their house and sat there until morning. It was his testimony that after closing the door, Opudo went and called him out but he declined to open the door after which Opudo left. PW2 and his siblings then went to where they had left their father was being beaten and found him dead.
18. PW2 testified that he went and called Pamela who responded, followed him to the scene and confirmed the death and went and called George then they called the police who went to the scene before tracing Opudo and bringing him to the scene where PW2's father lay dead. It was his testimony that the body of his father was removed to Bondo Police Station and later taken to the, mortuary.
19. It was his testimony that he had a disability on his left hand so he could not help his father. He identified Opudo as the accused in the dock and stated that he had known him for a long time as they lived with him. He stated that he did not know of any disagreement between Opudo and the deceased before that date.
20. In cross-examination, PW2 reiterated his testimony in chief and maintained that his father had no disagreement with Kevin and that his father and Kevin's mother were siblings. It was his testimony that Kevin had lived in their home and even schooled from there. He stated that their homestead had their house and their late grandmother's house which nobody lived in as Kevin used to live in the house of George, the deceased's brother.
21. PW2 further testified that during the day, he had been herding animals and that he was aware that Kevin had cleaned their grandmother's homestead as he had told the deceased that he wanted to inhabit PW2's late grandmother house but the deceased told him that there were some furniture which he had kept there. He testified that the deceased knew that Kevin was to occupy his grandmother's house. He further testified that Kevin went to their house at 10.00pm while drunk.
22. It was his testimony that from their home to George's house, was far and that when Opudo went to their house and knocked, PW2's father opened the door for him and they talked for a while before he left. He testified that he did not know if Opudo was going to his grandmother's house. He stated that he never carried a knife that night but that he carried a broken metal bar. PW2 testified that it was his father who held Kevin and started beating him and that he assisted his father in beating up Kevin though it was not true that Kevin only pushed his father to the ground. He further testified that his father had a phone torch light and that Pamela's house was nearby and one could hear screams from the scene.
23. PW2 testified that they screamed but no one went to rescue his father. He testified that their neighbour Peter heard the screams and on arrival, he managed to separate Opudo from the deceased. He further testified that Pamela was their immediate neighbor and that there was also another neighbor. In re-examination, PW2 stated that it was after Opudo pushed the deceased who fell down, that the deceased hit Opudo.



24. PW3 Peter Otieno Obiero testified that the deceased was his cousin brother in the clan and that their homes were separated by a fence as their land shared a boundary. He testified that the accused was his nephew and the deceased was the accused's maternal uncle.
25. It was his testimony that on January 6, 2021 at night, he was in his house when he heard screams from the home of the deceased so he went to the scene where screams were coming from and found Opudo pushing/pressing Owuor from the ground. He testified that from a far, he could hear the deceased making noise saying Opudo wanted to steal property and on arrival at the scene, PW3 removed Opudo who was lying on top of Owuor, from Owuor. He testified that Opudo was hitting Owuor from the ground and that the two were fighting.
26. PW3 testified that he held Opudo and removed him from Owuor and led Opudo into his grandmother's house. It was his testimony that the deceased's children were at the scene standing and watching as their father was being assaulted. He testified that he then told Owuor to get up and go to his house and sleep. PW3 testified that as he was trying to help Owuor, Owuor told him that his legs had been hit so he could not walk so he left Owuor at the scene and went to sleep. PW3 testified that he called Ataro the village elder and brother to Owuor and informed him of what had happened and asked him to go to the scene and resolve the issue between Opudo and Owuor.
27. PW3 testified that he went to sleep and in the morning, he received information that Owuor was dead. He testified that Owuor had fractured legs so he normally walked with the aid of two crutches and that when PW3 reached the scene, he found Opudo hitting Owuor from the ground. He testified that he held Opudo and told him not to hit Owuor. He identified Opudo as the accused in the dock.
28. In cross-examination, PW3 confirmed that Kevin Opudo was a nephew to the deceased Owuor. He further testified that when he arrived at the scene, he removed Opudo who was lying on top of Owuor and took Opudo into his grandmother's house. He testified that Opudo did not live in his grandmother's house and that he took him to his grandmother's house to sleep there. He testified that it was dark so he did not see items in the house and that he also never saw any item where the two were fighting as it was dark.
29. PW4 George Owuor Abith testified that the deceased was his brother and that the accused was his late younger sister's son. He testified that the accused's father also died so the accused went to stay with PW4. It was his testimony that the accused used to stay with his mother who also died in 2002 and was buried at her maternal home so PW4 took up the responsibility of caring for the accused and even educated him up to form four. He further testified that the accused used to eat at PW4's house and slept at his PW4's son's house. It was his testimony that his son Collins Oduor Owuor married a wife in December 2020 so they told Opudo to go and clear his maternal grandmother's house so that he could go and occupy it. He testified that he discussed with the deceased who also agreed that Opudo could occupy their mother's house.
30. PW4 testified that he could not tell whether as at January 6, 2021, the accused had moved into his grandmother's house. He testified that on the morning of January 7, 2021, PW2 went and told him that Willis Owuor had died and that Pamela had sent him to go and inform PW4. He testified that he called the Assistant Chief and the Police who went to the scene, arrested Opudo and removed the body of the deceased to the mortuary at Bondo. It was his testimony that the accused had a good relationship with the deceased and that the deceased had fractured his legs so Opudo used to help him. PW4 identified Kevin Opudo as the accused in the dock.



31. In cross-examination, PW4 stated that the accused used to sleep in his grandmother's kitchen before her death. He testified that they had agreed as a family that Kevin Opudo goes to stay in PW4 mother's house after PW4's son Collins married but Kevin used to feed at PW4's house.
32. PW5 Collins Oduor Owuor testified that the deceased was his uncle and the accused his cousin. He testified that from 2019, he lived with the accused in his house and that in December 2020, he married so his father told him that Kevin was to go to stay in his grandmother's house. He testified that the accused then went to clear and clean the grandmother's homestead but had not moved into that house as at January 6, 2021.
33. PW5 testified that on January 6, 2021 he had gone to pray in the mountain and returned at 6pm but did not find Kevin. He stated that he stayed until 10pm but Kevin never showed up. He stated that the accused used to sleep in the sitting room so PW5 slept but never locked the door. It was his testimony that in the morning, he saw the accused sleeping on the chair in the sitting room. He further testified that he got out and his father called him saying Kevin was a suspect in the killing of his uncle Willis. It was his testimony that the police then arrived and arrested the accused and removed the deceased's body to the mortuary. He identified Kevin as the accused in the dock adding that Kevin went to live in that home with their grandmother initially, after his mother died. He further testified that after the death of their grandmother, the accused moved in to stay with PW5.
34. In cross-examination, PW5 stated that he married on December 17, 2020 and Kevin told him that the deceased told the accused to go and live in their grandmother's house. He testified that Kevin had brought some items for use at their grandmother's house but had not moved into that house and had not slept there yet.
35. PW6 No. 47195 CPL Michael Olunga testified that on January 7, 2021 he was at the station at about 7.a.m. when his DCI Mr. Ndirangu informed him to accompany him to a scene of murder as reported by the OCS Usenge at Uhwaya village, Got Agulu sub-location, West Yimbo location. He testified that they were directed by the OCS up to the home of Mzee Abith and at the scene, they found the OCS Usenge and his team as well as the deceased Willis Owuor lying in front of his mother's house with bruises on the face and left arm.
36. PW6 testified that the suspect was also sitted next to the deceased's body with handcuffs on his hand with bruises on his face and a cut lip with dry blood. He testified that besides the body, they recovered a walking stick and broken crutches. It was his testimony that the deceased was lame so he walked with the aid of a stick and crutches to limp. He testified that they also recovered a torn white T-shirt worn by the suspect.
37. It was his testimony that they found that the suspect was a son of the late Salome, the younger sister of the deceased and that he lived with his uncles after his mother died. He testified that the suspect was escorted to Bondo Police Station and the body was removed to Bondo Sub County Mortuary and postmortem done on January 13, 2021.
38. PW6 testified that his investigations revealed that the suspect lived with his other uncle who lived at a distance of 1km from the deceased's home whereas the deceased lived in their original home. He testified that the crutches and walking stick were besides the body of the deceased. He produced the broken crutches as PEX2, the walking stick as PEX3 and the white T-shirt as PEX4.
39. PW6 further testified that he recovered the torn T-shirt from near the crutches and the walking stick. It was his testimony that the accused wore a different T-shirt when they arrested him. He stated that they escorted the injured suspect to hospital for treatment. He produced the treatment notes and patient's attendance card for Owuor Kevin Abith as PEX 5(a) & (b). He further testified that they took the



suspect to court and filed a Miscellaneous Application No E02/2021 at Bondo Law Courts on January 8, 2021 and were granted 14 days to complete investigations. He testified that they recorded witness statements.

40. PW6 testified that on January 26, 2021, he escorted the suspect to Jaramogi Oginga Odinga Teaching and Referral Hospital for mental assessment where he was examined and found fit to plead. He testified that on January 13, 2021, the doctor carried out an autopsy on the body of the deceased in the presence of Ruth Aoko Owuor and Rodgers Omondi Owuor. PW6 identified the accused in court and stated that he did not know him before the incident.
41. In cross-examination, PW6 stated that he established that the accused was a nephew to the deceased and that the accused lived with his other uncle 1 km from the deceased's home. It was his testimony that he found the body of the deceased lying outside his mother's house, the grandmother of the accused. He testified that people were many so he focused on the body and the suspect. PW6 testified that it was alleged that the fight was due to the accused breaking into the grandmother's house, which house PW6 found wide open. It was his testimony that no report of burglary was filed with the police.
42. PW6 testified that in Exhibit 5(a), it was indicated that the accused claimed to have been assaulted using the crutches. He testified that the accused had cuts on his face and a cut upper lip was covered in dry blood. He further testified that from the witness statements, the deceased only went to prevent the accused from breaking the grandmother's house, then a confrontation ensued.

Defence Case

43. Placed on his defence, the accused Kevin Owuor Abith gave his testimony on oath and stated that he knew the charge against him but denied murdering the deceased. He testified that he knew the deceased who was his uncle, a brother to his mother. He testified that on January 6, 2021 at about 10 pm, he was living with his uncle George Owuor who had given him his son's house to sleep in because the son was away in Kericho but his son then returned and as a result, the accused could not sleep in that house. It was his testimony that he asked to be allowed to go and live in his late grandmother's house so he went and cleared the compound then proceeded to Bondo and bought household items and kept them in his grandmother's house. He testified that he had spoken to the deceased and told him that George had agreed for him to go and stay in his late grandmother's house and the deceased did not object.
44. DW1 testified that after he brought his household items and kept them in his grandmother's house, he went to play football then returned at 8.00 pm when and proceeded to the deceased's house and they conversed for some time before he went to sleep at his grandmother's house. It was his testimony that before he settled in the house, he heard the deceased's voice saying that the accused could not stay there because that was not his home so the accused got out then the deceased hit the accused on the head with a rungu and the accused fell down. It was his testimony that the deceased's son also hit him and they continued assaulting him. He testified that he screamed and Peter, a neighbor responded and assisted him by removing the deceased and his son from him.
45. It was his testimony that before Peter arrived, the deceased had sent his son Felix to go and bring a panga but the son returned with a metal and used it to hit the accused so he fell down. He testified that it was that time that he heard Peter asking him what was the issue and he responded by telling him that his uncle had invaded him so Peter advised him to go back and sleep at the home of George Owuor as it was dangerous for him to sleep at his grandmother's house.
46. The accused testified that he decided to go and report to his other uncle William Owuor Abith and that when he knocked on his door, the wife of William opened the door and got out after which he



- explained to her what had happened and she told him that although he was injured, he could not go to hospital because of the curfew so she advised him to go to the home of George Owuor his other uncle.
47. It was his testimony that when he reached the home of George Owuor, he went to the house of his cousin Collins where he slept until morning and that when he went to his grandmother's house to check on his items, he found the deceased lying outside and on checking on him, he was shocked to find the deceased's body cold so he went and called Felix Owuor the deceased's son who only responded but did not open the door. He testified that he went back to Pamela's house and informed her of what he had found as he suspected his uncle to be dead.
48. The accused testified that he then left for the home of George Owuor but passed the latter and Felix on the way proceeded to George's home as he was scared and sat there. He testified that after about 20 minutes, the Assistant Chief found him there and arrested him and that he explained to him of what had happened. He testified that police officers arrived, rearrested him and escorted him to the scene where the deceased was lying. The accused testified that the DCI from Bondo escorted him to Bondo Police Station.
49. It was his testimony that Willis and Felix assaulted and injured him and that he was injured when he was brought to court and that he complained to the Magistrate that he was sick so an order was issued and he was taken to Bondo Hospital and treated. He testified that he had visible injuries. The accused testified that he never went to attack his uncle but that it was his uncle who attacked him. He stated that he never quarreled with his uncle and that neither had he ever had any disagreement with him. He testified that his grandmother's house had no items to be stolen and that he was the one who took items there that very day.
50. In cross-examination, the accused conceded that the deceased died. He further stated that he used to live at the home of George Owuor until January 6, 2021 when he moved into his grandmother's house. He admitted that Felix and his other siblings were present. He denied that Peter found him beating the deceased. He stated that the last time he saw the deceased alive was when the deceased attacked him. He stated that the deceased was had no issue ok when the accused went to his house that evening and spoke to him before proceeding to his grandmother's house.
51. In re-examination, the accused stated that his attack took place at his grandmother's house and that it was the deceased who attacked him. He stated that he left the deceased at his house after talking to him.

Analysis and Determination

52. 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 on the part of the accused person - "actus reus"; and
 - c. That the said unlawful act of omission or commission was committed with malice aforethought - "mens rea."
53. The fact of death of the deceased was proved beyond reasonable doubt by the evidence of all prosecution witnesses who testified that they found the deceased lying dead outside his mother's house. The accused person in his defence also conceded that the deceased who was his uncle died. The cause of that death was confirmed though the evidence of PW1 Dr Juma Wanjofu Daniel who carried out a postmortem on the deceased's body and concluded that the cause of death was head injury with massive



sub-dural bleeding secondary to blunt trauma to the head as evidenced by PEX1, the postmortem report.

54. As to whether the deceased's death was caused by an unlawful act or omission and as to who committed the unlawful act or omission, as stated in the post mortem report, herein above the death of deceased was as a result of head injury with massive sub-dural bleeding secondary to blunt trauma to the head. In *Gusambizi Wesanga v Republic* [1948] 15 EACA 65, it was that:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

55. The evidence adduced by the prosecution witnesses as a whole point to an unlawful act that led to the death of the deceased as the fatal injuries sustained by the deceased on the head could not have been self-inflicted. I am satisfied that the prosecution has proved beyond reasonable doubt that the deceased died as a result of an unlawful act.
56. As to whether it was the accused person herein who committed the unlawful act that led to the deceased's death, the testimony of PW2 was that there was a confrontation between the deceased, his father, and the accused over the furniture that the deceased found the accused removing from his grandmother's house, furniture which the deceased had stored in his mother's house.
57. PW2 testified that during that confrontation, the accused took one of the deceased's metallic crutch and hit the deceased on the legs severally and further that the accused also strangled the deceased, hit him on his abdomen and stepped on his chest. He further testified that him and his siblings screamed then Peter (PW3) heard the screams and went to the scene and separated Opudo from the deceased and told Opudo to leave but Opudo pretended to be leaving then he returned after Peter had left and stood on the deceased's head as he continued beating him.
58. PW2's testimony was corroborated by the testimony of PW3, Peter Otieno Obiero who testified that he was in his house when he heard screams from the home of the deceased so he went to the scene where screams were coming from and found Opudo, the accused pushing/pressing Owuor onto the ground. PW3 testified that from a far, he heard the deceased making noises saying Opudo wanted to steal property and on arrival at the scene, he removed Opudo who was lying on top of Owuor, from Owuor. He testified that Opudo was hitting Owuor from the ground and that the two were fighting.
59. PW3 further testified that he held Opudo and removed him from Owuor and led Opudo into his grandmother's house. It was his testimony that the deceased's children were at the scene standing and watching as their father was being assaulted.
60. PW2's testimony that the accused stood on the deceased's leg and hit him severally further corroborated PW1's finding on the injuries sustained by the deceased as well as the cause of the deceased's death as contained in PEX1, the postmortem report.
61. The accused had no duty to challenge the evidence adduced by the prosecution witnesses although he had the right to adduce and challenge that evidence. He chose to adduce and challenge that evidence to the effect that the deceased and his son attacked him and that when PW3 arrived at the scene, PW3 advised him to go back and sleep at the home of George Owuor as it was dangerous for him to sleep at his grandmother's house but the accused instead went to report to his other uncle William Owuor Abith whose wife also advised him to go to the home of George Owuor where he went and slept until morning. The accused also testified that the only things in his grandmother's house were things that he had bought earlier in the day.



62. However, PW5 Collins, who lived with the accused testified that although the accused was to go and start living in their grandmother's house, the accused went to clear and clean the homestead but had not moved into that house as at January 6, 2021.
63. In my humble view, the prosecution witnesses gave evidence that was corroborative. On the other hand, I find that the evidence by the accused consisted of denials and half-truths. I have considered the accused's defence and compared it against the totality of the evidence adduced by the prosecution. I am persuaded beyond reasonable doubt that the accused took part in the deceased's unlawful killing. I find the defence proffered by the accused not believable. There was clear evidence that the deceased was disabled and that he was using a stick and a crutch to aid him in walking. This court also saw PW2 the deceased's son who was equally seriously disabled and believes his testimony that because of that disability, he could not help his father from being assaulted by the accused. PW3 also testified that he found the children of the deceased standing by and watching as their father was being assaulted by the accused. to be made up.
64. I am therefore persuaded beyond reasonable doubt that the evidence adduced point towards the accused as the one who caused the unlawful death of the deceased.
65. Finally, as to whether the accused had malice aforethought when he unlawfully killed the deceased, the Court of Appeal in the case of *Peter Kiambi Muriuki v Republic* [2013] eKLR reiterated its previous holding regarding malice aforethought in the case of *Nzuki v Republic* [1993] KLR 171, where it stated that:
- “Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:
- The intention to cause death;
- The intention to cause grievous bodily harm;
- Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.(see *Hyman v Director of Public Prosecutions*, {1975} AC 55.”[emphasis added]
66. *In Rex v Tubere S/O Ochen 1945 12EACA 63*, the predecessor to the Court of Appeal laid down the guidelines for trial Judges in considering malice aforethought. The court held that:
- “To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident.”
67. In the cases of *Ernest Asami Bwire Abang Alias Onyango v republic Ndumbe* CACKA No. 32 of 1990, *Karani and three others v Republic* 1991 KLR 622, *Republic v Godfrey Ngotho Mutiso* 2008 eKLR and *James Masomo Mbacha v republic* 2015 eKLR, the courts have inferred malice aforethought from the nature and type of weapon used and multiple, severe bodily injuries to the victim.



68. In this case, PW2 testified that the accused hit the deceased severally on the legs and further that the accused also strangled the deceased, hit him on his abdomen and stepped on his chest and even after PW3 separated the accused from the deceased and told him to go home, the accused Opudo pretended to be leaving only to return and stand on the deceased's head as he continued beating him. It is worth noting that the evidence by the prosecution witness which was not controverted was that the deceased was disabled and used a stick and crutches as walking aids. He was also aged 59 years old unlike the accused who is a young strong man.
69. PW2 too was disabled as observed by this court. Although the accused too sustained some injuries as a result of the struggle that he had with the deceased who was his maternal uncle, I find that the accused person's vicious attack on the deceased was intended to cause him grievous harm which was confirmed by PW1 who carried out the deceased's postmortem and noted that the nature of injuries sustained by the deceased comprised blood stains on the face, incomplete ligature mark horizontal around the upper portion of the neck supporting PW2's testimony that he saw the accused strangle the deceased, left temporal parietal subdural blood collection 10 x 8 cm with compression of the brain matter in the nervous system leading him to conclude that the cause of death was due to massive subdural bleeding secondary to suspected blunt trauma to the head. The accused aimed at the head of his uncle and inflicted on it very severe injuries that led to his demise. He then left the uncle still alive without bothering to seek for help to save his life since the uncle was disabled and having been beaten on the legs and head, he could not walk.
70. Taking all the above evidence and circumstances into account, there is a clear manifestation of malice aforethought on the part of the accused person. The accused intended to cause grievous harm on the deceased and that is why even after being separated from the deceased by PW3, he returned and continued his attack on the deceased. I therefore find that the prosecution has proved malice aforethought beyond reasonable doubt on the part of the accused person.
71. In the end, I find that the prosecution has established all the elements of the offence of murder under section 203 of the Penal Code against the accused person. I find and hold that the accused person Kevin Owuor Owuor alias Opudo is Guilty of the murder of Willys Owuor Owuor as charged. I convict him accordingly. Sentence shall be pronounced after records and mitigation.
72. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 29TH DAY OF JUNE, 2022

R.E ABURILI

JUDGE

