



**Republic v Odiyo (Criminal Case E009 of 2023)
[2025] KEHC 190 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E009 OF 2023**

**DK KEMEL, J
JANUARY 17, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHN OTIENO ODIYO ACCUSED

JUDGMENT

1. The accused herein JOO is charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code.

The particulars of the offence are that on 21st March 2023 at around 1800hrs at [Particulars Withheld] within Siaya County, he assaulted his son ZW who sustained injuries causing death.

2. The prosecution called four witnesses in support of its case.

3. PW1 LAO (minor in camera) testified that she is 12 years old. That the accused John Otiemo Odiyo is her father and that the deceased ZW was her brother who died. That on that material date, they went to school and that their father came and found them at home when they had returned. That her father came with mushroom and asked them to prepare. She is the one who prepared the mushroom. She then found out that there was no flour as the deceased had used it to prepare porridge after school. Their father gave the deceased Ksh 200/- to go buy flour. Unfortunately, all shops were closed and that her father got angry and who slapped the deceased and that the deceased fell down. He then lifted him with his leg and punched him on the shoulder. That he held him on both legs and dropped him down on his head. She pleaded with him to forgive the deceased who started to cry but her father informed her that if he left the deceased then he would turn on her. She went on to testify that when Z fell down, he started breathing with difficulty. Her father sent her to bring cold water which he poured on him but he didn't wake up. He covered him with a blanket and left him on the cold cemented floor hoping he could wake up but he didn't. Her father asked them to go to sleep. The following morning at 6.00 am, her father tried to wake him up but he didn't wake up. She also tried to wake her brother up but



he still did not wake up. He was opening his hand and closing. They rushed him to hospital but at Lwak hospital the doctor indicated that it was impossible as the deceased lacked oxygen and water in his body. Her brother was confirmed dead afterwards.

On cross-examination, she stated that her father usually drinks but on that material day he was not drunk. That she is not the eldest since the eldest child is S who was away at the time. That R and G were present. She is older than R while R is older than G. R is in class three while G is in Baby class.

4. PW2 Wycliffe Odhiambo Odiango the Chief of [Particulars Withheld], testified that 23/03/2023 at 8.00 while he was on leave, he received a call from his village elder Donatus Opiyo who informed him that John Otieno Odiyo had beaten his child who had been taken to hospital. He then instructed his assistant chief to follow up on the incident. He testified that the child later died at Lwak Mission Hospital. He reported the issue to Aram police. They did a man hunt and found the accused at a changaa den whereupon he arrested him and alerted Aram police who came and took him away. He recorded his statement with the DCI on 30/03/2023. He identified the man he had arrested as the accused in the dock. He added that he had severally summoned him over abuse of his children but he never took heed until this current incident.

On cross-examination, he told the court that the accused has four children and that he interviewed the children and also neighbors. That the accused has a history of assaulting his children and even other members of the community. That in his statement he stated a case where the accused was placed under Community Service Order (CSO) for assaulting a neighbor.

5. PW3 Moses Owino Ombewa testified that he is the Assistant Chief Siger sub-location, West Asembo in Rarieda sub-county within Siaya County. He recalled that on 23/03/2023 at 6.00 Am he received a call from his chief informing him that one O had beaten his son to death. They agreed to follow up the same. That he and the chief went to Ndori Police Post. They informed the OCS and OCPD of Aram Police Station. They then reported to Aram police station then proceeded to the scene then to the mortuary with the police where they found the body of the young Z who was then aged six years old and that the body had head injuries. That they then went to Lwak hospital and talked to the doctor who had the treatment records.

There was no cross examination.

6. PW4 Dr Daniel Wanjovu Juma testified that he is a medical officer at Bondo sub county hospital. He holds a Bachelor's degree in Medicine and Surgery from University of Nairobi (2016) and that his registration is No. A11604. He had a post mortem report done on 8/4/2023 at Lwak Mission Hospital Mortuary, on the body of ZW. Externally, the face was swollen with blood stains. There was a swelling and abrasive wound on left parietal of the head with loss of hair 4*4cm. Internally, on the head, there was massive hemorrhagic congestion on subcutaneous tissue below the scalp expanding through the bi-temporal surface exteriorly. Temporal region is on the sides of the head. As a result, he formed the opinion that the cause of death was head injury with extensive skull fracture secondary to severe skull trauma. He issued death certificate No. 1522309. He produced the post-mortem report as P exhibit 1.

On cross-examination, he stated inter alia; that if it was a fall then the height and head first must have occurred; that the history given was that the child had been held by the legs and swung on a wall; that he would not say if it was accidental or intentional.

7. PW 5 Merceline Atieno Otieno testified that she is a nurse at Masala Dispensary in Rarieda and formerly of Rambalo in West Asembo. That she attended the deceased herein who was the aged six years old and that he was then unconscious but had a cut wound on the head. That the patient was referred to Lwak hospital. She identified the treatment note which was produced as exhibit 2.



On cross-examination, she stated inter alia; that the patient was then shivering; that she was given a history to the effect that the deceased had fallen down; that she did not know what the autopsy report indicated; that it is rare for one on convulsion to fall down and sustain severe head injuries.

8. PW6 Consolata Oluoch testified that she is a nurse based at Lwak hospital and who identified the treatment notes that had been made by her colleague Kennedy Ooko with whom she had worked for two months and who had left for further studies. That she is familiar with his handwriting and signatures. She produced the same as exhibit 3. She further stated that the deceased was received at the facility on 22/3/2023 in a semi-conscious state and that he had a bruise on the scalp and that the clinician held the view that the child suffered from malaria, pneumonia and malnutrition. That the patient later died after several resuscitation attempts.

On cross-examination, she stated that the father of the minor attributed the injuries to convulsion. That malaria and fever can cause convulsion. That she could not tell if this was out of a fall.

9. PW7 No. 249374 Pc Vincent Mugambi Mureithi testified that he was alerted by C.I.P James Ouma of a suspected murder of a juvenile and that the body was at Lwak mortuary and that he liaised with the area chief Moses Ombewa. That he proceeded to Lwak mortuary where he found the body of the deceased which had bruises on the left side of the head. That the deceased had succumbed while on treatment. That he learnt that the father of the deceased had beaten him to death. That they proceeded to the home of the accused herein where they found him and the children. That they took him to Aram Police station together with his children who looked like they were in need of care and protection. That he learnt that the children had lived with the accused from 2012. That the children were later placed under child protection and later released to their aunt MAO. That the witness statements revealed that the accused beat the deceased to death. That a post mortem examination was conducted on the body at Lwak hospital.

On cross-examination, he stated that the accused beat the deceased to death. That the accused had a history of beating his children. That one of the children tried to plead with the accused to spare the deceased.

10. At the close of the prosecution's case, this court established that the prosecution had established a prima facie case against the accused herein who was subsequently put on his defense. He opted to tender a sworn testimony.
11. DW1 JOO the accused, testified that on 20/3/2023 he went to work and returned at about 5.30 pm. That he has four children and that their mother/his wife is deceased. He went further to state that he did not feel like cooking that day and so he instructed his daughter Leila to prepare food. He then proceeded to a drinking joint and could not recall how he ended up in his house. The following morning, he woke up and his son ZW was sleeping in the children's bedroom. He went about his morning chores and at about 10.00am he realized that his son Z had not woken up and that on checking on him, he found that he was unconscious. He inquired from his daughter Leila on what had happened and who informed him that Z had fallen from his grip the previous night and injured himself. He first took him to the nearest dispensary and later to Lwak Mission Hospital where he was attended to. He then left and went home to take care of his other children. That he was called back to the hospital that his son Z had died. He took him to the mortuary.

The following day, on 22/3/2023 at about 4.30 pm, the area chief went to enquire from him about what had happened to the deceased and that he handcuffed him and called the police. It is his defense that he was drunk on the night of 20/3/2023 and cannot tell what happened. He states that he cannot reject the testimony of his daughter Leila that the deceased fell off his grip and got injured. He states that he has lived with his children single handedly for three years and cannot want to harm them. He



states that the version told by his daughter is the tR because himself was drunk and cannot remember what transpired that night.

On cross-examination, he stated that on the morning of 21/3/2023 he was not drunk save for some hangover and that he could not tell whether he assaulted one of his children. He denied having been assaulting the children prior to the incident. He confirmed having taken the son to hospital on the morning of 21/3/2023.

12. Learned counsels for the parties filed and exchanged submissions.
13. I have considered the evidence of both the prosecution and defence as well as the submissions. I find the issue for determination is whether the prosecution proved its case against the accused beyond any reasonable doubt.
14. The offence of murder is provided for under section 203 of the Penal Code which stipulates thus:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
15. The burden of proving the guilt of the accused is upon the prosecution and which should be beyond any reasonable doubt. The essential ingredients of the offence of murder which must be proved by the prosecution are as follows:
 - a. That the deceased died.
 - b. That his death was unlawfully caused.
 - c. That the death was actuated by malice aforethought.
 - d. That the accused is the perpetrator of the crime.
16. On whether there was death of the deceased, the evidence of the pathologist (PW4s) left no doubt about the same. The said witness conducted an autopsy on the body of the deceased and who noted a swelling and abrasions on the left parietal of the head and that there was massive hemorrhagic congestion on the sub-cutaneous tissue below the scalp. He also noted extensive skull fracture. He formed the opinion that the cause of death was head injury with extensive skull fracture secondary severe skull trauma. He produced the autopsy report as Exhibit 1. I find this ingredient was proved by the prosecution beyond any reasonable doubt.
17. On whether the death was unlawful, by dint of Article 26 of *the Constitution*, all homicides are deemed unlawful unless authorized by law. The deceased was a young minor who was then in good health save for malnutrition due to lack of parental care. The injuries inflicted on the deceased were so severe and which did not give him a chance to survive. The said injuries left no doubt that the perpetrator intended those injuries to lead to the death of the deceased. The deceased therefore did not deserve to die in the manner that he did. I find this ingredient was proved beyond any reasonable doubt by the prosecution.
18. On whether the accused was directly placed at the scene of crime, PW1 LAO testified that their father who is the accused herein gave the deceased KShs 200/- to go buy flour as it transpired that the deceased had earlier used the remaining maize flour to prepare porridge. Unfortunately, all shops were closed and the accused got annoyed and that he slapped the deceased who fell down. The accused then lifted him with his leg and punched him on the shoulder. That he held him on both legs and dropped him down on his head. PW1 pleaded with him to forgive the deceased who started to cry but the accused was unfazed as he threatened to turn against her. She went on to testify that when the deceased fell down, he started breathing with difficulty. The accused sent her to fetch cold water which he poured



on the deceased but he didn't wake up. He then covered him with a blanket and left him on the cold cemented floor hoping that he would wake up but he didn't. The accused then ordered the rest of the children to go to sleep. That the following morning both PW1 and the accused tried to wake the deceased up but he did not wake up. They rushed him to Lwak hospital where he was confirmed dead undergoing treatment.

PW2 Wycliffe Odhiambo Odiango the Chief of west Asembo testified that 23/03/2023 at 8.00am while he was on leave, he received a call from his village elder Donatus Opiyo who told him that JOO had beaten his child who had been taken to hospital. He then directed his assistant chief to follow up on the incident. He testified that the child later died at Lwak Mission Hospital.

This evidence clearly placed the accused directly at the scene of the crime as the perpetrator. Indeed, PW1 was the eye witness as she gave a vivid account of how the deceased viciously assaulted the deceased and then left him on a cold cemented floor and then went to sleep with the other children. In fact, the evidence of the accused did not deny the charge but he brought up the issue of drunkenness. However, on cross-examination, he confirmed that he was not drunk at the time of the incident. The accused had attempted to weave a narrative that the deceased suffered from convulsions and that he had fallen down and hurt himself. The evidence of PW1 was so direct and which placed the accused at the scene of crime. PW1 had no reason whatsoever to frame the accused yet he was the only parent that they had. I am satisfied by the evidence of PW1 that the accused had assaulted the deceased on the material date. The accused defence did not shake the evidence of the prosecution which is quite overwhelming against him. I find this ingredient was proved beyond any reasonable doubt.

19. On whether there was malice aforethought, section 206 of the Penal Code defines the same as follows:

‘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.

20. It was PW1's testimony that her father slapped the deceased and he fell down. Then he lifted him with his leg and punched him on the shoulder. That he held him on both legs and dropped him down on his head.

It was PW1's testimony on cross examination that their father usually drinks alcohol but on that fateful night he was not drunk. She further added that the accused was a temperamental person. PW2 likewise testified that he had severally summoned the accused over abuse of his children but that he never took heed until the current incident. Further, on cross examination, he told the court that the accused has a history of assaulting his children and even other members of the community. That in his statement, he mentioned of a case where the accused was placed under community service order (CSO) for assaulting a neighbor.



The accused had manhandled the deceased so viciously as if the deceased was a piece of a gunny bag. His actions were to completely kill him. No wonder that he left him to lie on a cold cemented floor without a care in the world and went to enjoy his sweet sleep. It also transpired from the evidence that the accused had been solely taking care of the children without his wife and that it seemed that he had gotten tired of them and hence the state in which the children were found in after this incident. It would appear that he had gotten tired of the deceased and thus wanted to get rid of him. I am therefore satisfied that malice aforethought was proved by the prosecution.

21. Having taken into account the evidence of all the witnesses including the defense of the accused, this court is satisfied that the prosecution proved all the elements of the offence of murder sufficiently beyond reasonable doubt. Consequently, I find that the accused is guilty of the offence of murder and that he is hereby convicted accordingly.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY 2025.

D. KEMEI

JUDGE

In the presence of:

JOO.....Accused

Ooro F.....for Accused

M/s Kerubo.....for Prosecution

Mboya.....Court Assistant

