



State v Owuor (Criminal Case 14 of 2020) [2022] KEHC 12863 (KLR) (21 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE 14 OF 2020**

RE ABURILI, J

JUNE 21, 2022

BETWEEN

STATE PROSECUTION

AND

BENARD OMONDI OWUOR ACCUSED

JUDGMENT

1. The accused person herein Bernard Omondi Owuor 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 September 6, 2020 at around 0700hrs at Powo village, Gombe sub location in Gem sub county within Siaya County, the accused murdered one Peres Anyango Omondi.
2. The accused person pleaded not guilty to the charges against him and the matter proceeded to full trial. The prosecution called a total of four (4) witnesses in support of its case while the defence consisted only the accused.

The Prosecution's Case

3. Mary Adhiambo testified as PW1 and stated that the accused was her husband. She recalled that on the September 5, 2020 at around 7 pm, her husband arrived when she was cooking for the children and started a fight with her asking her for her phone which he had earlier on, on Saturday, asked her to surrender.
4. According to PW1, her children ate as the accused continued quarrelling her after which the accused went outside and called out his mother asking her if she had PW1's phone. She stated that the accused's mother told him to stop disturbing PW1 as she was cooking for the children. It was her testimony that the accused continued asking for the phone but she kept quiet so he went out and smoked from the veranda and when she asked him to eat dinner, the accused stated that he could go for a month without food and that she could not persuade him with food.



5. PW1 testified that the accused went out to speak to his mother as she placed her 2 children to sleep before going out to establish what was happening. She testified that she found him still quarrelling his mother so she came and took her children and went to sleep at a neighbour's house.
6. It was her testimony that the following morning at 6 am she left her neighbours house with her children and as she was going to the accused's sister's house, she met the accused who asked her where she was going with the children to which she answered. She stated that the accused entered a *chang'aa* den and when he got out of the den, he asked her to accompany him home which she did together with her 2 children. PW1 testified that it was approaching 7 am.
7. PW1 further testified that on reaching their house, she found the door locked with a padlock and that the accused opened the door and started quarrelling her and her small children. She testified that the accused picked her child and threw her on a mattress and then also took the deceased child who was older and a girl and threw her on the metallic chair saying he was not their mother to sweet talk them. She testified that the accused stated that he wanted to know where PW1 had slept with the children.
8. PW1 stated that the accused started beating her with fists on her abdomen as the children cried out and that the child who was thrown onto the metallic chair hit her head on the chair. It was her testimony that she closed the door and went to report to the Assistant Chief and as she was returning, she met her mother-in-law and a sister-in-law.
9. She further testified that the accused followed her to the home of the Assistant Chief and upon her return, Omondi, her other child, told her that "Aperi" was dead and that the accused had beaten Aperi and that Aperi's tongue was protruding out. She stated that she started crying and that her mother-in-law removed Peres, the deceased child, from PW1's house and took her to her (mother in law's) house and hid the body under the bed in the bedroom. She stated that she found the deceased dead with faeces coming out of her anus and blood oozing from her mouth.
10. PW1 testified that the Assistant Chief arrived and called the police from Akala who went and removed the deceased's body to Akala Police Station and later to the morgue at Bondo. She stated that the deceased was not the accused's child and that she had married the accused in April 2019. She identified Omondi as the accused in the dock.
11. In cross-examination by the defence counsel, PW1 stated that the accused beat her and the children. She stated that the accused threw the deceased on the chair and that the deceased hit her head on the chair. It was her testimony that the accused had locked the door as he hit them and that she only escaped after he opened the door. She maintained that when she returned from the home of the Assistant Chief, she found the child dead.
12. PW2 Dr Juma Wanyofu Daniel testified that he knew Dr Oloo Paul whom he worked with from April 2020 to December 2020 and that the said Dr Oloo had since been transferred. He stated that he was thus familiar with the signature of Dr Oloo and confirmed that the signature on the postmortem report dated on September 14, 2020 belonged to Dr Oloo Paul.
13. It was his testimony that the Postmortem on the body of Peres Anyango Odhiambo was done at Bondo sub-county mortuary on September 14, 2020 at 4.00 O'clock That on the general observations, the body was of a female, naked, black race, 4 years old, of normal nutrition, normal physique, height of 100 centimeters with postmortem changes supine in different stages of rigor mortis indicating that death had occurred more than 48 hours.
14. He further testified that externally, the body was well preserved with no sight of external injuries whereas internally, the respiratory system and cardiovascular system was normal. He stated that the



- digestive system had haemoperitoneum (blood in the abdomen) with grade 1 splenic lacerations (small tear on covering of spleen) and that fluid was noted within the splenorenal recess, pelvic cavity and paracolic (color) gutters (spaces on lateral sides of the body where large intestines are positioned).
15. The doctor further testified that the genito-urinary system was normal and that on the head there was extensive right sided sub-dural haematoma 4mm thick (collection of blood below the brain tissue covering). He stated that blood should be in the blood vessels not spaces. He further testified that the spinal cord and column were normal.
 16. It was his testimony that as a result of the examination, Dr Oloo Paul concluded that the cause of death was due to blunt trauma to the head and he issued a death certificate No xxxxx and signed and stamped the postmortem report dating it the September 14, 2020. PW2 produced the post mortem as PEx1.
 17. PW3 PC Muchenje Godfrey only took oath to explain the absence of witnesses in court saying that he as the investigating officer was unable to bond witnesses due to his ailment which necessitated his admission into hospital and that he had just been discharged from hospital and come to court to explain why witnesses had not been bonded.
 18. PW4 No 24973 police constable (PC) Nichodemus Munywoki stationed at Akala police station testified that he took over the file after the transfer of police constable Godfrey Muchenje. He testified that from the investigations file, on September 6, 2020, police constable Muchenje received information from the Officer Commanding Station (OCS) that there was a sudden death in Gombe location, as reported by the Area Chief that there was a physical confrontation between the accused and his wife leading to the death of a child who was a minor.
 19. PW4 testified that the Officer Commanding Station (OCS) sent officers to respond to the call, to the scene and on arrival, the officers were met by mourners who had led the officers to the house of the deceased's grandmother where they found a body of a child lying on a sofa set covered in a lleso with a foot mark on the lower abdomen and the officers were informed that the accused kicked the child in the stomach. He further testified that the scene was processed and the body of the deceased removed to Bondo mortuary.
 20. PW4 testified that from the investigations, the primary scene was the house of the deceased and not where the body was found. He testified that investigations revealed that the deceased's mother had married the accused in February 2020 with 5 other children and that the deceased was not a biological child to the accused.
 21. He further testified that investigations revealed that a quarrel had ensued the previous evening between the accused and his wife, PW1 leading the wife to leave and sleep outside the house and that on September 6, 2020 as the wife and children were migrating to another place, they met the accused who forced them back to his house, snatched the child from its mother as he assaulted her and as she struggled with the accused, the accused hit the child against the chair and kicked the deceased in the abdomen. It was his testimony that the accused was arrested by members of the public who handed him over to the police.
 22. PW4 testified that on September 14, 2020 a postmortem was done on the body of the deceased witnessed by PC Muchenje, Fredrick Odhiambo and Mathew Ochieng Omollo. He further stated that the accused was escorted for mental assessment on June 2, 2020 and he was found fit to plead. It was his testimony that he never knew the accused or ever met him before.
 23. PW4 testified that a number of witnesses who recorded statements such as Wycliffe Omondi had not been traced to come to court and testify because he had left with his mother, PW1 after she testified in this case, to an unknown place. He stated that they had reached out to the Area Assistant Chief to help



them reach the witnesses but had failed to get them. He further stated that PW1 was Wycliffe's mother and that after she testified, PW1 left her abode and could not be traced and as such the chances of getting Wycliffe to come and testify were very low. He however testified that Wycliffe Omondi recorded his statement on September 6, 2020 with the police and thus sought leave of court to have the same adopted as evidence. With no objection from the defence, PW4 produced the statement by Wycliffe Omondi as PEx 2.

24. PW4 further testified that according to the statement of Wycliffe Omondi, he was the deceased's brother and that he was an eye witness and saw the accused assault the deceased. He further testified that Wycliffe saw the accused kick the deceased and was a crucial witness.
25. In cross-examination PW4 stated that Dorosa Aoko had moved the body of the deceased but failed to explain satisfactorily why she did that. He further testified that when officers arrived at the scene, the accused was arrested by the mob who wanted to lynch him within the homestead so the police officers rearrested him.
26. PW5 Dorosa Aoko Owuor, the accused's mother testified that PW1 was his son's wife and that Peres Anyango was the child of PW1 Mary Adhiambo. She stated that on September 6, 2020 at 6 am when she was to go to Ramula Church, she met Wycliffe Omondi who told her that his mother Mary and father Benard Omondi were fighting so she went to their house but did not find them as she learnt that they had gone to the Assistant Chief's home so she followed them.
27. It was her testimony that she met the two and they all returned home where Mary started screaming saying that her child had died. She stated that she did not know how the child died but that when she returned from the Assistant Chief's home, she found the dead child placed in her house although she did not know who placed the child in her house. She identified the accused in the dock, Benard Omondi, as her son. She further testified that Mary Adhiambo had married the accused with the children. It was her testimony that the deceased's body was collected and later buried by her biological father.

The Defence Case

28. Placed on his defence, the accused gave an unsworn testimony as DW1 and called no witness. He recalled that he knew the deceased as he had married her mother. He stated that prior to his arrest, he worked as a juakali artisan. It was his testimony that on September 5, 2020 at around 7 pm, he was in his homestead with PW1 having returned from work late. He testified that he was satisfied and did not want to eat food.
29. The accused testified that he found his wife asleep and asked her if she was sick but she remained silent. He stated that when he asked for water to bath as was the norm, PW1 kept silent and later she answered him asking him as to who used to serve him when she was not there. It was his testimony that he took soap and went to the river to bath and upon his return he found her standing at the door and on moving closer to her, he smelt alcohol. He further testified that he never spoke to her.
30. The accused further stated that he told PW1 that he did not want to eat ugali so he went to the shop to buy some snacks to take tea with and that on his return, he did not find his wife and the children. It was his testimony that he went to his mother Nyaloka's house and inquired from her the whereabouts of PW1 his wife. The accused denied fighting with his wife that night and stated that he never knew where she went to sleep with the children.
31. It was his testimony that on September 6, 2020 at about 6 am, his wife returned but that he never fought with her. He stated that he did not assault the child and that when he asked PW1 where she had



- slept, the latter answered him so he went into the house and asked her again where she had slept with the children and she answered that it was not his business to know. He testified that he was annoyed and as he went to hold her, PW1 pushed him reverse and he fell down on the child who was behind him.
32. He testified that PW1 left the house and the child started crying so he went to the home of the Assistant Chief to report the matter and PW1 followed him. He testified that he found the Assistant Chief had just woken up and that his mother also arrived so they had a discussion with the Assistant Chief and PW1 was advised to be respectful. It was his testimony that he went to work and at 10.00 am, he heard screams of mourning from his homestead so he went to establish what had happened.
33. The accused testified that he found the child whom he had fallen on after his wife pushed him was in his mother's house on a chair and was already dead. He testified that he asked the other child who was 14 years' old what happened and she told him that the deceased was walking out then she fell down so the accused person's mother took the child to her house. He testified that he went to report to the Assistant Chief who told him that he had killed the child and had the accused arrested. He testified that Wycliffe was not present. He further stated that he never saw injuries on the child when he fell on her and that she fell backwards.

Analysis and Determination

34. Having considered the evidence as adduced by the prosecution witnesses and the defence, I find that the only issue for determination is whether the prosecution have discharged the burden of proving beyond reasonable doubt that the accused unlawfully killed the deceased with malice aforethought. Sections 203 and 204 of the [Penal Code](#) under which the accused is charged provide for the offence of murder and the punishment for it. Section 203 of the [Penal Code](#) requires that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased and with malice aforethought. The sections read as follows:
203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
204. Any person who is convicted of murder shall be sentenced to death.”
35. The offence of murder is complete when, “malice aforethought” is established if, pursuant to section 206 of the [Penal Code](#) evidence proves 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.”
36. The burden of proof rests squarely upon the prosecution. The three ingredients of the offence of murder which the prosecution must establish beyond reasonable doubt under section 203 of the [Penal Code](#) as read with section 206 of the [Penal Code](#) are as follows:
- a. proof of the fact that and the cause of death of the deceased.



- b. That the cause of deceased's death was as a result of the direct consequences of the accused's unlawful act or omission which is the actus reus of the offence.
- c. Proof that the unlawful act or omission was committed with malice aforethought.
37. Regarding the first ingredient of the offence, it is noted that the prosecution has proved that there was death and the cause thereof. PW1 and PW5 all testified to seeing the deceased's dead body in PW5's house. PW1 further stated that she noticed that the deceased had faeces coming out of her anus and blood oozing from her mouth. The evidence of PW2 Dr Juma Wanyofu Daniel (PW2) is clear that the deceased met her death as a result of an assault. The said doctor produced the post mortem report as an exhibit 1 and stated that Dr Oloo who carried out the postmortem formed the opinion that the cause of death was blunt trauma to the head. The doctor noted that the deceased's digestive system had haemoperiternians (blood in the abdomen), splenic lacerations (small tear on covering of spleen) and fluid within the splenorenal recess, pelvic cavity and paracolic (color) gutters (spaces on lateral sides of the body where large intestines are positioned). He further noted that on the deceased's head, there was extensive right sided sub-dural haematoma (collection of blood below the brain tissue covering) which should not be the case as the blood should be in the blood vessels not spaces.
38. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that there was death and its cause established.
39. As to whether the deceased's death was caused by unlawful act or omission, I do note from the post-mortem report that the nature of injuries sustained by the deceased child could not have been self-inflicted injuries. In *Gusambizi Wesanga v Republic* [1948] 15 EACA 65 the court stated 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.”
40. In this case, I am satisfied that the evidence adduced by the prosecution point to an unlawful act leading to the death of the deceased.
41. As to whether it was the accused who caused the deceased's unlawful death, the prosecution led evidence as follows: PW1 testified that the accused picked her younger child and threw her on a mattress and then also took the deceased child and threw her on the metallic chair. In cross-examination, PW1 stated that the accused beat her up together with the children and that the accused threw the deceased on the chair where she hit her head on the chair.
42. The written statement of Wycliffe Omondi Omondi which was adopted as evidence before court and admitted as PEx 2 also placed the accused at the scene of crime and also identified him as the deceased's assailant. I must however warn myself of the dangers of relying on a statement made by a person who was not cross examined to test the veracity of that statement. This is not to say that that statement is hopeless or has no probative value, but that the statement must at least be corroborated by some other credible independent evidence.
43. Assessing that statement by Wycliffe Omondi, a son to PW1 and brother to the deceased, he stated that on the material date, the accused forced them back home and upon arrival, the accused locked them in the house and started assaulting his mother, PW1. He stated that the accused took the two arms of the deceased and hit her on the chair. He stated that he saw the accused kick the deceased in the stomach and step on her after which the deceased cried painfully then she fell silent.



44. PW4 who took over the matter from the original investigating officer testified that from the investigations file, the officers who arrived at the scene found a body of a child lying on a sofa set covered in a lessa with a foot mark on the lower abdomen.
45. The accused denied hitting the deceased but stated that he fell back on her after his wife pushed him and that he fell on the said child. He denied the presence of Wycliffe Omondi at the scene. He stated that he never saw injuries on the deceased when he fell over her.
46. From the above testimonies, the question is whether the evidence led by the prosecution is well corroborated. The testimony of PW1 corroborates the written statement of Wycliffe Omondi Omondi, PEx 2. Both pieces of evidence place the accused at the scene in detail and even detail how he assaulted the deceased child and PW1.
47. In addition, the injuries sustained by the deceased as contained in the postmortem report, PEx1, also corroborate the testimony of PW1 on how the accused assaulted her and her children and specifically the deceased by throwing the deceased on a metallic chair whereupon she hit her head on that metallic chair. The testimony by PW4 who that from the investigations the officers at the scene noticed that the deceased's abdomen had a footmark is clear evidence in my mind that the deceased was either kicked or stepped on as stated by Wycliffe in PEx 2.
48. Juxtaposed against this is the accused's evidence denying that he ever assaulted the deceased child, that I find his defence to be untruthful. The accused denies that Wycliffe was at the scene of crime and states that he did not fight with PW1 and claims that he fell on the deceased after his wife pushed him upon which he left for the Assistant Chief's home where they were joined by his mother and were counseled with PW1 being told to be more respectful. On the contrast, the accused's mother testified that she met Wycliffe who informed her that the accused and PW1 had been fighting and had gone to the Assistant Chief, where she proceeded.
49. This testimony by the accused and his mother which is contradictory points to two things; that Wycliffe must have been at the scene of crime to be able to tell the accused's mother what had happened and secondly that Wycliffe was aware of where the accused and PW1 were headed.
50. As earlier noted, the injuries sustained by the deceased match the nature of assault by the accused as testified by both PW1 and in the statement of Wycliffe and further as testified by PW4 regarding the body of the deceased as found by the police who removed it to the mortuary. The injuries on the abdomen were confirmed by the postmortem report which shows that the deceased had hemoperitoneum with grade 1 splenic laceration and fluid noted in the spleno renal recess. The head which PW1 stated that the child hit on a metallic chair had subdural haematoma 4mm thick on the left side.
51. In view of the above evidence, I find that the accused person's defence consisted of mere denials and is not believable. I therefore hold that the prosecution proved beyond reasonable doubt that it was the accused who unlawfully caused the death of the deceased.
52. I observe that the name of the deceased on the information dated September 21, 2020 reads Peres Anyango Omondi whereas on the post-mortem, it reads Peres Anyango Odhiambo. I note that no issue was raised on whether the deceased was one and the same person going by the names Peres Anyango Omondi and Peres Anyango Odhiambo. I find that there is no doubt as to the identity of the deceased Peres Anyango a child aged about 4 years as per the testimony of PW1 her mother and the post-mortem report.



53. Finally, on whether the accused unlawfully killed the deceased with malice aforethought, the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused beyond reasonable doubt. In *Republic v Tubere S/O Ochen* [1945] 12 EACA 63, the court held and acknowledged that in determining whether malice aforethought has been established, the following elements should be considered:
- (1) The nature of the weapon used.
 - (2) The manner in which it was used.
 - (3) The part of the body targeted.
 - (4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.
 - (5) The conduct of the accused before, during and after the incident.
54. The injuries sustained by the deceased as contained in PEX1 are indicative of an intent to cause grievous harm. The testimony of PW1 as well as the post-mortem report produced as PEX1 paint a picture of an accused who seemed intent on causing grievous harm to the deceased minors who would have looked up to him for protection. The brutal attack on the deceased who was powerless to escape like their mother or put up a defense, is indicative of an intent to cause grievous harm or even death.
55. I am thus persuaded that the prosecution proved the ingredient of malice aforethought on the part of the accused, beyond reasonable doubt.
56. In the end, I find and hold that the prosecution proved all the elements of murder against the accused person beyond reasonable doubt. I find the accused person herein Bernard Omondi Owuor guilty of the murder of the deceased Peres Anyango Omondi *alias* Peres Anyango Odhiambo. The accused Bernard Omondi Owuor is accordingly convicted of murder as charged.
57. Sentence shall be pronounced after records and mitigation as counsel for the accused is reported to be unwell and therefore unable to appear and mitigate online today.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF JUNE, 2022

R.E. ABURILI

JUDGE

