



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Otieno (Criminal Case (MURDER) E033 of 2022)
[2025] KEHC 1887 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE (MURDER) E033 OF 2022**

DK KEMEL, J

FEBRUARY 7, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

STEPHEN OCHIENG OTIENO ACCUSED

JUDGMENT

1. The accused herein Stephen Ochieng Otieno was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars are that on 11th December 2022 at about 0446 hrs at Siriwo sub location, Gem location, Gem sub county within Siaya County, he murdered Elvis Omondi Onyango.
2. The prosecution called a total of six witnesses in support of its case.
3. PW1 Simon Okoth Obiero testified that he is a resident of Kagilo sub location, Gem Sub County and a retired Assistant Chief. He stated that on 11/12/2022 one Moses Demba came to him at 6.00 Am and requested him for transport to take a patient to hospital. They went together to Masinde village where he found the said patient lying beside the road and that the patient was Elvis Omondi Onyango who could not talk but only groaned. That the patient had cut wounds on the head that was bleeding. That there was a crowd of people he did not recognize who assisted him put the patient in his vehicle. He rushed him to Mutumbu Health centre in the company of one Victor. That they missed the nurses at the health centre so they took him to Yala sub district hospital where he was treated and admitted. That he left him there and returned to his home. That three days later, he was informed that the said Elvis had died.

On cross examination, he stated that he had been the assistant chief of Kagilo for 27 years. That he did not know Elvis nor did he know the accused before the court. That Masinde sub location neighbours Kagilo and that he did not find it strange when Moses came to him because the victim was found three kilometres from his home.



4. PW2 William Wasonga Omuombo testified that he is a resident of Gogo in Gem Sub County and that the deceased Elvis Omondi Wasonga was his son. That on 2/12/2022 he went to Yala mortuary and identified the body of the deceased for a postmortem examination. That he did not know the accused before court. There was no cross examination.
5. PW3 Corporal James Owino testified that he is the in charge Sawagongo Police Post. That on the Sunday of 11/12/2022 at about 6.30 Am, four men Richard Omollo, James Okinda, Maurice Omondi and Stephen Ochieng reported at the post. That Maurice Omondi reported that they were at a disco at their home in Siriwo sub location and in which Stephen Ochieng Otieno was in attendance. That at about 4.00 Am, Stephen walked out in the company of his friend Sipa as Maurice watched. That they immediately came back and that Stephen attacked Elvis Omondi with a panga and ran away. That when he at Stephen Otieno Ochieng, he had bruises, fresh blood and wounds. That he asked Maurice where the victim was and who informed him that he had been rushed to Yala hospital by some friends and that he was not in a good condition. That he passed the information to OCS Yala police station. That the OCS instructed him to organize how the accused could be taken to hospital. That he was taken to hospital and returned back at 9.00am. That the OCS again instructed him to hold the suspect temporarily. That he contacted the parents of the victim who had gone to the hospital as they hailed from Sirembe sub location. That he contacted the Assistant Chief Sirembe and briefed him of what had happened to Elvis Omondi Wasonga from his area. He requested him to contact the father of the complainant /victim. He responded that the father was away and that it is only the uncle one Willis Ochola who confirmed that he knew the victim/complainant Elvis Wasonga. That he advised him to rush to Yala hospital where the victim (Elvis) had been admitted. That he passed the information to the OCS who instructed him to have the accused escorted to Yala police station which he did.

That on Monday 12/12/2022, the uncle of the victim called him and informed him that his nephew had died. That two days later, Maurice took to him a panga at Sawagongo police station while claiming that it had been found at the accused's house and was the one the accused had used to attack the deceased. That he kept it as an exhibit. That he recorded his own statement and handed it over to the CID together with the panga as exhibit. He marked it in court as MFI 1. He identified the one he arrested as the accused in the dock.

On cross examination, he stated that it was on the Sunday of 11/12/2022 at 6.30am when a group of people came to his station. That he wrote his own statement. That the said accused assaulted the deceased at 0430hrs. That he did not visit the scene. That he knew the area but didn't know the home. That after assaulting the deceased, the accused ran away. That the victim was immediately rushed to hospital. That the accused had visible injuries and when asked about them he didn't say anything. That it was Maurice who brought the panga after two days while claiming that he got it from the accused's house. There was no re-examination.

6. PW4 Maurice Omondi Demba testified that he is a welder from Siriwo. He stated that on 10/12/2022 he was at home for his father's memorial service. That the following morning on 11/12/2023 at 4.46 am some visitors who had slept over had started to leave. That at around that time two young men came to their home and assaulted a certain lady and left. That five minutes later, they returned to the home and one Sifa who had a torch spotted one Elvis who was standing next to PW4's brother's house. That the said Sifa then turned off the torch and that Ochieng cut Elvis with a panga on the head. That Elvis staggered and fell down. That he ran to him to inquire as to why he had been assaulted but Elvis informed him that he did not know the reason why he had been attacked. That he crossed the fence and went to the home of Sifa who was their neighbor and found him holding the blood stained panga and that he snatched it from him. That he held Sifa and brought him back to his home in the company of his mother. That he tried to get Elvis on a motorbike to take him to hospital but he was too weak.



That they contacted the assistant chief who had a tuktuk to rush him to hospital. That he together with James Okinda and Richard Odongo apprehended the accused Otieno Ochieng and took him to the police station, while Sifa managed to escape.

That he identified the blood stained panga with a rubber handle in court as MFI-1. That Elvis died one day later. He identified Otieno as the accused in the dock.

On cross examination, he stated that Otieno and Sifa were seated next to his brother's house and that they assaulted the lady a few metres away from where he was. That music was playing and that Otieno was ahead of Sifa when they spotted Elvis. That Elvis was in combat jeans, white vest and a black sweater. That the accused was in a black trouser and a jacket plus a Marvin. That Sifa was in a black trouser and a yellowish top. That when they assaulted the lady, it was Sifa who was holding a panga. That it is Sifa who slapped the lady. That when they returned, the accused is the one who carried the panga. That in the company of James and Richard, they went to accused's home at 7.00 Am and arrested him. That they forgot the panga at home but he later took it to the police station. That he knew the accused very well since he was young but did not know Elvis until when he visited him in hospital and that he heard his father call him by that name. That he did not know where the accused got the marks on his face.

On re-examination, he stated that since the accused was young he saw him with scars on his face which he didn't get that day.

7. PW5 No. 113559 PC Collins Kemboi testified that he is from DCI Gem. That he was instructed by the OCS Yala to take up a case of grievous harm turned murder that had been reported vide OBS12/12/2022. That Elvis Omondi Onyango had been assaulted by one Stephen Otieno and Sifa on the morning of 11/12/2022. That the victim was taken to Yala level four hospital and the accused detained at Yala police station. That the accused had been arrested by PW4 and others. That he recorded witness statements and recovered the murder weapon which was a blood stained panga, produced as Exhibit 1. That they got custodial orders to do a mental assessment which indicated that the accused was fit to plead and that a post mortem examination was conducted on the deceased's body. That he was present during the post mortem examination and that he identified the report which was marked as MFI 2. That he then charged the accused with the offence of murder.

On cross examination, he stated that he was the investigating officer. That he relied on the witness statement that the panga was the murder weapon. That the whereabouts of Sifa are not known to date. That the murder weapon was given to him on 12/12/2022. That the accused who was at Yala police station alleged that he had differences with the deceased.

8. PW6 Dr. Patricia Chacha testified that she is a medical officer at Yala sub county hospital, with a bachelor's degree in clinical medicine (2020) and has been a doctor for three years. That she had a postmortem report done by her colleague Dr. Bruno with whom they have worked together for one year but who is on transfer to Bondo sub county hospital. That the post mortem report of one Elvis Omondi Wasonga is dated 21/12/2022. The post mortem was done approximately a week after death. The body had bruises on the shoulder and a 6 by 6 cm deep cut wound on the head, skull fracture, deep cut wound on left hemisphere. That he formed an opinion that the cause of death was severe brain injury secondary to deep cut wound by a sharp object and that he signed the form. Postmortem report produced as Exhibit 2.

No questions on cross examination.

9. At the close of the prosecution's case, this court found that a prima facie case had been established by the prosecution and that the accused was therefore put on his defence. He opted to tender a sworn testimony.



10. DW 1 Stephen Ochieng Otieno testified that he is the accused and a vegetable farmer. He stated that on 11/04/2022 he was on his way home when he met the deceased who snatched his mobile phone and hit him on the head. That he was rushed to the hospital where he stayed there for four months. He stated further that thereafter, there was a funeral at their neighborhood on 11/12/2022 where the deceased warned him not to visit his place. At that time, he was with a friend called Sifa and they decided to go to the funeral. Later on, as they left the funeral, the deceased slapped him with a panga on the face. That his friend Sifa went and fetched a panga which he handed to him and that he threw it towards the deceased and he went home. That he had no intention to kill the deceased. That he did not report to the police over his being assaulted by the deceased previously since he opted to forgive him.

The following day, he was arrested. That the deceased was in the company of Kevin and Omondi. That he recorded his statement with the police and that he knew the deceased well. That the deceased was heavy built than him. That he did not intend to kill him or revenge on him. That he did not report when the deceased assaulted him.

On cross examination, he stated that they were at a disco matanga on 11/12/2022 and that the deceased chased them out of the funeral without a reason. That he was cut by the deceased which led to his hospitalization for four months. That his grandfather advised him not to lodge the case of his assault against the deceased. That he did not have his treatment notes of his attack on 11/4/2022. That it was not true that a mob attacked him. That he learnt later after his arrest that he had cut somebody with a panga. That he does not know from where the panga was recovered.

On reexamination, he stated that he was not present during the recovery of the panga.

11. That marked the close of the defence. Learned counsels herein filed and exchanged written submissions.
12. I have considered the evidence tendered by both prosecution and defence as well as the rival submissions. It is the duty of the prosecution to prove the guilt of the accused and which must be beyond reasonable doubt. See *Woolmington Vs Dpp* [1935] AC 462. I find the issue for determination is whether the prosecution discharged the burden of proof against the accused.
13. The offence of murder is defined in Section 203 of the *Penal Code* as:
- Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
14. The burden placed upon the shoulders of the prosecution is to prove the guilt of the accused beyond any reasonable doubt. The prosecution must establish the following essential ingredients:
- 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 was the assailant.
15. As regards the proof and fact of death, the evidence of the pathologist (PW6) left no doubt about it. The said pathologist confirmed that there were bruises on the right shoulder as well as a deep cut wound on the head and who formed the opinion that the cause of death was severe brain injury secondary to deep cut wound by a sharp object. The autopsy report was produced as P Exhibit 2. I find that the prosecution proved this ingredient beyond reasonable doubt.



16. 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 had lived a normal life without any problems with his health and that he did not deserve to lose his life. The injuries inflicted on the deceased left no doubt that the same would cause his death. The assailant had no legal right or excuse to eliminate the deceased. I find that the prosecution proved this ingredient beyond any reasonable doubt.
17. As regards the third ingredient on whether the accused was the assailant, the evidence presented left no doubt that the accused was placed at the scene of the crime. PW4 testified that they were at the funeral of his father and in the morning of 11/12/2022 he saw the accused assaulting the deceased with a panga which he later took to the police as exhibit. That he together with the assistant chief escorted the deceased to Yala hospital. That later together with others arrested the accused and took him to the police station. This evidence by PW4 was not rebutted by the accused but rather the accused corroborated the testimony of the witness (PW4). The Accused testified that indeed, he assaulted the deceased but that he did not intend to kill him. This evidence directly placed the Accused at the scene as the perpetrator of the crime. I find this ingredient was proved by the prosecution beyond any reasonable doubt.
18. On whether there was malice aforethought was proved, the same is provided for in Section 206 of the *Penal Code* 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.
19. PW4 testified that “the following morning on 11/12/2023 at 4.46 AM, some visitors who had slept over had started to leave. That at around that time two young men came to their home and assaulted a certain lady and left. That five minutes later, they returned to the home and one Sifa spotted with a torch one Elvis who was standing next to PW4’s brothers house. That the said Sifa then turned off the torch and that Ochieng cut Elvis with a panga on the head. That Elvis staggered and fell down.”
- The said PW4 further stated that he took the blood- stained panga to the police station and that he identified it in court and which was marked as MFI 1. PW5 likewise stated that he relied on the statements of the witnesses and produced the panga (a murder weapon) as Exhibit 1.
20. The Accused in his defence evidence stated that he had earlier been assaulted by the deceased forcing him to be admitted in hospital for four months. Even though the accused did not produce the medical notes, I have no doubt that indeed the incident must have taken place. It is this incident of the deceased having assaulted the accused previously which I find brewed anger and malice on the part of the accused herein to the point that he plotted to revenge. The memorial service at the home of PW4 provided a perfect opportunity for the accused to attack the deceased. The accused in his evidence stated that he



threw the panga in the direction of the deceased and that he did not know that it hit him. It is clear that the accused had the intention of harming the deceased as a way of avenging his injuries which he sustained earlier on 11/4/2022. The eye witnesses saw the accused attacking the deceased and then running away and that he was apprehended at the scene of crime and handed over to the police station. I am therefore satisfied that the accused had the requisite malice aforethought and executed the same when he assaulted the deceased. The accused in his evidence further stated that he had earlier hidden the panga under a tree which was retrieved by his companion Sipa who is still at large and used it to injure the deceased. The accused further stated that he had no intention to kill the deceased as he learnt afterwards that he had cut somebody with a panga. I find the prosecution proved this ingredient beyond reasonable doubt.

21. In view of the foregoing observations, it is my finding that the prosecution proved all the elements of the offence of murder beyond reasonable doubt. The defence evidence did not shake that of the prosecution which is overwhelming against the accused. I find the accused Stephen Ochieng Otieno guilty of the offence of murder and he is hereby convicted accordingly.

Orders accordingly.

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

D. KEMEI

JUDGE

In the presence of:

Stephen Ochieng Otieno.....Accused

Were.....for Accused

M/s Kerubo.....for Prosecution

Ogendo.....Court Assistant

