



**Republic v Onyango & another (Criminal Case E024 of 2023)
[2025] KEHC 7213 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 7213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE E024 OF 2023
A. ONG'INJO, J
FEBRUARY 6, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ANTONY ONYANGO 1ST ACCUSED

KEVIN OCHIENG 2ND ACCUSED

JUDGMENT

1. The Accused persons Antony Onyango and Kevin Ochieng were charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars are that on 24th day of August 2023 at Ramoya village Suna South Sub-Location Suna Lower Location in Migori County the Accused murdered Michael Ouma Abienda.
3. The Prosecution availed 7 witnesses in support of the charge of murder and when placed on defence the accused persons gave sworn evidence and called 1 defence witness.
4. PW1 Molvin Achieng Magobo testified that she came from Ramoya village, Suna West and that she was a farmer. That on 24/8/2023, at about 7:30am she had gone outside the home to get the cows and on return she found her door open. She asked who was there twice and there was no response. The third time when she asked who was there, the person grouted "him". When she asked who he was and he not speaking, she screamed. She said she did not see the person because it was dark in the house. When she raised alarm somebody spoke from inside and asked "Daughter of Gwasi don't you know me?. That she told the person she was not from Gwasi. She wanted to know who the person was but he did not respond. She continued to raise alarm and the first people to go to the scene were Anthony and Kevin. They asked what the problem was and PW1 told them that somebody was in her house. Antony and Kevin were known to her as she bought the land from Kevin's father in 2016 and Antony



is Kevin's Cousin, their fathers are brothers. PW1 said that from her home to Accused persons home is like from the court to the road about 50 meters.

5. That when the Accused persons entered the house they asked who he was and why he was there and if he knew he was in somebody's house but at first, he did not respond. The second time, he said that he was from Wiga. When they tried to pull him from where he was, he overpowered them they gave him way and he ran out. PW1 said the Accused persons chased the stranger for a few minutes and came back. When the person came out, PW1 saw him because Anthony and Kevin had a torch. She said he had a faded blue jeans trouser, bare chested and bare foot.
6. It was PW1s further evidence that when the Accused persons returned after chasing the stranger they helped her tether the cows and told her that the person headed towards the road.
7. That the Accused persons left her making super for my children and the next morning the village elder, Wilson went to her home at about 8:00am and asked her whether she knew the person who left her house last night had been found dead. That the village elder told her to go and record her statement with the police. That she went with the village elder where deceased's body was found in a cassava plantation. PW1 said she did not know the owner of the land.
8. PW1 said she did not know the deceased person and that the body was about 2-3 kms away- a distance like from the court to the hospital (about 500 meters). That they accompanied Police who took the body to the mortuary whereas her and the Accused persons were taken to Oruba Police Station. PW1 said the person found dead was naked with no clothing. PW1 said she knew Julita Adhiambo and even knew her home which is about 10 meters apart (estimation is over 50 meters).
9. In cross – examination PW1 said she had known Kevin and Anthony since 2016 about 7 years and that they have not been suspected of any assault and she could not tell if they had been charged before for assault or murder. PW1 said that when the accused went to her home, they were not carrying any weapons. That they tried to forcefully remove the deceased from her house but they did not beat him. That as they chased the person, the accused were not uttering any threats or words and that they did not know the deceased. The accused chased the person and came back and so there can have been no conflict between them.
10. They were not carrying anything when they returned. They were as clean as they left chasing, the deceased. PW1 testified that when the village elder called accused persons they did not run away and they could not have killed deceased because they had no weapons
11. When cross examined by the court PW1 said she had closed the door with a lock. She said that wo minutes can take me from this court room to the gate.
12. PW2 Wilson Onyango testified that he was the village elder for Ramoya A. That on 25/8/2023, in the morning he was ploughing with cattle at his home, when he received a phone call at 8:30am from Jack Agure who told him that a dead body had been found in his area of jurisdiction. He told him to go and see. He went to the scene and found the body lying face down in Jack's farm which he had leased to somebody who had planted cassava. That at first he went there alone and observed the body which was naked. That there were spots of blood on the head but he did not check the whole body.
13. PW2 said the scene was disturbed as if people had stepped there a lot. PW2 said the nearest homestead belonged to Odonyo. Odonyo was away but the wife was around. Pw2 said further that from PW1s home to the scene where body was, was from the court to Huduma center or from court to police station about 100 meters.



14. PW2 said it was PW1 who was at home and he informed her and she said that deceased had strayed into her house at about 6;30pm to 7;00pm, when she went to untie her cattle and was seated on a chair, bare chest and had a jeans trouser. That when she raised alarm the Accused persons responded and went with a torch.
15. PW2 called the chief who went to the scene with police and that is when he left. PW2 did not know the deceased person. He said the body was near the river and the nearest house was Odonyo's but other homesteads were far.
16. He said from Odonyo's house to where the body was, there is a road in between the home of Odonyo and where the body was and that the body was in the second farm from the road.
17. PW2 learnt that deceased home is Jumbo -Suna West Wasibeta, near Pin Oyier on the way to Tanzania and he was very far from his home as he came from area of jurisdiction of a chief called Nyarumbe.
18. In cross examination the village elder said he had known the accused persons from the childhood but he had never heard that they had assaulted or murdered. PW2 did not get any weapons at the murder scene except there were cassava stocks and another stick from a tree. There was no panga at the scene and nobody claimed to have witnessed the murder. He said that as alarm was raised and the person was running boys coming from football responded. PW2 said he could not tell whether accused was with the deceased and when the deceased died.
19. PW3 Julita Adhiambo also testified that she came from Ramoya village Suna West sub –County and she was a farmer. That on 24/8/2023, at 2;00pm, she had gone to church and left church at 9;00pm. The next morning, she went to her farm and noticed lots of footsteps in cassava farm. That after a short while, she saw village elder pass by and then heard that a dead body had been found in a different farm but she did not go there because she was scared. She said the farm where the body was found was a distance similar to the one from court to the hospital gate. PW3 said she knew Molvin Achieng but did not know her home. She also said she did not know the person whose body was found in the farm.
20. PW4 Dr. Ian Omuo Medical officer practicing at Migori County Referral Hospital produced postmortem form reference No. 042582023 in reference to body of Micheal Ouma Abienda. He conducted the PM at Migori County Referral hospital on 6/9/2023 and formed the opinion that cause of death was hemorrhagic shock due to multiple injuries or excessive injuries. He issued Death certificate No 1516906, filled and signed the PM which he produced as evidence.
21. It bears stamp of the County Referral Hospital. Dr. Omuom produced the report as evidence.
22. PW 5 Lilian Auma the wife of the deceased said she was 20 years old and got married to deceased in 2015 when she was 16 years. She said that at the time they got married the deceased was well and they lived with him for 4 years and he became mentally sick on and off. She said that whenever he was sick he would be making a lot of noise, laughing a lot and play like a child and wondering about but he was not violent. That they would take him to hospital and he would be given some drugs. She said the deceased was always at home and they used both home and hospital treatment. PW5 said that she took care of the deceased alone as her mother in-law was elderly. That the deceased could be normal after being given injection and he would attend to his duties and on the day he left he had gone to the farm and did his duties. That he left on 17/8/2023 when he went to the river after coming from the farm and did not return. PW5 described the clothes the deceased wore as jeans trouser and white T-shirt. That he disappeared and after 3 days the deceased sister called to say that he was at Uriri but when they went to Uriri with her mother in-law the sister said Micheal had gone missing again. That after 2 days they heard that somebody was killed at Ramoya. They went to Ramoya and found the police had escorted



- the body and taken to mortuary. On visiting the mortuary they identified the body which was naked and was badly injured and had changed appearance.
- PW5 said the deceased had a cut on the upper head, back and stomach.
23. That Postmortem was done and body was taken for burial. PW5 said Michael was very loving, peaceful and just used to laugh.
24. PW5 said she saw the Accused persons at the police station and they were not known to her. She said in cross –examination that sometimes the deceased was mentally ill and he was he would walk but he had never gotten lost from home. He would go to the market and come back home. She said she used to look after him in market and take him back home but did not follow him whenever he went. Sometimes he used to go to his brothers’ homes. He had never attacked anybody. She said they also used herbal treatments.
25. PW6 Ezra Okeyo Omani a resident at Nyarambo in Suna West and a farmer testified that the deceased was his brother’s son. He said he had last seen him on 17/8/2023 and he was well because we went to the farm dug and came back home.
26. PW6 said sometimes the deceased had mental problem but when they went to the farm there were no signs of the illness. Sometimes he would go leave, walk about and return. PW6 said the deceased went missing and he saw his dead body on 25/8/2023 at the hospital. His body had a lot of injuries, blood on the head with cuts.
27. That on 6/9/2023, he was at the hospital where he identified the body to the doctor who did Post Mortem and then took the body on 26/9/2023. PW6 said he did not know the accused persons.
28. PW 7 No.1118 P C Robert Alumasa of Rongo Police Station testified that he was formerly at DCI Suna West and that on 24/8/2023 at 9.00am, while at station his boss called CIP Hager Owuor informed me of an incident and he was asked to proceed to the scene. The scene was in a cassava farm at Ramoya village. That on arrival at scene they found a dead body which had marks of whips all over the body. That the farm was ½ acre and body was on the edge of the farm a kilometer from the main road. That he was with CIP Onyango and other officers who assisted processed the scene by taking photographs at the scene and then took the body for postmortem at mortuary.
29. PW7 said he came to learn that the deceased was last seen in house of one lady called Molvin; that the lady screamed for help after deceased sought help from her house. PW7 said he learnt that deceased was mentally ill and may have just been walking around. From the scream, the 2 accused responded dragged deceased from the house and chased deceased away. They caught up with him and deceased’s body was later found in the farm. That from Molvin’s house to the scene where there was a struggle was about 200 meters. That Molvin lived about 100 meters from accused house. PW7 drew a sketch map of the scene – MFI-4 Sketch map produced as PExhibit He said he did not recover any weapon as there were many people at the scene by the time I arrived. PW7 established the deceased home was about 8km away, it was far. He said the Accused persons were arrested on same day after eye witness saw them.
- He said he was present when Doctor Umuom conducted Postmortem.
30. In cross examination the investigating officer said he found villagers at the scene but nobody came out to say they witnessed the murder as most people said it was evening hours and they could not attend.
31. He said the Accused were not present when he interviewed witnesses and they were pointed to him by a person. He said the Accused persons lived in a different homestead. He also said the Accused’s clothes were not blood stained. He searched their houses but did not find anything with stains.



32. After investigations it was resolved that Molvin be treated as a witness. PW7 said he never wrote that the deceased was identified by one of the Accused persons and he was not certain who murdered the deceased but accused was last seen with deceased.

Defence

33. When the accused persons were placed on defence they gave sworn statements. The 1st Accused said that on 24.8.2023 he was at home when at 7.30pm he heard Molvin screaming and he rushed to go and see what had happened to her. That on his way he met Kevin at the gate and they proceeded to Molvins home. That on arrival they met Molvin coming from her home while screaming and saying someone had entered her house. Molvin explained to them that she had gone to bring her cows from the field and on return she found the door to her house was open and yet she had left it closed. That when she called out to know who was inside there was no response but when she wanted to enter she saw someone seated on a chair next to her bed. That the person who was in the house was not known to Molvin and he challenged her and that is when she raised alarm while running away from the home.
34. 1st Accused said it was already dark and he used the torch on his phone to see who was in the house. That when they inquired who the person was he said he was from Wiga Ward and again changed and said he was from Kadika. That they told him to leave and he started walking towards them and they gave him way. A1 said the person did not have a shirt and was bare feet. That at the door step he started running and entered the cassava plantation nearby.
35. A1 testified that after the person who strayed into Molvis house had run away they advised her to take her cows into the compound and they assisted her to tether them before leaving. That he left as Kevin was entering their home which was along the way as he also proceeded home. That on the same night A1 visited his elder brother at his home before retiring to bed at 9.30pm
36. A1 testified further that the next morning he woke up and went to the farm and at 8.30am a child was send to call him. He went home to find it was the village elder Wilson Obembo Onyango who was looking for him and was at Molvins home. He proceeded to Molvins home and found the village elder together with Kevin A2 herein. That the village elder inquired what had happened in Molvins home and they explained that they responded to the alarm she had raised when someone strayed into her house. That he told the village elder that the person who strayed into Molvins house was not known to him and that he was not aware he had been killed. That the village elder led them to where the body of a dead man was. He said the body was stark naked and he could not tell if it was the same person who ran from Molvins house. He said the dead body was found past the cassava plantation. That DCI Officers processed the scene and searched their homes but nothing was recovered. That when they went back to the scene they assisted to carry the body into the police vehicle and accompanied police to the post and they were detained for 14 days pending investigations. A1 said that from their home to the scene is 300m.
37. The 2nd Accused also gave his sworn statement and reiterated what A1 said how they responded to alarm raised by PW1 when a stranger strayed into her house. A2 said that they found PW1 outside her compound and on inquiring who the person was the stranger also asked who they were. That A1 told the person to leave PW1s house. That the stranger got out and started running and they shone torch on him as he ran out and into the cassava plantation.
38. A2 testified further that when he went home his father returned and inquired about the noise he heard near the cassava plantation and he explained that someone had strayed into Molvins house and they chased him away. That after the mother returned and prepared supper they ate and went to sleep after watching news.



39. According to A2 the following day while he was at the farm spraying his vegetables he received a call from the village elder who instructed him to go to Molvins compound. That on arrival he was told to wait for A1 so they explain about the person they removed from Molvins house the previous evening. That they told the village elder they did not know the person and they did not know he had died. That the village elder led them to where the body was and they found the Chief and DCI officers at the scene and they were asked if they knew who killed the person and they said they did not know. That the Chief told them to assist police carry the body into the vehicle and they were taken to Oruba Police Station as the body was taken to the mortuary. That they were detained for 21 days as investigations were going on before being arraigned in court.
40. The 2nd Accused said that he was alone with 1 when they responded to alarm raised by Molvin. He said Molvins compound is big and that her house is one room which is separated by a curtain. He said they were in PW1s compound for around 15 minutes. He said further that the deceased body was found about 300m from PW1s home. He said they did not pursue the stranger after he left Molvins home and they did not kill the deceased.
41. DW3 Samwel Otieno Buko the father of A2 testified and said that on 24.8.2023 at around 7.30pm he returned home from work and as he was about to get home he heard some noise on the direction he was going. That he was riding a motor cycle and he stopped when he saw people pursuing someone. That he did not identify the people who were running into the farm nearby. He said that he just proceeded home and remained at home and after his wife returned and prepared food they went to sleep at 10.00pm until the following morning. He said his son Kevin had his own cottage within the same compound. DW3 said his son did not commit murder.
42. DW3 said in cross examination that the nearest home to the scene is Josephs farm which across the road from the scene, DW3 said he had supper with A2 and A2 did not tell him he assisted to remove a stranger from Molvins house. He said he was not present and he cannot tell if Kevin and Antony killed the deceased.
43. The Defence submissions dated 14th November 2024 are to the effect that the Accused persons offered a plausible defence which displaced the prosecution evidence and created doubt which can only be interpreted in favour of the accused persons.
44. It was submitted that there was no direct evidence linking the accused persons to the murder and the circumstances relied upon by the prosecution does not meet the standard for relying on circumstantial evidence to convict the accused persons.
45. The Defence Counsel argued that there was no evidence that the accused persons were the last to be seen with the deceased person on the material night as the deceased might have met other people on the way. It was contended that the prosecution witnesses left room for assumption.
46. The Court of Appeal holding in Joan Chebichii Sawe v Republic [2003] eKLR was cited in support of the defence argument that conditions to satisfy the test circumstantial evidence had not been met by the prosecution.
47. The holding by Kimaru J in Robert Khamala Nyongesa v Republic [2013] eKLR was also cited where it was held that in order to justify circumstantial evidence, the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of any other explanation upon any other reasonable hypothesis than that of guilt.
48. The Defence Counsel submitted that the Accused persons explained clearly how the events unfolded until they were arrested and charged and there was nothing sinister or adverse which can be drawn



from their conduct and from their defence. The defence urged the court to acquit the accused persons as anyone else could have committed the murder of the deceased and there was no eye witness to the murder.

49. The Prosecutions submissions are dated 7th December 2024 are to the effect that the Accused persons chased the deceased from PW1s home and unfortunately the deceased was found dead the following day in the cassava plantation. That in the circumstances the prosecution had placed the accused persons on the scene of the murder within the cassava plantation of Julieta Adhiambo where the Accused persons chased the deceased into.
50. The Prosecution further submitted that it is the Accused persons who were last known persons seen chasing the deceased to the cassava plantation and that the following day his body was found with many cut wounds. The Prosecution argued that the disturbance at the cassava plantation was evidence the deceased was killed there and there is no explanation how the body got to the 2nd different plantation after the Accused persons chased him into Julieta's plantation.
51. The Prosecution acknowledged that the Accused persons did a noble act of responding to PW1s distress call but their action led to the death of the deceased.

The court was urged to find Accused persons guilty.

Analysis and Determination

52. In consideration of the evidence of the 7 Prosecution witnesses evidence, the Accused persons sworn statements as well as the evidence A2s witness and the rival submissions this court is to determine whether the prosecution has proved the ingredients of the offence of murder under Section 203 of the [Penal Code](#) beyond reasonable doubt.
53. Section 203 of the [Penal Code](#) under which the Accused person was charged provides as follows:
- “ Any Person who of malice aforethought causes the death of another person, by an unlawful act or omission is guilty of murder”
54. In the case of Anthony Ndegwa Ngare Vs Republic 2014 Eklr, the elements of the offence of murder were stated to include;
- i. That the deceased died;
 - ii. The death was caused by an unlawful act or omission;
 - iii. That the Accused person directly or indirectly participated in the commission of the alleged offence;
 - iv. That there was malice aforethought
55. There is no dispute that the deceased herein Micheal Ouma Abienda died.
56. It is also not in dispute that the deceased died as a result of an unlawful act. His body was found in a farm in the morning and Dr. Ian Omuom of Migori County Hospital upon examining the body observed multiple cut wounds on the upper part of the left eye with rough edges extending to the skull; mid occipital cut wound 6cm long with smooth edges extending to the skull; cut wound on the left arm with smooth edges on posterior aspect; cut wound on right arm 4cm long; right scapular abrasion 5 x 6cm; cut on the left infra-scapular region extending to the rib cage; 8cm cut on right thigh posteriorly and cut wound on posterior of the left leg. The injuries observed by the doctor and other prosecution witnesses were not accidental or self-inflicted and were therefore caused by an unlawful act.



57. The dispute is whether the Accused persons directly or indirectly participated in committing the unlawful act that caused the death of the deceased.
58. From the evidence of PW5 the wife of the deceased and PW6 the deceased suffered from mental illness on and off from 2019 and they used to take him to hospital from time to time. PW5 said he was well until on 17th August 2023 when he went to bath in the river and did not return home. That on the 3rd day his sister called to say he was in Uriri. That when they got to Uriri they found he had gone missing again and 2 days thereafter they got information that somebody had been killed in Ramoya. PW5 went and identified the body as that of her husband. She said the body was naked. She said the deceased had never attacked anybody.
59. From the evidence of PW5 and PW6 the deceased suffered from mental illness and that may have been the reason he strayed into PW1s house and when the Accused persons responded to the alarm raised by her and found the deceased in the house he was incoherent and gave conflicting information as to where he had come from and even referred to PW1 as if he knew her.
60. PW1 had reason to be scared on finding a stranger had accessed her house and was seated comfortably on a chair next to her bed whereas she had left her door closed when she went to get her animals from the field. PW1 said the accused persons responded to her screams and chased the stranger out of the house and he ran into the nearby cassava plantation and they returned after 2 minutes. That after helping PW1 to bring the animals and tethering them in the compound they left. PW1 said the Accused persons had no weapons when they went to her home and could not have killed the deceased as they returned immediately after chasing the stranger away.
61. It was not in dispute that the Accused persons responded to the alarm raised by PW1 when she found a stranger in her house but it is in dispute that the Accused persons went beyond PW1s gate after chasing the stranger into the cassava plantation, had a struggle with him, inflicted injuries on him and then took him across the road to the 2nd farm from the road. According to the village elder, as alarm was raised boys coming from watching football also responded and he could not tell when the deceased was killed. Nobody witnessed the murder being committed and therefore what the prosecution relied on was purely circumstantial evidence based on the fact that the Accused persons had responded to alarm raised by PW1.
62. This was quite an unfortunate death being that the deceased was of unsound mind and needed protection as a person in need of care but was so far away from his home where his relatives knew his mental condition. When he strayed into PW1s home late in the evening in a village where he was not known it must have been suspected that he was not there for any good intention and he suffered fatally in the hands of people who have no regard for the rule of law. In a society where people are civilized and have respect for the rule of law and know that life is sacred even where a person commits an offence they are supposed to be arrested and presented before court. This did not happen in this instance and it is a sign of backwardness and barbaric behavior in a modern society.
63. In consideration of the village elders evidence that there is a possibility the deceased was attacked and killed by other people other than the Accused persons and in consideration of PW7s evidence that he was not certain who murdered the deceased save that the Accused persons were the last to be seen with him this court finds that there is doubt in the prosecutions case which doubt is resolved in favour of the Accused persons and they are acquitted accordingly.

Right of Appeal 14 days explained.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF FEBRUARY, 2025.



.....

HON. JUSTICE A. ONGINJO

JUDGE

In the presence of: -

Hon Anne Onginjo

