



**Republic v Otieno (Criminal Case E004 of 2023)
[2025] KEHC 1905 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E004 OF 2023
DK KEMEL, J
FEBRUARY 7, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

MARTIN OMONDI OTIENO ACCUSED

JUDGMENT

1. The accused, Martin Omondi Otieno has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence being that on 6th February, 2023 at around 1600 hours in Udonga Village, Baragui Sub-location within Siaya County, murdered one Joseph Oluoch.
2. In support of its case, the Prosecution called seven witness. PW1 Edwinar Akinyi Asino told court that he is a village elder and that on 5/2/2023 at about 9.00 pm while in his house, George Owino Okise asked him the phone number of Ibrahim, brother to the deceased. George Owino Okise informed him that the Appellant had beaten the deceased. He then called Ibrahim to inform him on what George Owino Okise had told him. He went to Undanga Village where the deceased had been attacked where he found a crowd where the deceased was lying down in bad shape. He stated that the deceased's trouser had been pulled down and private parts were visible and had soil particles on the neck and shoulders. He stated that the deceased was crying of stomach pains whenever he turned round. He stated that they took him to Siaya District Hospital where he was treated and discharged but on 6th February, 2023 he passed on. On being cross-examined, he stated that when he reached the scene, he did not see any physical injuries on the victim or blood stains.
3. PW2 Ibrahim Odhiambo Alango told court that on 5/2/2023 at about 9.00 Pm Edwinar called and informed him that his brother Joseph Oluoch Alango had been beaten by Martin Omondi Otieno at the home of George Okise. He proceeded to the scene where he found the deceased lying down helpless and not talking. He was holding his stomach while foam was coming out of his mouth. They took



him to Siaya Hospital where he was treated and discharged. He told the court that while being treated, the deceased regained consciousness and was able to speak saying that he doubted if he would live because Martin Omondi had hit his kidneys badly. He stated that the following day, the deceased still complained of stomach pains. He stated that the deceased died before they returned him to hospital. They reported the incident at Karemo police post. He stated that when he went to view the deceased's body, he saw scars all over the body and head. On being cross-examined, he stated that he found the deceased unconscious. He stated that the deceased managed to talk to him after he had been treated at about 3.00 am. He stated that the deceased talked to him the following day when he went to see him at about 11.00am. He stated that what his brother told him was not in the statement recorded at the police station. He told court that the deceased even told their mother that it was Omondi who had beaten him.

4. PW3 George Owino Okise told the court that on 5/2/23, Sunday at about 8.30 pm his son Churchill came back to the house and informed him that someone was trying to get inside their home through the fence. He stated that he heard a voice saying "Kama sio kuingia hapo, ningekuua" and when he went to check, he found Joseph Oluoch Alango in his compound who claimed "Baba, huyo kijana ameniua" but he did not mention the name but later informed him that it was Omondi Nyatodi. He told the court that he knew Omondi Nyatodi who came from the same village with him. He stated that the deceased complained of stomach pains and had injuries on his back which was bleeding. He told the court that the deceased died the following evening. On being cross-examined, he told the court that the incident happened at about 8.30 pm and it was dark. He told the court that when he heard the first voice, he did not know who it was. He stated that Nyangem and Nyaloka were present and heard what the deceased was telling him. He added that he informed the village elder what Joshua had told him.
5. PW4 No. 84469 PC Patrick Omondi of Bar Obongo police post testified that on 10/2/2023 a group of boda boda riders came with the accused having been suspected and or accused of murder. He told the court that he re-arrested and interrogated him. He testified that he inquired from the deceased's home area where the murder was confirmed. On being cross-examined, he stated that the people who brought the accused were boda boda riders.
6. PW5 Daniel Ongere Sella told the court that on 21/2/2023 he identified the body of the deceased for postmortem examination. He added that the body had injuries on the right shoulder and on the back.
7. PW6 Dr. Eric Okongo, Medical Officer, Siaya Referral Hospital testified that the postmortem was done on 31/2/2023 by his colleague Jonah Wekesa. He stated that the body had tense abdominal wall, bruises on the right shoulder and back. The respiratory, cardiovascular system was normal. There was perforation of the large gut with pieces of intestines soiled with stool. He stated that it was opined that the cause of death was perforated gut secondary to blunt force trauma and worms. He produced the postmortem, admission card, abdominal ultra sound report and the treatment notes. On being cross-examined, he told the court that there was possible worm involvement which possibly got into the abdomen because of the perforated abdomen or were there before.
8. PW7 PC Peter Mutwiri of DCI, Siaya told the court that on 6/2/2023 at about 8.30pm he got information of an incident where villagers were burning the house of Martin Omondi Otieno for having assaulted Joseph Alango Oluoch. He told the court that the accused had hit the deceased on his abdomen with a jembe stick. He testified that the accused was arrested on 10/2/2023 at Randongo Junction while trying to flee to Bondo. On being cross-examined, he stated that they did not arrest any person over the arson. He stated that the accused was arrested by members of the public on 10th having assaulted the deceased earlier on.



9. On 11th April, 2024, this court found the accused had a case to answer and placed him on his defence. He opted to tender an unsworn statement.
10. In his defence, the Accused told the court that he did not kill the deceased. He stated that he knew the deceased. He stated that he had no differences with the deceased. He stated that on 5/2/2023 he woke up at 7.00 am and went to Kowino's house to drink alcohol and that Owino gave him work to do at a fee of Kshs. 1,000/=. He worked until 5.00 pm and then started drinking alcohol until 7.30 pm. He went to the Centre to buy medicine and then went home, ate and slept. He woke up sick as a result of consuming alcohol. He slept outside on a mattress until 5.00 pm and then proceeded to drink alcohol until 9.00 pm. He told the court that when he came back home he found their house burnt. He stated that he slept at the police station with his family members. He added that the next day when he went to the house, people started beating him and took him to the police station where he was charged. He stated that the witnesses in court have lied.
11. The defence opted to rely on the evidence so far tendered while the Prosecution opted to file submissions. Vide submissions dated 11th July, 2024 and filed on 26th November, 2024, the Prosecution submitted that death was not in dispute. Reference has been made to PW 6's testimony, that the cause of death was perforated gut secondary to blunt force trauma and worms. It is submitted that the deceased's death was caused by an unlawful act of the accused. According to the state, despite there being no eye witness, reliance is placed on PW2's testimony on the dying declaration of the deceased "I doubt if I would live, Martin Omondi hit my kidney badly". It is submitted that the evidence of PW2 and PW3 is that the deceased told them that the accused had beaten him. Further, that PW3 heard noises from outside his home saying "kama sio kuingia hapo, ningekuua". The State submitted that the cumulative actions of the accused in the manner of killing of the deceased was executed, is without any shred of doubt that the accused, with common intention, purposed to kill the deceased, thus the accused had malice aforethought. The State submitted that it has proved malice aforethought by the accused. According to the State, it has established its case beyond reasonable doubt to warrant a verdict of conviction against the accused for the offence of murder.
12. I have given due consideration to the evidence on record and written submissions filed herein. This court forms the view that the Prosecution's case is primarily premised on the statement by the deceased alleged to have been made to PW2 and PW3 which amounts to a dying declaration.
13. Section 203 of the [Penal Code](#) provides that:

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."
14. In the case of Joseph Githua Njuguna Vs Republic [2016] eKLR the Court of Appeal outlined the ingredients of the offence of murder as follows:-

"...13 Under section 203 of the [Penal Code](#), any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought.."



15. The death of the deceased is not disputed. All the prosecution witnesses and the Postmortem report confirm the death. The accused has also not disputed the death. On the cause of death, PW6 Dr. Eric Okongo, Medical Officer, Siaya Referral Hospital formed the opinion that the cause of death was perforated gut secondary to blunt force trauma and worms. PW1, PW2 and PW3 stated that the deceased complained of stomach pains before he died.

16. Under section 33(a) of the *Evidence Act*, a statement made by a deceased person relating to his cause of death is admissible in evidence:

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question, such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

17. In Philip Nzaka Watu Vs Republic [2016] eKLR, this Court stated the following on admission and reliance on a dying declaration:

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in Choge V. Republic (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”



18. In Pius Jasunga s/o Akumu vs Republic (1954) 21 EACA 333 had the following to say: -

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.....It is a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R -v- Eligu s/o Odel & Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused ,,,,,,, But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

19. PW1 Edwinar Akinyi Asino told the court that on 5/2/2023 at about 9.00 pm while in his house, PW3 told him that the Appellant had beaten the deceased. He thus went to Ulonga Village where the deceased had been attacked where he found a crowd where the deceased was lying down in bad shape. He stated that the deceased was crying of stomach pains whenever he turned round. PW2 Ibrahim Odhiambo Alango told the court that the deceased told him that he doubted if he would live because Martin Omondi had hit his kidneys badly. On being cross-examined, PW2 stated that the deceased managed to talk to him after treatment at about 3.00 am. He told the court that the deceased even told their mother that it was Omondi who had beaten him. PW3 George Owino Okise told the court that on 5/2/23, Sunday at about 8.30 pm while at home he had a voice saying “Kama sio kuingia hapo, ningekuua” and when he went to check, he found Joseph Oluoch Alango in his compound who said “Baba, huyo kijana ameniua” but he did not mention the name but later told him that it was Omondi Nyatodi. PW6 Dr. Eric Okongo, Medical Officer, Siaya Referral Hospital told the court that the body had tense abdominal wall, bruises on the right shoulder and back. He told the court that the cause of death was perforated gut secondary to blunt force trauma and worms.

20. Based on the evidence of PW1, PW2, PW3 and PW6, the court finds the deceased’s dying declaration was corroborated. While speaking to PW2, the deceased doubted whether he would live because his kidneys had been hit badly by the Accused. PW3 told the court that he heard the voice saying “Kama sio kuingia hapo, ningekuua” that if the deceased had not entered PW3’s compound, he would have been killed. The dying declaration by the deceased placed the Accused at the scene of crime as the perpetrator. PW6 told the court that there was perforation of the large gut with pieces of intestines soiled with stool. PW7 PC Peter Mutwiri told the court that the Accused had hit the deceased on his abdomen with a jembe stick.

21. From the foregoing analysis, this Court finds that the Accused was placed at the scene of crime and thus the person who committed the unlawful act which caused the death of the deceased.

22. Section 206(b) of the *Penal Code*, states as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving anyone 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..”

23. In Joseph Kimani Njau vs R (2014) eKLR, the Court of Appeal held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....

24. PW3 told the court that he heard a voice saying “Kama sio kuingia hapo, ningekuua” and when he went to check, he found Joseph Oluoch Alango in his compound who said “Baba, huyo kijana ameniua”. This is clear evidence that the Accused had the intention to cause death and grievous bodily harm. PW6 told the court that the deceased’s body had tense abdominal wall, bruises on the right shoulder and back. There was perforation of the large gut with pieces of intestines soiled with stool. PW1 told the court that the deceased was crying of stomach pains whenever he turned round.

25. The Accused in his defence told the court that on 5/2/2023 he woke up at 7.00 Am and went to Kowino’s house to drink alcohol. He stated that Owino gave him work to do at a fee of Kshs. 1,000/= . He worked until 5.00 Pm and then started drinking alcohol until 7.30 pm. The Accused never called Owino to testify in support of his case. The Accused’s testimony is a mere defence. I find the accused’s alibi did not shake the overwhelming evidence of the prosecution which clearly placed him at the scene as the perpetrator of the murder of the deceased.

26. In the premises, there is a clear manifestation of malice. Were it not for the deceased going into PW3’s home for safety, the Accused would have inflicted more injuries on the deceased. It is therefore this Court’s finding that the prosecution has established malice aforethought in this matter.

27. In view of the foregoing observations, it is my finding that the prosecution has proved its case against the accused herein beyond any reasonable doubt. I find the Accused herein Martin Omondi Otieno guilty of the offence of murder and is hereby convicted therefor accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 7TH DAY OF FEBRUARY, 2025.

D. K. KEME

JUDGE

In the presence of:

Martin Omondi Otieno.....Accused

Ooro E..... for Accused

M/s Kerubo.....for Prosecution



Ogendo..... Court Assistant

