



**State v Mochanga (Criminal Case 46 of 2019)  
[2022] KEHC 14879 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14879 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL CASE 46 OF 2019  
REA OUGO, J  
OCTOBER 31, 2022**

**BETWEEN**

**STATE ..... PROSECUTOR**

**AND**

**LESHAN JOSHUA MOCHANGA ..... ACCUSED**

**JUDGMENT**

1. The accused person, Leshan Joshua Mochanga is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63 of the Laws of Kenya). The particulars of the offence are that on the June 14, 2009 at Kerema village in North Masaba Location, Masaba South County within Kisii County murdered James Oigo Mochanga.
2. The accused person pleaded not guilty to the Information. Mr. Otieno, State Counsel, in his opening statement told the court that the accused person and the deceased were brothers. On June 14, 2009 the accused had a disagreement with the deceased because the accused person had beaten the deceased's children. The accused person took a spear and stabbed the deceased causing his death.
3. The prosecution called 4 witnesses who gave their testimony before Ndung'u J. and I took the testimony of the accused person.
4. Damaris Nyaboke Okachi (Pw1), the wife to the deceased, testified that on June 14, 2009 she was outside her house with her youngest child while her 3 children, Bright Oingo, Beacorson Oingo and Naomi Oingo, had gone to church. When the children came back they were crying and had swellings on their bodies. The children told her that the accused person had beaten them for eating fruits. She recalled that the accused person was furious so they hid. In the evening around 8:00 p.m. the deceased came home and asked about the beating of the children. Suddenly, Pw1 heard the accused person question why they were accusing him of beating the children twice on the same day. The accused then stated that they should wait for 5 minutes. Pw1 and the deceased were outside but quickly entered the



- house as they feared the accused person. The accused person came back with a torch that had bright light. The deceased went outside and the accused person shone the light on the deceased. He then shot him with a spear on the neck. Pw1 testified that although the accused person wore a mask, she recognized his voice as she had known the accused person for 18 years. The accused then ran off stating that he had finished his enemy. Pw1 raised an alarm and people responded. Later the police also came. She testified that the incident took place about 10 years ago. On cross examination, Pw1 testified that the accused person and the deceased had differences and he used to threaten that he would kill the deceased. She further testified that she saw the deceased wearing a mask and recognized him as she saw his head, ears and knew how he walked.
5. Bright Oingo (Pw2) testified that the deceased was his father and that she was 7 years old when the deceased died. She recalled that on June 14, 2009 after church they bought some fruits and began to eat when the accused person came and beat them. She was with her siblings Ben and Naomi. They told Pw1 what had transpired and in the evening when the deceased came home. Pw1 informed him of the incident. As Pw1 explained to the deceased what happened, Pw2 heard the accused say that 'you are talking about me, wait for me in 5 minutes'. They all ran to the house. The accused person came back, shone a torch on the deceased and hit him with a spear. The accused person ran away say that 'today he has finished me'. Pw2 identified the accused person's voice. The accused disappeared following the incident and was arrested in December 2020. On cross examination she testified that Pw1 gave the report to the deceased when darkness was falling and that Pw1 had not finished narrating the incident when the accused person came. Pw2 testified that she only heard voices and knew it was the accused person. The deceased was hit on the left side of the neck.
  6. Dr Achoki Daniel (Pw3) testified that on June 22, 2009 he conducted post-mortem on James Oigo at Gucha Nursing Home. The deceased was 31 years old and of good nutrition. He had a deep cut wound on the front aspect of the left jaw causing a fracture of the jaw bone. The death was due to hemorrhage shock due to the excess bleeding. There was a maxillary artery that was cut causing a lot of bleeding.
  7. Morris Mutua No 1132XXX (Pw4) attached at the Directorate of Criminal Investigations at Masaba South Sub-county was the investigating officer. Investigations reveal that the deceased was attacked by the accused person after which he disappeared. The accused person escaped to Transmara, Migori then to Mombasa. He came back for the burial of relative in 2017. On December 13, 2019 he came back for a cleansing ceremony that had been prepared by his family. Pw4 got information that the accused person was within the locality and he was arrested. On cross examination, he testified that there were no finger prints taken off the spear.
  8. When placed on his defence, the accused gave a sworn testimony. He testified that he is a driver staying in Mombasa. On June 14, 2009, he was in Mpeketoni digging for gold. He had been taken to the place by Jarius Nyabime Oburi. In 2012, he left and started working in a Matatu that operated from Hola to Bura. At the time he was living in Hola. He then left Hola and joined the matatus of Mombasa-Malindi. He stayed in Malindi till 2014. On June 14, 2009, he was still in Mpeketoni. He testified that the deceased was his elder brother and that he did not kill him as he was still in Mpeketoni.
  9. The defence in its submissions argued that there was no single witness that saw and/or directly linked the accused to the killing of the deceased. The court is meant to rely on circumstantial evidence. However, from the totality of the prosecution case it is apparent that the case against the accused person is heavily anchored on mere suspicions. According to the prosecution evidence, Pw1 and Pw2 proceeded on the assumption that the accused person killed the deceased because the deceased told them to wait for him. There is no evidence that was tendered to corroborate the allegations. It was necessary that the finger prints of the accused person be compared to those found in the spear. The prosecution therefore failed to prove its case to the required standard. There was no evidence



demonstrating that the accused and the deceased had a bad relationship that led to the killing of the deceased. The defence relied on the case of *Republic v Elizabeth Anyango Ajwang* (2018) eKLR where the court observed that:

35. In the final analysis I find and hold that the circumstantial evidence herein taken cumulatively do not form a chain so complete that there is no escape from the conclusion that within all human probability the crime herein was committed by the accused and none else. I have taken into account the accused statement under inquiry which I find consistent with her evidence in court. The fact that the prosecution has failed to adduce any evidence on record to prove motive on the part of the accused to commit the offence herein has convinced me to draw an adverse inference against the prosecution case and come to the only logical conclusion that mere suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. See *Mary Wanjiku Gichiri V Republic*, Criminal Appeal No. 17 of 1998.

### **Analysis And Determination**

10. I have considered the evidence adduced by both the prosecution and the defence herein. The main issue for determination is whether the prosecution proved beyond reasonable doubt all the elements of murder against the accused person herein. The offence of murder is defined under section 203 of the *Penal Code* thus; “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” From this definition, the prosecution is expected to prove the following facts beyond reasonable doubt:

- (1) The death of the deceased and cause of that death;
- (2) That the accused committed an unlawful act or omission that led to the death; and
- (3) That the accused committed the unlawful act with malice aforethought.

11. The fact and cause of the deceased’s death is not in dispute. Dr Achoki Daniel produced the Post Mortem Form confirming that the deceased died due to cardio respiratory failure due to hemorrhage shock which occurred as a result of excessive bleeding. According to the report the deceased sustained a deep cut wound on the anterior aspect of the wound and a maxillary artery was cut leading to severe hemorrhage. This is consistent with the testimony of Pw1 and Pw2 who testified that the spear hit the deceased on the neck.

12. The defence submitted that there was no direct evidence linking the accused person to the killing of the deceased, on the contrary there was direct evidence from Pw1 and Pw2. The incident took place at 8:00 p.m. when it was dark. The determination of who committed the unlawful that caused the deceased’s death therefore depends on the circumstances of recognition of the assailant as the incident took place at night. In such circumstances, our courts are urged to proceed with caution as was held by the Court of Appeal in *Wamunga v Republic* [1989] KLR 426. The court stated:

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

13. The only person who saw the accused person commit the offence was Pw1. She testified that the accused person had a bright torch that he shone on the deceased. On cross examination she also recalled that there was also light from the moonlight. The accused person was well known to Pw1 and although he wore a mask she knew how he walked. She also recognized his voice when he stated he had finished his



enemy. The evidence of Pw1 was also corroborated by that of Pw2 who on cross examination testified that during the incident he only heard voices. Pw2 testified that she recognized the accused person's voice. The accused person was his uncle and therefore she was familiar with his voice. In my view the accused person was positively identified by the prosecution witnesses after hearing his voice. The Court of Appeal in *Mbelle vs. Republic* (1984) KLR 626 held:

“In dealing with evidence of identification by voice, the court should ensure that: a) The voice was that of the accused. b) The witness was familiar with the voice and recognized it. c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.”

14. Similarly, in *Vura Mwachi Rumbi vs. Republic* [2016] eKLR the court stated:

“In the case of *Choge v R* [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it...”

15. Pw2 testified that when the incident took place it was dark and the neighbourhood was quiet. The accused person having been a person well known to Pw1 and Pw2 there is no room for mistaken identity.

16. Although the accused person denied committing the crime on account of being in Mpeketoni at the time, he did not tender before court evidence supporting the same. The defence in the submissions also challenged the fact that the prosecution did not carry out forensic evidence and that the prosecution therefore failed to prove its case beyond reasonable doubt. In my view, the failure to take the finger prints of the accused person and compare it to those found in the spear did water down the prosecution case. The standard of proof was defined in the case of *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 the court observed as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

17. The prosecution established that the accused person was in the locus in quo and the argument that he was in Mpeketoni is misplaced. In my view, it was established after Pw1 informed the deceased that the accused person had beaten the children, he was enraged, looked for a spear and used it to kill the deceased.

18. The last issue for determination is whether the accused killed the deceased with malice aforethought. Section 206 of the *Penal Code* provides that malice aforethought includes-

- (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.
19. Malice can be inferred from the weapon used and the place of injury. There was evidence that the accused person returned to the deceased's home equipped with a spear. Pw2 testified that he also carried a bright torch. It can only be inferred that the accused person did not want to miss his target, the deceased. Pw2 testified that he shone the torch on the deceased and threw the spear piercing his neck. The accused person was then heard bragging immediately after killing the deceased that he had finished his enemy. The deceased had the intention to do grievous harm within the meaning of section 206 of the Penal Code.
20. I find that the prosecution has proved the offence of murder beyond reasonable doubt. I therefore find the accused, Leshan Joshua Mochanga guilty of the murder of James Oigo Mochanga and I convict him accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT BUNGOMA THIS  
31<sup>ST</sup> DAY OF OCTOBER, 2022**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Accused – present**

**Miss Kerubo for accused**

