



**Republic v Ogolo (Criminal Case 13 of 2019)
[2022] KEHC 3126 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 13 OF 2019**

**KW KIARIE, J
JUNE 23, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

WALTER OCHIENG' OGOLO ACCUSED

JUDGMENT

1. Walter Ochieng' Ogolo is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the 5th day of June, 2018, at Bassi village, Kasewe location, Rachuonyo East Sub County of Homa Bay County, murdered Wilson Ogoi Jalang'o.
3. It was contended that the deceased referred to the accused as son of Owino, a title he detested, and this led him to attack the deceased. Owino had entered into a leviratic union with the mother of the accused after the death of his father.
4. The accused in his defence contended that he did not know the cause of the death of the deceased.
5. The issues for determination are:
 - a. Whether the accused caused the death of the deceased or not; and
 - b. Whether the offence of murder was proved.
6. Robinson Hezron Jalang'o (PW1) the brother of the deceased was the only witness whose evidence linked the accused to the offence. A fact can be proved by the evidence of a single witness. The Court



of Appeal for *Eastern Africa in Abdalla Wendo v Republic* [1953] 20 E.A.C.A 166 held on this issue as follows:

Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or / direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

In the instant case I will attempt to find if the evidence of PW1 can be a basis for conviction.

7. Robinson Hezron Jalang'o (PW1) went to the scene after the fact. He was attracted by noises behind his house. This was at about 6.30 p.m. When he arrived at the scene, he found the deceased lying down and the accused on seeing him ran away. The evidence against the accused by this witness is circumstantial. In the case of *Mohamed & 3 Others vs. Republic* [2005]1 KLR 722 Osiemo Judge restated circumstantial evidence as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

8. The evidence of PW1 is believable because of the following reasons:
 - a. The accused was known to him since his (accused's) childhood and there was no claim that the obtaining conditions at the time of the recognition were not favourable;
 - b. The deceased told him that the accused attacked him after he had called him son of Owino; and
 - c. There is no evidence on record as to why this witness would implicate the accused falsely.
9. I therefore find that it was the accused who inflicted the fatal injuries to the deceased.
10. For a conviction to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In *Black's Law dictionary*, 10th Edition malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the *Penal Code* gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference



whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

11. The circumstances of this case, indicate that the deceased addressed the accused with a title he detested. The accused may therefore have felt provoked. I therefore, find that the prosecution has not proved the offence of murder against him. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit him of the charge of murder. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

