



**Republic v Oduor (Criminal Case E030 of 2023)
[2025] KEHC 193 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E030 OF 2023**

DK KEMEL, J

JANUARY 17, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

SUSAN AUMA ODUOR ACCUSED

JUDGMENT

1. The accused herein Susan Auma Oduor was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 17th August 2023 at around 2330 hrs within Christian area, Karapul Sub-Location Siaya Township Location in Siaya Sub- County within Siaya County, jointly with others not before the court unlawfully killed one David Obumba by hitting him with a blunt object on his head.
2. The accused denied the charges and that the prosecution called six witnesses in support of its case. I took over this matter after the defence had closed its case and that parties took directions to the effect that the matter proceeds from where it had reached. I have now been called upon to come up with the judgement in the matter.
3. PW1 Emily Adhiambo testified that she is a resident of Soweto Karapul within Siaya Township. That on 17/08/2023 at around 8.00 Pm she was in her house when the accused went to her house while in company of a certain man she did not know. That they bought changaa for 50/= and that they drunk it and left. That the following morning, the accused went to her house and informed her that the man she had been with the previous night had died. She identified the accused in the dock as the lady who had visited her house for chang'aa in the company of a man she didn't know.

On cross examination, she stated that it is the accused who informed her about the death of the deceased, but didn't tell her how the deceased had died.



4. PW 2 Sandra Adhiambo Odotte testified that she is a resident of Euro style in Karapul. That on 17/08/2023 at 10.30 pm the accused went to her house with a man. They bought chang'aa worth Ksh 50/- That they took it fast and left. That the following day at 6.00pm, Susan the accused went back to her house to take changaa then she left. That in the morning they received word that a man had been beaten at Otare. That on 30/08/2023 Susan was arrested. That is the time she realized that the man who had been beaten is the one who had been with Susan.

On cross examination, she stated that after the man's assault, word went round about the incident, and that the accused and the deceased had gone to her house at 10.30 pm.

5. PW 3 FAO stated that she was in form two at [particulars withheld] Secondary school. That on 18/08/2023 at around midnight, their tenant Susan came and woke them together with her father and brother. That Susan informed them that she had locked her keys in her house thus she requested them to give her the spare keys. They thus gave her the spare keys as requested. That the following day, a lady went and informed her that Susan had sent her to lock her house with double padlocks and so she added another padlock to the tenant's door. The lady likewise informed her that Susan had been arrested. That Susan is the accused in the dock.

6. PW4 Dr. Okong'o Eric testified that he is based at Siaya County Referral Hospital. That he had the post mortem report of David Obumba (deceased) which had been conducted on 30/08/2023 at 1710 hours. It was a body of a male African aged about 30 years and of good nutrition. That the head had a repaired cut wound. That there was cranial hematoma measuring 2 by 2 cm scalp fracture on the left temporal area with a crack extending from left to right temporal region. He formed the opinion that the cause of death was severe head injury. That he made his report and signed it. He produced the Post mortem report as Exhibit 1.

7. PW5 Romlus Okoth he testified that he was the chief Siaya Township. That on 18/08/2023 at about 0645hrs, he received a call from a member of public that someone had been found lying in a drainage at the gate of St. Paul. That he called the police who informed him that they had already sent some officers. That the police took him to Siaya County Hospital. That he did not know the said person. That he later learnt that the man was a fundi and a resident of Awelo and who died at the Hospital.

On cross examination, he testified that he had only seen the deceased only on that day. That the deceased was still alive when he saw him at St. Paul's Church and that blood was oozing from his forehead and that the wound was still fresh.

8. PW 6 No. 25XX75 Pc Langat Dominic stated that he is attached to DCI Siaya. That on 20/08/2023 while at the station at about 1.00 Pm, he received a call from the OCS Mr Ole Keiwua- DCIO Siaya. That he learnt that one David Obumba who had been admitted at Siaya hospital on 18/08/2023 had succumbed to his injuries. That he together with other officers visited Siaya County Hospital mortuary and confirmed that indeed the said David Obumba had died. That on 22/08/2023 he together with PC Kikundi, PC Kibet visited the scene at Christian Area where the deceased had been attacked. That they established that the accused had been with the deceased on 17/08/2023 at a changaa den throughout the night. That thereafter the duo moved together towards Christian area. That he recorded the statement of Susan (accused) who alleged that they had been attacked by robbers and that she reported to her landlord who gave her a spare key at her request. That the accused did not report to the police station or go to any hospital over the attack. That on 23/08/2023, they arrested her and she was detained by order of court in a miscellaneous application. That on 30/08/2023 he together with the deceased's relatives went to Siaya County Hospital and witnessed the post mortem which was conducted by Dr. Okong'o.



On cross examination, he testified that he is the investigation officer in this case. That he recorded the statement of PW1 Emily who had stated that Susan had informed her that she woke up to learn that the deceased had died. That they moved from one house to another for Changaa. That as they started moving to the accused's house Susan alleged that they had been attacked, about 50 metres away. That the deceased died at the hospital but that he had been found at Christian area while alive but could not talk. That they got information from where they had been but that the accused refused to disclose anything related to the incident.

9. That marked the close of the prosecution case.
10. At the close of the prosecution's case, the court found that the prosecution had established a prima facie case against the accused who was thus found to have a case to answer and was subsequently placed on her defense.
11. DW1 Susan Auma Oduor gave a sworn statement. She testified that on 17/08/2023 at around 6.00 pm she went visiting her friend Nyamalo who sells changaa. That upon arriving she found David taking changaa with one Mary. That she bought changaa worth Ksh 50/- and that she sat and drunk it there. That at 10.30 pm while she was leaving for her house, David informed her that he wanted to visit his cousin who lived in the same direction she was going and so they left together. That on the way some people attacked them and they ran in different directions. That she ran to her house and thought that David had run to his cousin's place. That the following day as she went to inform Mary how they had been attacked, one man called Victor asked her whether she was the one who had been with David the previous night. That she answered in the affirmative and that the said Victor apprehended her and took her to the DCIO. That she did not know how the deceased was killed. That she had only met the deceased on that day and that she did not know how he got the injury that led to his death. That she learnt about his death from the person who apprehended her.

On cross examination, she stated that she only came to know the deceased on that day. That it is not true that they went to Nyamalo together and that they went to Sandra's place together after they left Nyamalo. That she did not report the incident to the police because she did not get time to do so as she was apprehended before she could do so. That the deceased was a cousin to the young man who apprehended her.

12. The defense case closed at that juncture. Both parties filed and exchanged submissions.
13. Learned counsel for the defence reiterated all the prosecution and defense evidence and submitted that the prosecution's case relies purely on circumstantial evidence since none of the witnesses testified to have witnessed who or what caused the unlawful death of the deceased. Learned counsel pointed out that the burden of proof is on the prosecution to prove beyond reasonable doubt that it was the accused who caused the unlawful death of the deceased and that the burden of prove never shifts from the prosecution to the defence. Reliance was placed in the locus classicus case of Woolmington vs. DPP (1935) A.C 462.
14. It was further submitted further that the evidence placed before the court is purely circumstantial and that circumstantial evidence is good as any evidence if it is properly evaluated, and that the same can prove a case with the accuracy of mathematics. (Musili Tulo vs. Republic, Criminal Appeal No. 30 of 2013) [2014] eKLR. Further, that circumstantial evidence should however be very closely examined before basing a conviction on it. (Ndurya v Republic [2008] eKLR.

In conclusion, the defence submitted that the prosecution has failed to prove the case beyond reasonable doubt against the accused herein and urged this court to acquit her of the charge.



15. On its part, the Prosecution submitted that it has proved all elements of murder satisfactorily. To start with, it submitted that on the issue of proof of death, the same was confirmed by the pathologist (PW4) who formed the opinion that the cause of death was severe head injury and who produced the autopsy report as exhibit one.
16. As regards the issue of whether the death of the deceased was caused by an unlawful act or omission, it was submitted that Article 26 of *the Constitution* guarantees every person the right to life. That the post mortem report indicated that the cause of death of the deceased was a severe head injury and which indicated that the deceased was assaulted on the head which led to his death.
17. As regards the issue of whether it is the accused herein who unlawfully caused the death of the deceased, the prosecution relied on a myriad of authorities specifically touching on the issue of circumstantial evidence and the doctrine of “last seen”. In this regard, the prosecution relied on the Nigerian case of *Stephen Haruna vs. The Attorney general of the Federation (2010) 1 Ilaw/ca/a/86/c/2009* where the court opined that:

“The doctrine of ‘last seen’ means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused is the person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to explain how the deceased met his death in such circumstances. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

18. Lastly, as regards the issue of malice aforethought, the prosecution relied on the provisions of section 206 of the Penal Code that defines malice aforethought 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

The prosecution submitted that the evidence of PW4 established the cause of death to be severe head injury. That from the evidence on record, the accused did not report the incident to the police until her arrest and which showed an intention by the accused to cause grievous harm or death upon the deceased. The prosecution therefore submitted that they had sufficiently proved the charge beyond reasonable doubt as by law required and argued that the accused be convicted of the offence herein.



19. I have considered the evidence presented by both prosecution and defence as well as the respective submissions by the learned counsels for the parties. I find the issue for determination is whether the prosecution proved its case beyond reasonable doubt against the accused.
20. The prosecution was under duty to prove the ingredients of murder against the accused beyond any reasonable doubt. The essential ingredients of the offence of murder are inter alia; proof of death as well as the cause of death; proof that the death was due to an unlawful act or omission; that the unlawful act or omission was by the accused and that there was malice aforethought.
21. As regards the proof and cause of death, the pathologist (PW4) testified that the deceased suffered a skull fracture on the temporal region of the head and that he formed the opinion that the cause of death was severe head injury. He produced the autopsy report as exhibit one. I find that this ingredient was sufficiently proved by the prosecution beyond any reasonable doubt.
22. On whether the death was unlawful, by dint of Article 26 of *the Constitution*, all deaths are deemed unlawful unless authorized by law. Every human being has a right to life. The deceased was in good health even when he went to the changaa den to have a quick drink and which was confirmed by PW1 and PW2. The fact that the deceased later died of head injuries, is a clear indication that the said injuries were inflicted by the assailant in a manner to suggest that the same were to cause death of the deceased and hence the death was not justified and was unlawful in the circumstances.
23. On the question whether the accused caused the unlawful death of the deceased, there is no direct evidence pointing at the accused as the perpetrator of the death of the crime. However, the circumstantial evidence on record points at the accused as the person last seen with the deceased. On this aspect the court in *Ndurya v Republic* [2008] eKLR stated that circumstantial evidence should however be very closely examined before basing a conviction on it. The accused in her defence evidence stated that she went to a changaa den to have a drink and met the accused and that she and the deceased left the drinking joint only to be attacked by a group of unknown persons. She added that she managed to run to her home safely and that she did not know what became of the deceased until the following day when she learnt of the incident. She added that she was in the process of going to the police to report the incident when she was apprehended by a son of her landlord and escorted to the police station. She finally stated that she does not know how the deceased met his death. It seems the defence by the accused serves an explanation about her role in the matter and that she has pushed the blame upon some person who had attacked her and the deceased as they walked to their separate places. This explanation must be juxtaposed with the doctrine of "last seen".
24. As the evidence by the prosecution is basically circumstantial in nature, the principles regarding circumstantial evidence are well settled. In the case of *John Mutuma Gatabu Vs R* [2015]EKLRL the Court of Appeal held as follows:

“It has been stated in numerous cases that in order to justify a finding of guilt, the circumstantial evidence, taken as a whole, ought to be such that the inculpatory facts lead to the irresistible conclusion of guilt and that there should be an absence of any co-existing facts that are exculpatory or explicable on any other reasonable hypothesis save the guilt of the person accused.”

Also in *Teper Vs R* [1952] AC 480, it was held as follows:

Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because of this kind may be fabricated to cast suspicion on another...
It is also necessary before drawing the inference of the accused's guilt from circumstantial



evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference,”

And also in *Abolfathi Mohammed & Another Vs R* [2018] eKLR it was held that before circumstantial evidence can form the basis of a conviction, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused, and to no other person, as the perpetrator of the offence.

Again, in the case of *Sawe Vs R* [2003] eKLR it was held that suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made it clear in the case of *Mary Wanjiku Gichira Vs R* (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

The prosecution have pitched tent on the assumption that the accused was in the company of the deceased prior to his demise. Indeed, the accused confirmed in her defence testimony that she was with the deceased before they were allegedly attacked. The prosecution also seeks to find fault in the conduct of the accused in failing to report about the alleged assault by some strangers on the material night. The prosecution is thus seeking to pin down the accused as one of the assailants and that she was placed at the scene of crime. Indeed, the principle is that if a person has been placed at the scene of crime, he/she is under obligation to render an explanation as to how the deceased met his/her death. The prosecution has also maintained that the doctrine of “last seen” must apply in the circumstances.

25. As regards the doctrine of ‘last seen’, the Nigerian case of *Stephen Haruna vs. The Attorney General of the Federation* (2010) 1 I law/ca/a/86/c/2009 is relevant. The court in that case held:

“The doctrine of ‘last seen’ means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused is the person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to explain how the deceased met his death in such circumstances. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

26. Again, in the Indian case of *Ramreddy Rajeshkhanna Reddy & Another vs State of Andhra Pradesh*, JT 2006 (4) SC 16 the court held that:

“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, the possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

27. As the accused has been placed at the scene of crime, I find that she is under obligation to render an explanation as to how the deceased met his death in line with the provisions of sections 11 and 119 of the *Evidence Act* which impose such an obligation. The same provide as follows:

111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:



Provided that such burden shall be deemed to be discharged if the court is satisfied by the evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

119. The court may presume the existence of any fact which it thinks is likely to have happened, regard being had to the common course of natural events, human conduct and public an private business, in their relation to the facts of the particular case.”
28. Looking at the circumstances of the case together with the explanation offered by the accused, I find that there exists some doubt as to whether or not the accused had a hand in the death of the deceased. Even though the accused failed to report the incident to the authorities at the time, it is obvious that the accused and deceased were then quite drunk. If as the accused claimed that they had been attacked by unknown persons forcing them to flee in different directions, then there is a possibility that other persons could have also been involved. Indeed, there were no eyewitness account and hence, it is the version of the accused as opposed to that of the prosecution. As noted in the case of *Sawe Vs R* [2003] ECLR (supra), suspicion may be strong but then the same cannot be a basis for inferring guilt which must be proved by evidence. The duty to prove the guilt of the accused was upon the prosecution to discharge and which is beyond any reasonable doubt. The prosecution’s main plank is that the accused did not report the incident and also did not avail evidence to the effect that she had been injured by the assailants. It did not transpire from the evidence that the accused and deceased had any differences so as to suggest that the accused could have harboured a grudge against him. However, to the contrary, both accused and deceased had been drinking buddies and were at the time walking to their respective homes before the incident took place. I am satisfied that the accused has given a cogent explanation regarding here presence and role at the scene. I am not convinced that the prosecution has discharged the burden of proof in their case against the accused since mere suspicion alone cannot sustain a conviction. As there is some doubt created, the benefit of such doubt must be resolved in favour of the accused in any event.
29. In view of the foregoing observations, it is my finding that the prosecution has not proved its case against the accused herein Susan Auma Oduor beyond any reasonable doubt. I find the accused not guilty. She is ordered to be set at liberty forthwith unless otherwise lawfully held.

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

D. KEMEI

JUDGE

In the presence of:

Susan Ouma Oduor.....Accused

Oduol.....for Accused

M/s Kerubo.....for Prosecution

Mboya.....Court Assistant

