



State v Otieno (Criminal Case 10 of 2020) [2022] KEHC 12323 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE 10 OF 2020**

RE ABURILI, J

JUNE 29, 2022

BETWEEN

STATE PROSECUTION

AND

HENRY OCHIENG OTIENO ACCUSED

JUDGMENT

1. The accused person Henry Ochieng Otieno 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 night of May 28, 2020 at Magoya village in Magoya sub location Ugunja sub county within Siaya County, the accused murdered one Clinton Mukonzo M. The accused person pleaded not guilty to the charges against him and the matter proceeded to full trial. The prosecution called seven (7) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

2. PW1 Dr Leon Adai stationed at Bondo Sub County Hospital testified on behalf of Dr Tonny Kinja who conducted a postmortem on the body of Clinton Mukonzo on June 3, 2020 at 11.55 am at Ambira Sub-County Hospital but was unavailable and could thus not attend court. PW1 testified that he worked with Dr Kinja for 3 months and was familiar with his handwriting. On application by the prosecution and no objection from the defence, Dr Leon was allowed to give evidence on behalf of Dr Tonny and produced the postmortem report.
3. It was the testimony of Dr Leon that the deceased's body was identified by Hansan Maloba Mukonzo and Francis Chimei Ngalibo on May 28, 2020 at around 8 pm. He testified that the body was of a naked, male, African, black, of apparent age 1 year, 1 month, good nutrition, height 83 cm, with fair physique. He testified that the postmortem changes evidenced were that rigor mortis had taken place and that the deceased died at 8pm pm on May 28, 2020.



4. PW1 further testified that externally, the head was swollen on the anterior-front and that there was a scar mark on the anterior left side of the head. He testified that the face had scar marks on the anterior left side. Internally he noted as follows: The respiratory system - normal. Cardiovascular system – normal. Digestive system – normal. Genito urinary system – normal.
5. PW1 further testified that on the head there was scalp fracture from left anterior aspect of the head to the right posterior aspect of the head and that there was haematoma on the scalp. He testified that on opening of the scalp, there was subdural - bleeding on the on the surface of the brain. He testified that the nervous system and spinal cord were all normal.
6. It was his testimony that as a result of examination, the cause of death was found to be traumatic brain injury due to blunt object trauma and Dr Kinja signed the postmortem after issuing a Death Certificate No 0763729. PW1 produced the postmortem report as PEx1.
7. In cross-examination PW1 stated that the traumatic brain injury was due to blunt object being applied but it could also be caused by a fall.
8. No 257075 PC James Odhiambo Osudi attached to Mboisia Police Patrol Base in Sigomere testified as PW2 and stated that on May 28, 2020 at noon, he was with his colleague PC Philip Too patrolling when they received a call from Benard Otieno, the Assistant Chief that a suspect in a murder case Henry Ochieng Otieno was attacked by the Public. PW2 testified that they rushed to the scene and arrested the suspect in Magoya, Ilego village then called the DCIO from Sigomere Police Station who went to the scene and they were handed the suspect Henry Ochieng Otieno whom they rearrested for further action after he had been rescued from the irate members of the public.
9. In cross-examination, PW2 stated that when he went to the scene, he found members of the public and upon inquiry from them, they informed him that Henry Ochieng was a murder suspect.
10. Emily Akinyi Owino, the accused' person's cousin testified as PW3 and stated that on May 28, 2020 at about 6pm, she had returned from visiting her grandmother and as it was raining, she took shelter at the accused's wife, Cynthia, house where she found Henry at the door step and asked him to step aside so that she could shelter. She further testified that she asked Henry where Cynthia was and he told her that Cynthia had gone to visit her friend and that he did not find her at home when she returned from work.
11. It was her testimony that they entered Henry's house and while in his house as it was raining, they conversed. She testified that Henry's brother, Malon, returned from work and Henry got out and stood at the door and told Malon to see how they could plough that land since Cynthia had left. PW3 testified that she then asked Henry why Cynthia had left and he told her that someone had told him that Cynthia had boarded a boda boda and left. She testified that they stayed on and as it was getting dark, she asked Henry to light a lamp but he told her that he did not know where Cynthia had kept the lamp and the matchbox after which Malon said that he could bring the matchbox to light the lamp.
12. PW3 testified that she got scared as she was a woman among men so she used her phone to light the torch and as she bent, she heard something hitting the floor and upon lighting her torch under the bed, she saw Cynthia's leg. She testified that she told Malon that she had seen Cynthia's leg and Malon also bent and saw Cynthia's head which was bleeding after which they started asking Henry why he had told them that Cynthia had gone yet she was under the bed. It was her testimony that Henry told them that Cynthia had slipped and fallen and she got injured but they questioned him why he had hidden her under the bed. PW3 testified that she then asked Henry where the baby was as she could not see the baby around and Henry responded by saying that baby Clinton was asleep. She testified that she checked on the bed but never saw the baby.



13. It was her testimony that Malon then interrogated the accused who told them that he had fought with Cynthia who had hit her head on the table and got injured. She further testified that they then realized on checking that the child Clinton, was on Cynthia's back and was dead. She testified that she then decided to leave and Malon also left and that as they got out, the accused called them back saying he was ready to tell them what had transpired but they got scared of getting back into the house so they went to Nancy's house and Malon called out Nancy Akinyi and her husband Daniel Ouma who followed them to Henry's house. She testified that they found Henry still standing at the door step and that he then went away and Daniel went and looked for Mark, the Assistant Chief who called the Police who went to the scene.
14. PW3 testified that Henry's house is one roomed. She clarified that they never touched Cynthia because of the state in which she was. She further testified that she knew that the child was motionless because Malon lifted the curtain and saw the child who was very silent and when they checked the child's neck, it was twisted backwards. It was her testimony that when Mark the Assistant Chief arrived, the child was removed from Cynthia's back and they confirmed that he was indeed dead. She testified that when the Assistant Chief arrived, he confirmed that Cynthia was injured and lying under the bed and her child was dead. It was her testimony that the child was removed from Cynthia's back and covered in a white sheet. PW3 testified that police arrived and took Cynthia who was badly injured to the hospital and the child was taken to the Mortuary. She stated that she went with the Police and recorded her statement. She identified Henry as the accused person in the dock.
15. In cross-examination, PW3 stated that she lived at Uriya Magoya with her grandmother. She testified that she was going to visit Cynthia that evening and that it was raining and that she did not tell the police that she was merely taking shelter. She further stated that Cynthia was also a friend to her friend. She testified that she found Henry standing at his doorstep and that he never wanted her to enter the house but she told him that she wanted to enter the house because it was raining. PW3 testified that she used to visit Henry's house regularly and he even used to go to her grandmother's house. She admitted that she kind of forcefully entered his house because he did not want her to enter the house. She further stated that she never checked to see if Henry was armed with any weapon.
16. PW3 testified that when she asked Henry about Cynthia's whereabouts, he told her that she had left. She further stated that when Malon arrived, she told him that she wanted to know why Cynthia had left because Henry told Malon that they should plough the land since Cynthia had left for her home. She further testified that Malon used to tell her grandmother that Henry used to quarrel with his wife daily. It was her testimony that when she found Henry, he appeared troubled and she thought he was stressed because Cynthia had left. She testified that he was not drunk and that Henry never used to drink alcohol.
17. PW3 further testified that after they had seen Cynthia and the child under the bed is when Henry told them that he had a quarrel with Cynthia and she had hit her head on the table. She admitted that she never saw Henry fight with Cynthia. It was her testimony that Malon was present with her when she discovered Cynthia under the bed. She further testified that after Ouma and Nancy had come to Henry's house, Henry told them that he had no matchbox and he took off. It was her testimony that when she and Malon were leaving to go to Nancy's place, they left Henry at his doorstep and they found him still at his doorstep upon their return. She reiterated that she never saw any sign of fighting in the house.
18. PW4 Daniel Ouma Omondi testified that on May 28, 2020 at about 6pm, he was at his house when Emily and Malon went and that they informed him that they had seen something bad which they could not be silent about specifically that Henry had killed Cynthia and the child and hidden them under



- the bed so he should call the Chief. He testified that Daniel told them that he could not call the Chief before seeing what had happened. It was his testimony that he was with his wife Nancy. He stated that Emily was his maternal cousin while Malon was his cousin and that they were neighbours.
19. PW4 testified that him and his wife Nancy accompanied Emily and Malon to Henry's house where they found Henry standing at the doorstep. He testified that he asked Henry why the house was dark then and that Henry told him that he was going to look for a lamp at his mother's place. PW4 testified that Henry left as PW4 entered the house of Henry house with a torch and lit and found Cynthia lying under the bed with her child on her back. He testified that he checked and saw the child dead. He further testified that he tried calling the Assistant Chief but due to poor network, he could not reach him so he proceeded to the home of the Assistant Chief, found him and explained to him what had happened to Cynthia and her child upon which the Assistant Chief accompanied him to Henry's house and on seeing what had happened, he called the police who arrived and assisted them to carry Cynthia and her dead child to Ambira Hospital and took the child to the mortuary.
 20. PW4 testified that the police arrived in two vehicles and that he got into the vehicle carrying Cynthia. He testified that from his home to Henry's was about 50 meters away. He testified that he knew Henry very well and that Henry and Cynthia were just married so he could not tell how they lived on a daily basis but that he did not witness any quarrels between them. It was his testimony that the following morning they were to go to Ambira to visit Cynthia. He stated that they saw Henry at the latter's house the uncle told Henry to stay indoors to avoid being beaten by a mob. He testified that the uncle then called the Assistant Chief who called the police who went and arrested Henry. It was his testimony that he and Henry's uncle went to Ugunja where they recorded their statements. PW4 identified Henry as the accused in the dock.
 21. In cross-examination, PW4 stated that he went to Henry's house and found him outside the house and spoke to him. He testified that he asked Henry as to why his house was in darkness and Henry responded that the lamp was at his mother's place then he left and never returned. PW4 testified that Emily and Malon told him that Henry had killed his wife and child and that they asked PW4 to call the Chief but he told them that he wanted to confirm the situation first. He further testified that he did not find Henry with any weapon and further that Cynthia was not talking. It was his testimony that by the time the Assistant Chief arrived, Henry had left. It was his testimony that as a neighbor, he never found Henry fighting with his wife.
 22. PW5 Nancy Akinyi Ouma testified that PW4 was her husband. She stated that on May 28 2020 at about 6.30pm, Emily Akinyi went to her house in the company of Malon and that Emily was trembling and weeping. It was her testimony that Emily told her to call the Assistant Chief and when she inquired why, she insisted on her calling him but she informed Emily that she did not have airtime. It was her testimony that her husband also told Emily that he did not have airtime. PW5 testified that when she inquired further, Emily told her that she had seen Cynthia and her child under the bed and they could be dead or alive.
 23. It was her testimony that they all left for Henry's house, carrying her solar lamp. She further testified that they found Henry at the door and asked him why the house was dark before they entered his house, lit under the bed and saw Cynthia lying and on checking on the child who was tied on her back, they found him already dead. She testified that her husband went and called the Assistant Chief who went to the scene and called the police. She further testified that the Assistant Chief took photographs of the scene. PW5 testified that Cynthia was not talking and that the police arrived and removed both Cynthia and her dead child to Ambira Hospital where Cynthia was treated as the child was taken to the mortuary. She testified that Cynthia remained at the hospital and that she never saw injuries on the child but that Cynthia had injuries on her head.



24. PW5 further testified that Henry was her neighbor. She stated that he once told her that Cynthia wanted to go away but that Henry did not want her to leave further, that a man used to call and chat with Cynthia at night and that despite him asking her to desist from chatting, she did not heed. It was her testimony that while at the home of Henry, she saw a jembe at the bed side which had blood on it which jembe she identified in court as MF 11. She stated that she was not able to see the state of Henry's clothing as it was getting dark. PW5 identified Henry as the accused in the dock.
25. In cross-examination, PW5 stated that she found Henry at his door. She stated that her husband spoke to him. It was her testimony that she saw the jembe, MF 11 in the house and that it had blood stains. She testified that she knew Henry and Cynthia had a quarrel over a phone about 3 days earlier which quarrel was brought to her attention by Henry but that she never witnessed it. It was her testimony that when she got into Cynthia's house, the latter could not talk. She further stated that Henry appeared restless from his appearance and that he never told them what had transpired.
26. PW6 Mark Benard Otieno who was the Assistant Chief for Magoya sub location testified that on May 28 2020 at about 7pm, he received a telephone call from Daniel Ouma but could not get him well so Daniel went to the house of PW6 and informed the latter that he had gone to the house of Henry Ochieng and found Henry's wife and her child dead. He testified that he went with Daniel whilst carrying a torch and found Nancy Akinyi, Daniel's wife and Malon, the brother to Henry and Emily Akinyi.
27. It was his testimony that he used his torch to light under the wooden bed where he saw a lady lying and on her backside was a baby boy. He stated that he pulled off the child and found him dead but that the lady was breathing. PW6 testified that he saw blood stains on the head of the lady so he called the area Chief Charles Ochieng Otieno and informed him of what he had seen after which the Chief informed the police and at 8pm, the police from Ugunja and the Chief arrived and removed Cynthia to Ambira then to Siaya Referral Hospital while the dead boy was taken to Ambira Mortuary.
28. PW6 testified that he returned to his house and the following day on May 29, 2020 at noon, Nicholas Oloo, Henry's Paternal uncle, called him and informed him that Henry Ochieng was being chased and had taken refuge at his uncle's home. It was his testimony that he immediately notified the DCI Ugunja who alerted Mbosie Police Post who went and accompanied the witness to the home of Nicholas Oloo. It was his further testimony that on arrival, they found Henry Ochieng inside the house of Nicholas Oloo who was later arrested by the DCI officers from Ugunja.
29. PW6 testified that while he was still in Nicholas' house, they heard from small children that a grave had been dug near a thicket, behind the home of Henry Ochieng and so they proceeded to the stated site where they found a hole, 1ft deep. He testified that the hole was less than 50 meters away from Henry Ochieng's house. He further testified that the children told them that they heard someone digging when they were near the thicket on May 28, 2020 during the day and that when the said children moved closer, they saw Henry digging the hole but when he saw them, he stopped and left.
30. It was his testimony that on May 29, 2020 when the DCIO arrested Henry Ochieng, they went to Henry's house and recovered a Jembe which had blood stains, PMF 11, which they took custody of. He testified that they also went to Henry's mother's house and recovered a knife. He testified that as the Assistant Chief of the area, he knew the accused and his wife and that the two had been married for about two months and that none of them had reported to him of any dispute or quarrel. He stated that he knew Henry who was his relative in the family. He identified Henry as the accused in the dock.
31. In cross-examination, PW6 stated that on the 28/5/2020, he did not find Henry in his house and further that he did not search the house or recover any weapon. He stated that it was the DCI Ugunja



- who recovered a knife from Henry Ochieng Mother's house which knife had no blood stains and that Henry then claimed that his wife wanted to knife him. It was his testimony that he learnt that during the day of May 28, 2020, Henry Ochieng had been found digging a hole by some children in the thicket, 50 meters from his house. He testified that he saw the hole which was about 1ft and 4 meters' length. PW6 further testified that those who found Henry digging the hole were children and that he did not know if they recorded statements. He stated that he learnt of this the following day as he went in the company of police officers and saw the hole.
32. It was his testimony that the Jembe (PMF 11) was recovered from Henry Ochieng's house and that it had blood stains. He stated that the DCI took the Jembe to the Police Station. He reiterated that he never saw any injury on Henry. He further stated that during the arrest, they found Henry in the house of his paternal uncle, Nicholas Oloo, near Henry's house as both houses were adjacent to each other.
 33. PW7 No 57107 CPL Richard Ong'era the investigating officer in this matter testified that on May 28, 2020 at around 8.00pm, he was within the Ugunja Police Station lines in his house when the former DCIO CIP Nyambiti called him and informed him that he had received information of a murder from the Assistant Chief of Uriya Magoya Sub location. It was his testimony that he teamed up with the OCS Ugunja and proceeded to the scene where they found many people gathered outside the house and upon entering the house, they were shown by the Assistant Chief and some relatives where the bodies were under the bed. He stated that the accused was absent from the scene and that they removed the two bodies from under the bed and realized that the wife was still alive but her son was dead.
 34. PW7 further testified that the OCS rushed the injured lady to Ambira Hospital while PW7 and others removed the body of the child to Ambira Mortuary. He stated that since the suspect was at large, the following day on May 29, 2020, the accused was sighted at his uncle's homestead near his home about 300 meters from his home. He stated that he rushed to the scene with police officers and found the accused already arrested by the Assistant Chief and officers from Mbosie Police Post so they took the accused and interrogated him as they escorted him to the station. It was his testimony that the accused took them to the place where he had already dug a grave and where he planned to bury the wife and the son.
 35. It was his testimony that they found a 7.8ft wide and 4ft deep grave freshly dug. He further testified that Henry also led them to his late mother's house where he showed them the jembe that he used to dig the grave, which Jembe had fresh muddy sandy soil. He produced the jembe as PEX 2. PW7 then recorded statements of witnesses and escorted the accused to Kakamega County Referral Hospital for Mental Assessment. PW7 stated that when they first went to the house of the accused on May 28, 2020, they recovered a small jembe that had blood on it. He produced the small jembe as PEX 3.
 36. PW7 testified that the mother of the deceased child, Cynthia Makupa Angolo did not die but was seriously injured so she was referred to Siaya Hospital. He testified that she could not talk and that she lived in Shianda in Mumias East with her parents. It was his testimony that he visited her but never found her although he met her parents who informed him that she was away and that she was partially paralyzed and could not talk. He testified that he visited her home on March 18, 2022. He further stated that she had been receiving treatment but she had not fully recovered.
 37. PW7 further testified that on June 3, 2020, he attended the postmortem of the deceased in the company of Hassan Maloba. He identified the accused as the person they arrested was the accused in the dock though he did not know him before that day of arrest. He stated that he was unable to record the statement of Cynthia because she was totally unable to talk and walk but her parents told him that she could now talk and walk but cannot recall.



38. In cross-examination PW7 reiterated that he visited the scene on May 28, 2020 at around 2030 hours after being called by the DCIO. He stated that he found the Assistant Chief who informed them that the accused was at the scene before they arrived. He stated that they inspected the house but did not take photographs of the scene. It was his testimony that the small jembe was recovered from the house of the accused on May 28, 2020. He stated that he found household items scattered and the 2 bodies placed underneath the wooden bed. PW7 described the crime scene as a single mud house room with one wooden chair, a wooden table and the bed. He stated that he found blood under the bed and that the jembe was also lying beside in the room. He stated that the blood was on the sharp end of the jembe. It was his testimony that both the deceased and his mother had cuts on the head. He further stated that the blood was flowing from under the bed towards the wooden chair.
39. PW7 stated that he attended the postmortem of the deceased where the cause of death was shown as traumatic brain injury due to blunt object. He stated that the following day on May 9, 2020, he went to the scene in the morning and after arresting the accused, the accused showed them the freshly dug grave. He stated that there was rain so the place was muddy and that the big jembe was also muddy. PW7 stated that it was raining even when they went to the scene and that from information received, someone had gone to shelter at the accused person's house that evening. He further stated that from information gathered, the accused left his house after sensing danger as people gathered at his house. He stated that the grave must have been dug before the killing of the deceased.
40. PW7 stated that there was a maize plantation nearby which was freshly weeded. He admitted that they did not get the scenes of crime personnel to take photographs of the grave and of the scene at the house. He stated that at that time, none of them had a smart phone to take photographs of the scene of crime. He stated that the wooden chair was not broken and had no blood stains but that blood was under the chair. He further stated that the grave was at a neighbor's maize plantation, which neighbor was in Nairobi and that the said neighbor informed PW7 that he had hired some people to weed his maize. He further stated that he did not see blood on the handle of the jembe. PW7 stated that he found the accused arrested and was found at his Uncle's home. He stated that the Assistant Chief and some Police Officers from Mbosie Police Post were present.
41. In re-examination, PW7 stated that the maize was about to flower and that the weeding had taken place about 2 days earlier and further that it was during the rainy period.

The Defence Case

42. Placed on his defence, the accused Henry Ochieng Otieno gave unsworn testimony and stated that on May 27, 2020 at about midnight, he was in the company of his wife and child when his wife's phone rang so she got out and he followed slowly only to realize that she was talking to her boyfriend. He testified that he heard the person asking her "vipi"? "where can we meet to make love" so he got agitated and went to sleep angry. It was his testimony that in the morning his wife made breakfast which he ate before proceeding to work and that in the evening, he passed by a drinking den and took chang'aa with his friends and also carried some home where he arrived at about 5.30 pm and found his wife washing utensils while carrying the baby on her back.
43. The accused testified that he entered the house and rested a bit to avoid thinking of what had happened the previous night but he could not avoid it so he confronted his wife about it and his wife got annoyed and slapped him till he started nose bleeding. He testified that he confronted his wife on what had happened the previous night and she pulled out her phone from a lesso and showed him the photograph of the man she had been talking to the previous night so he got mad at her and wanted to slap her but she slipped and fell on a chair which had hooks thus injuring the child and killing him.



The accused testified that the blood from the child spilt over to the jembe. He reiterated that his wife slipped and hit herself on the chair.

44. The accused testified that he regretted the deceased's death and sought help from the court as he was a first time offender. He stated that he had no peace whenever he thought of the death of his child. He stated that he sought forgiveness from his wife and that it was the devil who entered his family and made him do all this and regretted what had transpired. He further reiterated that he did not assault his child but that it was the child's mother who got shocked and slipped and fell on the chair.
45. The accused denied running away from his homestead after the incident and stated that when the police and the chief went to his house, they never took any photographs but that they checked the scene, found a jembe which was behind the seat that his wife had fallen on. He stated that there were two jembes but only one was found with blood stains.

The Prosecution's Submissions

46. It was submitted that it was not in contention that the death of the deceased occurred and that the cause of death had been established and proved by the post-mortem to be traumatic brain injury due to blunt object trauma.
47. As to whether it was the deceased who caused the deceased's death, it was submitted that the fact that the deceased hid the bodies under the bed and lied to PW3 about the whereabouts of his wife and the deceased clearly showed that he knew that he had killed his wife and the deceased.
48. On malice aforethought, it was submitted that the fact that there were apparent injuries on the accused's wife as a result of the altercation demonstrated that the accused intended to commit a felony and as such, malice aforethought had been proved.
49. The prosecution thus submitted in conclusion that it had proved its case against the accused beyond reasonable doubt.
50. There was no submission by the defence counsel.

Analysis and Determination

51. I have considered the evidence adduced by the prosecution and the defence. The main issue for determination is whether the prosecution proved beyond reasonable doubt all the elements of murder against the accused person. These elements are: the fact of the death of the deceased; the cause of that death; that the death was occasioned by an unlawful act or omission; that it was the accused person and no other person who caused the unlawful death of the deceased and finally, that the accused had malice aforethought when he unlawfully killed the deceased.
52. The fact of the deceased's death is not in doubt as all prosecution witnesses testified to the deceased's death and even the accused testified on the same. The cause of death was determined by Dr. Tony Kinja who carried out the postmortem of the deceased's body and reached a conclusion that the cause of death was traumatic brain injury due to blunt trauma. This was contained in the postmortem report which PW1 produced as PEX1. Accordingly, the prosecution proved beyond reasonable doubt that indeed the deceased died and the cause thereof was established beyond reasonable doubt.
53. As to whether the deceased's death was caused by an unlawful act or omission, Article 26 (1) of the *Constitution* guarantees every person the right to life. The postmortem report prepared by Dr. Kinja and produced as PEX1 showed that the cause of death was traumatic brain injury due to blunt object trauma. The postmortem report also detailed the serious head injuries suffered by the deceased child



who was found tied on his mother's back. Those injuries could not have been self-inflicted. There is no lawful basis for the aforementioned cause of death. In the circumstances, it is my finding that indeed the deceased's death was unlawfully caused.

54. On the question of whether it was the accused who caused the deceased's unlawful death, in this case, none of the prosecution witnesses saw the accused unlawfully kill the deceased. The prosecution relied on circumstantial evidence.
55. The Court of Appeal in the case of *Pon v Republic* (2019) eKLR stated inter alia that when faced with circumstantial evidence, such evidence must satisfy three tests namely:
- i the circumstances from which an inference of guilty is 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”
56. Examining the evidence presented by the prosecution witnesses, PW3 testified that she sought shelter from rain in the accused's house and when she initially asked the accused where his wife and her friend, Cynthia, was, the accused told her that Cynthia had gone to visit a friend but when the accused's brother later returned, the accused told his brother Malon that Cynthia had left and upon inquiry by PW3 stated that she had boarded a boda boda and left.
57. PW3 testified that as it was getting dark, she asked the accused to light a lamp but the accused stated that he did not know where Cynthia had kept it so she switched on her phone torch and on bending, she saw Cynthia's leg under the bed. PW3 stated that she informed the accused's brother who also saw Cynthia's head and on inquiring from the accused, the accused initially stated that Cynthia had slipped and fallen. PW3 stated that the accused's brother interrogated him further and asked him why he had hidden his wife under the bed and that the accused told him that he had fought with his wife who fell and fell and hit herself and the child on the metallic chair.
58. PW4 and his wife PW5 corroborated PW3's testimony on the deceased's location as well as that of Cynthia. PW4 further stated that they found the accused outside his house and that when they asked him why the house was in darkness, the accused stated that the lamp was at his mother's house so he left but never returned.
59. PW6 was also called to the scene by PW4 and he corroborated PW3's testimony on the persons found under the bed and further stated that while at the scene, they received information from some children who were there who informed them that they saw the accused digging a grave near a thicket but the accused stopped digging when he realized the kids had seen him. PW6 saw the said graves. PW7, the investigating officer corroborated this testimony when he stated that when they arrested the accused, he took them to the grave which he had dug. PW7 produced a muddy jembe, PEX2, allegedly used to dig the grave and a smaller jembe, PEX3 that had blood on it.
60. Juxtaposed against this was the accused's defence that he confronted his wife over the phone call he had overheard and when he threatened to beat her, his wife slipped and fell knocking the child's head on the chair that had hooks, thus causing the blood to splatter on PEX3.



61. Although the small jembe PEX 3 was not been subjected to forensic examination, I have no doubt in my mind that the deceased was hit using a blunt object which fatally injured him. In addition, there is no gap in this case as to who could have inflicted the fatal injuries on the deceased child, as the accused was the only person who was in company of the child and its mother. In addition, the accused person in his own defence conceded that he attempted to beat the child's mother as a result of which she slipped and fell on a metallic chair.
62. However, the injuries which the child suffered, from the postmortem report, were not as a result of a fall. This is so because from the above evidence, it is clear that the accused was the last person seen with the deceased and that he knew what happened to the deceased. However, the accused's explanation for how the deceased met his death raises more questions than answers. First, it is not clear why the accused lied to PW3 about the location of his wife Cynthia. It is evident that the accused knew that he had hidden her under the bed and if at all the injuries to his wife were accidental, one would think that a reasonable man would make efforts to rush her to hospital. It is clear that the accused's wife was still alive and rushing her to hospital would have played some part in helping her and even saving the deceased's life. The accused in his defence pontificated of how he had plans for his child and how his demise was an accident but he still chose to hide the deceased and his mother under the bed without even the courtesy of unstrapping the deceased from his mother's back.
63. In addition, PW3 and PW4 all testified to the accused's reluctance to turn on the lights in the house. PW3 testified that the accused told her that he did not know where his wife kept the lamp while PW4 testified that the accused informed him that the lamp was at his mother's place and that he would go and get it only for him to disappear. Clearly, the accused was conscious of what he had done and must have known that he would have been exposed had the house been properly lit.
64. Secondly, PW6 testified of learning from some children who saw the accused dig a grave only for him to stop once he noticed the kids. PW6 saw the dug grave. PW7 corroborated this testimony when he stated that after arresting the accused, the accused took –the police to the dug grave. PW7 further testified, and this remained unchallenged even in cross-examination, that the grave appeared to have been dug prior to the death of the deceased. The question is, what was the purpose of the grave if not to dispose of the deceased's body and that of his mother?
65. Thirdly, the accused testified that his wife slipped and fell and subsequently, the deceased who was on her back got the fatal injuries. He denied inflicting any injuries on the two. However, this testimony was contradicted by the testimony of PW7, the investigating officer who testified that both the deceased and his mother had cut wounds on the head as well as the evidence contained in PEX1, the postmortem report prepared by Dr. Kinja, PW1 that show that the deceased had scar marks on the anterior left aspect of the head and also had scar marks on th anterior aspect of the face.
66. The evidence adduced by the prosecution witnesses as demonstrated above clearly form a tight link and point at the accused as the person who caused the unlawful death of the deceased. The accused's defence, in my view, sought to misdirect the court and make the court perceive the accused as a victim. I am not persuaded that the deceased met his death as a result of an accident as claimed by the accused, as the evidence presented before this court simply does not support an accidental death.
67. In the circumstances, I am persuaded that the prosecution has proved beyond reasonable doubt that it was the accused person who caused the unlawful death of the deceased.



68. On whether the accused had malice aforethought when he unlawfully killed the deceased, in the case of *Rex v Tubere S/O Ochen 1945 12EACA 63* the Court laid down the guidelines for trial Judges in determining whether malice aforethought is established and stated 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”.

69. 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 inferred malice aforethought from the nature and types of weapons used and the multiple severe bodily injuries to the victim.

70. In this case, the accused person’s motive is discernible from the postmortem report prepared by Dr Kinja, who concluded that the cause of death was traumatic brain injury due to blunt object trauma. Dr. Kinja pointed at the deceased having suffered injuries to the head which was swollen on the anterior-front and had a scar mark on the anterior left side of the head as well as the face that had scar marks on the anterior left side.

71. Considering the deceased’s infantile age, it is clear that those injuries were meant to cause the deceased grievous harm. Further, the fact that the accused managed to hide the deceased’s body, while still strapped to his mother’s back, under the bed and even the fact that the evidence adduced herein show that the accused had previously dug a grave, clearly point to a mind that was made up on the elimination of the deceased and its mother and upon being confronted by PW3 who sought to shelter from rain in the accused’s house, he deliberately hid from her the whereabouts of the deceased and his mother only for her to discover on her own curiosity.

72. Taking all the above circumstances into account, there is a clear manifestation of malice aforethought on the part of the accused person. I thus find that the prosecution has proved malice aforethought beyond reasonable doubt on the part of the accused person.

73. In the end, I find that the prosecution has established all the elements of murder against the accused person beyond reasonable doubt. I find the accused person herein Henry Ochieng Otieno is guilty of the offence of murder of the deceased Clinton Mukonzo Maloba and I hereby convict him for the murder of the deceased. Sentence shall be pronounced after records and mitigation.

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

R E. ABURILI

JUDGE

