



**Republic v Omolo alias Khai & another (Criminal Case E001 of 2021)  
[2025] KEHC 1441 (KLR) (3 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1441 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E001 OF 2021  
RE ABURILI, J  
FEBRUARY 3, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**AYUB OGADA OMOLO ALIAS KHAI ..... 1<sup>ST</sup> ACCUSED**

**AMOS OGADA OYIER ALIAS GENGE ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons, Ayub Ogada Omolo alias Khai and Amos Ogada Oyier alias Genge were mentally examined on 19.1.2021 and 22.2.2022 respectively and found fit to plead and stand trial for the offence of murder. They are charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the Information dated 14<sup>th</sup> of January 2021. Particulars of the offence are that on the night of 26<sup>th</sup> and 27<sup>th</sup> December 2020, in Usare Village, North-West Kisumu Sub-location, Kanyawegi Location, in Kisumu West Sub County within Kisumu County, they jointly murdered George Otieno Odao alias Abiola.
2. Both the accused persons pleaded not guilty to the Information for murder and the case went on to full trial. The plea for the 1<sup>st</sup> accused was taken on 21/1/2021 while the plea for the 2<sup>nd</sup> accused person was taken on 31/3/2021 after he had undergone a second mental assessment and a report filed into court to the effect that he was mentally fit to stand trial. Accused persons were each released on bond of Kshs. 250,000 as subsequently reviewed by the court, with a surety of the same amount.
3. The prosecution called ten (10) witnesses to support its case. Placed on their defence, each accused testified on oath and called no witness.
4. The prosecution case is as follows:



## The Prosecution's Case

5. PW1, Silas Odour, a form four student at Usare Secondary School, South West Kisumu, and aged 18 years old testified that on the 1<sup>st</sup> day of January 2021 at 10.00 am, he was at his grandfather Albert Oyier's house, who is now deceased, when he spotted a guava fruit which he wanted to pick. He then noticed flies coming out from the house of Amos Ogada which had no door. He stated that he moved closer and was shocked to see the body of a human being by the neck and hand upon entry which prompted him to call his father PW2 who came with the mother to PW1 to see what he had seen. He identified the 2<sup>nd</sup> accused in court as being the owner of the house wherein he saw a dead body's neck and hand. He stated that the 1<sup>st</sup> accused was their neighbour.
6. Upon Cross-examination, the witness stated that Amos Ogada was his blood uncle but that he did not know the deceased. He stated that Amos Ogada, his uncle, lived alone in the mud house wherein the dead person was to be found and which house had no door. He reiterated that after seeing the body, he went to inform his father.
7. In reexamination, he stated that he only came to know who the deceased after hearing from neighbours.
8. PW2, Everlyne Akinyi, a small-scale business lady at Usare testified that she knew both the accused persons and that the 1<sup>st</sup> accused person was her brother-in-law while the 2<sup>nd</sup> accused person was her cousin. She stated that on 28<sup>th</sup> December 2020, Ayub went to her house and asked for a cigarette. She stated that Ayub, the 1<sup>st</sup> accused person, told her that he had killed a person and that he was going to report to the Assistant Chief. Later, on 29<sup>th</sup> December 2020, both Ayub and Amos went to her house and when she requested Ayub to confirm the information he had given her previously, Amos stated that no person had been killed but only that 'they had killed people with alcohol at Pap Olanga'.
9. She further stated that later on 21<sup>st</sup> January 2021, a body of a person was found lying in the house of Amos who was arrested. That Ayub was also arrested a while after. She was later summoned to identify the body that had been found and that on 7<sup>th</sup> January 2021, the police knocked at her door in search of a mattress which was not found.
10. PW3, Benter Atieno Hongo, a farmer at Usare Village, testified that she knew both the accused persons. She stated that on 26<sup>th</sup> December 2020, Ayub approached her at her house and asked her to take his maize to be sold later. It was her testimony that Ayub further stated that he was selling a mattress, measuring 4x6 which they negotiated to be bought at kshs. 1800. She paid him Kshs, 1500 and the balance was collected later from her.
11. It was her testimony that she went to pick the mattress from the house of Ayub, where he used the backdoor at around 7.00pm, the same day of 26<sup>th</sup> December 2020. She stated that she peed through the window to see if there was anyone inside and later after entering the house, she heard Ayub ask if he had come. While she was at the door, Ayub came with one named "Jaloka" also known as 'Abiola,' in the presence of Amos Ogada. It was her testimony that later, Ayub instructed Amos to get the keys to open the kitchen and then went to open the kitchen door. It is her testimony that when she moved there, Amos instructed her not to enter the place. Later, Amos brought the mattress to her and he instructed to help her carry the said mattress by Ayub to her house.
12. PW3 testified that Amos helped her carry the said mattress and when they reached the field, she heard someone following them who she later confirmed to be Jaloka. She then instructed Jaloka to go back and sleep and he responded by stating that he had heard. It was her testimony that they proceeded with Amos to her house and on arrival, she thanked him with Kshs. 20 and he then left. She further stated



- that she entered her house and slept. She testified that she knew Jaloka from the lake where they used to work together and that on the said night, all the three men seemed drunk as they were staggering.
13. PW3 further testified that on 1<sup>st</sup> January 2021, she was having tea with visitors who she had received on the 31<sup>st</sup> December 2020, when they received information that the body of a dead man had been found at a house. She stated that when they went to the said house, they found many people gathered and they saw the body of a person half buried. It was her testimony that the police came and stood at the door and went to the home of Ayub.
  14. She stated that she did not see Ayub and Amos at the time and that the police came to retrieve the mattress which she had bought from Ayub. It was her testimony that she later came to find out the identity of the deceased to be Jaloka.
  15. On cross examination, she confirmed that on the night of 26<sup>th</sup> December 2020, she went to the house of Ayub and not Amos' house, where she found the three men, Ayub, Amos and Ayub. She also reiterated that the mattress was sold to her by Ayub and Amos only helped her to carry the said mattress to her house, when she noticed that Jaloka was following them. She stated that she told Jaloka to go and sleep but she did not exactly know where Jaloka used to live or where he went to sleep that night. It was her testimony that she was not aware also where Amos and Ayub spent the night on the night of 26<sup>th</sup> December 2020 or if the three men parted ways that night.
  16. PW4, Maurice Oduor Oyier, a small-scale farmer in Usare village testified that PW1 was his son and that the 1<sup>st</sup> accused person Ayub was his distant cousin. It was his testimony that Amos, the 2<sup>nd</sup> accused person was his brother. He recalled that on 1<sup>st</sup> January 2020, he was in his homestead having breakfast under a mango tree when at around 10.00 am, he told his son to take the cows to the field to tie them there to graze. That he then saw his son walking towards a house where there was a guava in front. It is his testimony that PW1 looked up the tree and then called out on PW4 saying "baba, baba, kimbia." PW4 then ran to where his son was and was shown a person inside the house which had no door. He then got in and saw a hand of a man buried in the house. It was his testimony that he went and reported the matter to Nyumba Kumi – Village Elder Syphrose Kure, who later reported the matter to the Chief, Phillip Harambee and they went to the scene. He recalled that it was now around 11.00 am when this was happening and that the police arrived a short while later.
  17. PW4 testified that he saw a blanket beside the body and that Amos also came around but that he was not certain if he was the first to arrive or the police. He stated that there had been rain the previous night and that the police followed the dragging which showed that the body had been dragged to Amos' House from the house of Ayub, which is a distance of about 200 meters. It was his testimony that he later saw Amos being interrogated by the police upon which he saw Ayub pass and the police were shown that he was the owner of the house where the body was being dragged from. Ayub was later arrested and a blanket that was near the body taken by the police. It was his testimony that the body was secured until the 4<sup>th</sup> of January 2021 when the police came and removed the body from the house. He stated that he was not aware whose body that was.
  18. PW4 further testified that PW1, his son, reported to him that he had been threatened by Amos, who went to his house one night and questioned why he was pursuing the matter yet he was just a child. It was his testimony that Amos threatened to 'cut off the head of PW1'. He stated that he later reported the threats to the investigating officer.
  19. On cross examination, PW4 confirmed that the dragging had led them to the house of Ayub and that Amos lived next to the witness' house while Ayub lived across the road. It was his testimony that he could not tell when the death occurred.



20. PW5, Phillip Arambe Otieno, the Assistant Chief of Kanyawinji Sub-location testified that he has been the Assistant Chief for a period of 25 years and that he knew both the accused persons for over 30 years. It was his testimony that both the accused persons lived in his locality. He stated that on the 1<sup>st</sup> of January 2022, the clan elder Syphrose and Maurice Oyier reported to him that there had been a body buried in the house of Amos and that when he visited the scene, he found that the body had been buried partly but the hand and neck were still visible. It was his testimony that they followed the dragging up to Ayub's house on a path which led them to a burial site suggesting of an exhumation that had occurred.
21. He further testified that he called the chief who called the police, who secured the scene. He stated that Ayub was later found hidden in a thicket in his home, from where he was arrested. He further stated that Ayub opened his house which led to the discovery of seat cushions which had blood stains, a 20 litre plastic jerrican with blood stains, a jembe and a panga with blood stains.
22. It was his testimony that Ayub later showed the police where he had hidden the panga. PW5 then received orders to guard the home as the police obtain court orders to exhume the body. It was also his testimony that the police found an orange t-shirt from Amos' house which was blood stained. He states that on the 4<sup>th</sup> of January 2022, officers got the orders to exhume the body which was removed to the morgue. He stated that he did not know the deceased person George Otieno alias Abiola.
23. On being cross-examined, PW5 confirmed that he was present when the items were recovered by the police but that he had not seen them since. He further stated that he knew Amos Oyier, who lived in his village and that the said Amos used to drink a lot of illicit brews and that he also used to sleep where he took alcohol. He also confirmed that Amos rarely returned home after taking alcohol.
24. PW5 was recalled to testify and he did identify the following items which he had earlier testified on, saying that they were recovered from the houses of Ayub, and Amos. The items were:
  1. Orange T-Shirt which was bloody and written the words Anyang Nyong'o which he stated was found in the house of Amos Ogada
  2. A Jembe recovered from Ayub Ogada's house (PMFI 3) identified.
  3. A Panga found in Ayub Ogada's house (PMFI 4) identified
  4. A Yellow 20 litre jerrican found in Ayub's house (PMFI 5) identified
  5. Seat cushions which had blood stains (PMFI 6) identified and found in Ayub's house.
25. Upon further cross examination, the witness stated that he was present when the said items were recovered where the accused persons and Mr. Masika the investigating officer were also present.
26. PW6, Jesicca Adhiambo Alwala, testified that between the date of 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> December 2020, she used to sell alcohol under a tree near Usare. It was her testimony that she knew Abiola, the deceased person only for a short period of time, because he was new in the area. It was also her testimony that she last saw him on the 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> December 2020.
27. She stated that the deceased, Abiola, went to take alcohol from her place on the 24<sup>th</sup> December 2020 at around 6.00pm, with some of his friends whose names she did not know and later left. She further stated that on the 25<sup>th</sup> December 2020, the deceased went to her den at around 3.00pm asking for alcohol and was later followed by Ayub who was already drunk then he left. She stated that Amos, did not find Abiola there. She further stated that on the 26<sup>th</sup> December 2020, she saw Abiola at around 10.00 am and that they lived in the same plot.



28. PW6 further testified that she knew the accused persons for a while since when they came to the area in the year 1997. She stated that she saw Ayub once between the 24<sup>th</sup> and 26<sup>th</sup> of December 2020.
29. On cross examination, PW6 revealed that Abiola, the deceased, was her neighbor in the rental rooms where she stayed and that the deceased used to fish and go for alcohol with his colleague fishermen at her place. She stated that she did not see Abiola with any other people except the fishermen. She further confirmed that the accused persons were not her customers and that Abiola used to come alone, while Abiola also used to come alone.
30. PW7, Polycarp Lutta Kweyu, the Principal Chemist for 12 years at the Kisumu Government Chemist Laboratories testified that he was in charge of DNA Section at Kisumu Government Chemist. It was his testimony that on different dates, he received requests from the SRM Court at Maseno and PC Paul Masika No. 107842 of Kisumu West DCI to conduct DNA analysis on the submitted items to identify the dead victim and also the origin of the biological evidential material.
31. It was his testimony that on 5<sup>th</sup> January 2021, he received the following items for DNA analysis:
  1. A panga with a brown wooden handle 'A'
  2. A jembe with a wooded handle 'B'
  3. A multi coloured door curtain 'C'
  4. A green/white checked long sleeved shirt 'D'
  5. A navy Blue cap branded cavaliers Cleveland 'E'
  6. A red ash tray on a white wooden board with 3 cigarette buds 'F'
  7. A gold coloured cushion 'G'
  8. 2 green gunny sack 'H'
  9. A Bamburi Cement paper 'I'
  10. A dry swab from an iron sheet walled house 'J'
  11. A dry swap from iron sheet mud walled house 'K'
  12. A dry stem from Pawpaw tree 'L'

All above indicated to have been collected from scene 'A'

  13. Soil sample in a marked container 'B1'
  14. Soil sample in a white plastic container 'B2'
  15. Soil sample in a white container 'B3'
  16. A dry swab marked 'B4'

All above indicated as collected from scene 'B'

  17. Soil sample in a white container 'D1'
  18. Soil sample in a white container 'D2'

All above collected from scene 'C'.

  19. A black pair of long trouser marked 'D1'



20. An orange short sleeved T-Shirt branded Anyang Nyongo 2017 'D2'  
All above collected from scene 'D'.
21. Fingernails from the body of unknown deceased marked 'E1'
22. A cartilage body unknown marked 'E2'
32. Further on 7<sup>th</sup> January 2021, he received the following items for analysis:
  1. Buccal swab sample from Amos Ogada Oyier, accused 'M'
  2. Buccal swab sample from Ayub Ogada Omollo, accused 'N'
  3. A mopper with wooden handle marked 'O'
  4. A Blue plastic mopping bucket 'P'
  5. A yellow 20 litres plastic jerrican 'Q'
  6. A grey pair of long trouser 'R'
  7. A long sleeved torn navy blue shirt marked 'S'
  8. A cream pair of long trouser 'T'
  9. A red/purple cream coloured blanket in a brown carton 'V'
33. It was his testimony that on 13<sup>th</sup> January 2021, he received the following further items for analysis:
  1. A short-sleeved T-Shirt branded Uso Fedex 'A1'
  2. A short sleeved grey T-shirt marked 'A2'
  3. A short sleeved faded navy-blue T-shirt branded Tusker Project Fame 'A3'
  4. A short-sleeved orange T-shirt marked DM - 'A4'
  5. Pink/Black/Grey coloured short 'A5'
  6. A long sleeved white/pink stripped shirt 'A6'
  7. A light grey hat 'A7'
  8. A navy-blue track shit trouser 'A8'
  9. A grey pair of long trouser 'A9'
  10. A pair of blue long jeans trouser 'A10'
  11. A pair of long jeans trouser 'A11'
  12. A short-sleeved blue/white shirt 'A12'
  13. A red/blue/white short sleeved checked shirt 'A13'
  14. Blue/white long-sleeved shirt 'A14'
  15. A blue/white/black checked long sleeved shirt 'A15'
  16. A white shoe inner sole 'A16'



17. A panga with a black rubber handle marked 'A17'
34. It was his further testimony that the following items were submitted on 1<sup>st</sup> February 2021 for analysis:
    1. Buccal swab from Fabrigas Otieno Otieno alleged son to the deceased.
    2. Buccal swab from Eunice Adhiambo Otieno alleged wife to the deceased.
    3. Buccal swab from Mary Auma Odawo alleged sister to the deceased
  35. It was his testimony that he made findings as follows, after analysis:
    1. The panga 'A', Jembe 'B', cushion 'G', T-shirt 'D2', T-shirt 'A1, A2, A3 and A4, shirt 'A6' and trouser item A8 all were heavily stained with blood of a human being.
    2. The curtain item 'C', Bamburi Cement paper item 'I', trouser item 'D1', jerrican item 'Q', the jeans trousers A10 and A11 and the shirts A12, A13 and A14 were moderately stained with blood of human being.
    3. The shirt, item 'D', Manila sacks item 'H', the short item 'A5, inner sole 'A16, the Hat 'A7, the trouser item 'A9 and the shirt 'A15 were lightly stained with blood of a human being.
    4. The stains on the cap item 'E', ash tray item 'F' and panga item '17 tested negative for blood of human origin.
    5. The stains on swabs 'J, K, L, and 'B4', the stains on the blanket item 'V', stains on the soil items 'B1, B2, B3, C1, C2 tested positive for blood of a human being.
    6. The stains on the trouser item 'R', shirt item 5, trouser item T and blanket item 'V' tested positive for oils and fats as the body was decomposing.
  36. It was also his testimony that the DNA generated from the deceased showed 99.99+% chances of fatherhood to Fabrigas Otieno Otieno while the DNA generated from "Items Panga 'A', Jembe 'B', Curtain 'C', Shirt 'D', Cushion 'G', green sacks 'H', Cement paper 'I' swabs items J, K, and B4, soil item B1, B2, B3, C1 and C2, trouser item D1, T-shirt item D2, jerrican item Q, T-shirts items A1, A2, A3, and A4, Shirts items A5, A6, A12, A13, A14 and A15, Hat item A7, trouser, item A8, A9 and A11 and the blood stains on inner sole A16 are identical and marched that of the profile generated from the nail and cartilage of the deceased person.'
  37. He also testified that the DNA from the cub 'E' and ash tray "F" and swab "L" were partial and inconclusive while that from the mopper "O" and bucket "P" were mixed , partial and incomplete. It was his testimony that item A 17 was muddy and that no DNA stains could be generated from the stains thereon. However, it was also his testimony that the DNA of both the accused persons did not match any of those generated from the items.
  38. On cross examination, PW7 confirmed that the exhibits were retrieved from scenes A, B, C and D and that the other items had no scene ascribed to them and he is not aware where they were recovered from. He confirmed that none of the items presented matched DNA profiles from the accused persons.
  39. PW8, Dr. Ombok Lucy testified and produced the postmortem report done by Dr. Adera which report confirmed that the body of the deceased person was that of an unknown African male at JOOTRH mortuary, naked, approximate height of 172 cm, well built, and of unspecified age. It was her testimony that on postmortem changes, there were oozing maggots, with pulling of blood underneath and further skeletonization of the skull of the neck, upper and lower limbs. She stated that on external



- appearance, there were fractures on the head measuring 7cm and several deep cut wounds and that some of the tissues were missing.
40. It was her testimony that internally, the skull was exposed, with fractures on the head which were multiple and that the right and left kidneys were partially decomposed including the liver and spleen. That the lungs of the deceased were completely decomposed.
  41. The doctor formed the opinion that the cause of death was due to head injuries which had multiple cut wounds and caused by a sharp object. It was also her testimony that the Death Certificate number 1061159 was issued and the report signed on 5<sup>th</sup> January 2021.
  42. Upon cross examination, she stated that although it was possible to ascertain the time of death from the postmortem changes and assessment, the same had not been indicated.
  43. PW9, PW9, Eric Otieno Abiero a resident of Kisian, Kisumu West and a fisherman for 3 years testified that he did not know George Otieno Odao but knew Ayub Ogada and Amos Ogada, the accused persons for many years. It was his testimony that on 25<sup>th</sup> December 2020 in the morning, he had a party and had invited his friends at his home including Amos and Ayub. He stated that they had food and drinks and the celebration ended at 2.00pm.
  44. He stated that on 26<sup>th</sup> December 2020 in the morning at 8.00am, Ayub and Amos returned to the house of PW9 and that he gave them food to eat from the remainders of 25<sup>th</sup> December 2020. He stated that there were no drinks. He then left them as he went his way at about 11.00am. that on 1<sup>st</sup> January 2021 at 10.00am, while he was at his house, he saw many people walking and rushing towards Usare and they were saying that someone had been killed and buried in a house. He then went there and saw soil in a house belonging to Amos. He stated that the Police officers arrived and secured the scene.
  45. On cross examination, he stated that he never knew the deceased person, George Otieno Odao and that the accused persons did not go to his house with the deceased.
  46. PW10, Inspector Paul Masika, the investigating officer in this case, attached to DCI Meru, but previously of Kisumu west testified that on 1<sup>st</sup> January 2021 around 10.00am, while at Maseno Police station, he received a report from Usare Kanyawidhi Assistant Chief Phillip Arambe of a murder case in the area. That he visited the scene with the OCS, DCIO and officers from Maseno police station and thereafter they went to Usare off Kisian Bondo Road. He stated that at the scene, they established that a minor, Silas Oduor, a nephew to Amos Oyier was the 1<sup>st</sup> person to discover a body partially buried in a partially muddy unfinished two roomed house without any door and which house belonged to the 2<sup>nd</sup> accused, Amos Ogada. He stated that the minor said that he had gone to pick guavas from the compound near the house when he encountered the scene.
  47. PW10 testified that in one of the rooms, they recovered beddings belonging to the 2<sup>nd</sup> accused Amos Ogada while in the other room, was a partially buried body of an unknown male person, which they suspected to have been buried on the eve of the new year 2021.
  48. He stated that on the evening prior, it had rained and that they saw traces of dragging on the ground which they followed until the house of the 1<sup>st</sup> accused and that behind his house, they smelt bad smell and portion of rotten body parts and that they suspected that to be where the body decomposed before it was taken for burial inside the incomplete house of the 2<sup>nd</sup> accused.
  49. It was also his testimony that they looked for the 1<sup>st</sup> accused because his house was locked. They also searched in the nearby bushes and found the 1<sup>st</sup> accused hiding in the bush, whom they arrested and forced him to open his house, which upon entry, they found blood spat all over the house and most



- blood were on his seat cushions, floor and walls. He further testified that in the same house, they recovered a jembe, panga, cushions and other items which are in the inventory dated 1<sup>st</sup> January 2021.
50. Further, that at the house of Ayub Ogada, they recovered items which are in the inventory of 1<sup>st</sup> January 2021 and signed by the accused person and that upon interrogation, Ayub told them that Amos, the 2<sup>nd</sup> accused knew more about the incident. He stated that members of the public and the Area Chief Mr. Arambee traced Amos Ogada at a nearby funeral place where he was arrested and brought to the partially (incomplete) muddy house where they recovered items with blood stains including a T-shirt written Anyang Nyong'o, orange in colour, a wooden handle panga and later an inventory for him was done.
  51. It was also his testimony that they did not exhume the body as it was a Friday, the first day of the year. They therefore had Officers from Maseno Police station guard the body at the scene for 3 days and that on 4<sup>th</sup> January 2021, he applied and obtained an order vide Maseno SPM Misc. No. 1 of 2021 to have the body exhumed in the presence of the morticians and Government Analyst and for the accused to be held for 14 days pending investigations.
  52. Further, that on the 4<sup>th</sup> January 2021, they proceeded to the scene with experts to exhume the body and that at 1700 hours, they started to exhume the body in the presence of all the personnel stated. They then found a naked body of a male person, which had a deep cut wound at the back of the neck, wrapped in a blanket, a black trouser wrapped around the shoulder, ostensibly used to drag the body. They then removed the body to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) where postmortem was done on 5<sup>th</sup> January 2021.
  53. They then took some samples ie finger nails and cartilage plus other recovered items from the scene and escorted them to the Government Chemist vide Exhibit Memo dated 7<sup>th</sup> January 2021 and 5<sup>th</sup> January 2021, for analysis.
  54. The accused persons were then interrogated to tell the identity of the dead man since there was no report of any missing person. He stated that the accused persons stated that they knew the deceased as 'Abiola' or 'Jaloka' and that with the help of the area Assistant Chief Phillip Arambe, the information was shared with the locals who who came forward and identified the deceased as George Otieno Odao alias 'Abiola' alias 'Jaloka' from Homabay and a fisherman from Homabay, and that he came to Kisumu on 27<sup>th</sup> November 2020 to fish. His relatives were traced through the Area Chief who came to Maseno including Eunice Adhiambo, the deceased's wife, his son Fabricus Otieno and his daughter Nelly Auma.
  55. The witness stated that the body was beyond recognition so they obtained court orders for DNA analysis and escorted his family to the Government Chemist vide Exhibit Memo of 1<sup>st</sup> February 2021.
  56. He stated that the 1<sup>st</sup> accused revealed to them more exhibits on 7<sup>th</sup> January 2021 that led them to his kitchen where they recovered more clothes with blood stains hidden in a tyre and a small pot, which were taken to the Government Chemist vide Exhibit Memo of 13<sup>th</sup> January 2021.
  57. It was his testimony that on 9<sup>th</sup> February 2021, the paternity of the deceased was released confirming that the deceased was George Otieno Odao alias Jaloka alias Abiola, the father to Fabrigas Otieno Otieno.
  58. The body was later released to the family for burial and the investigators gathered witnesses who had last seen the deceased including Benter Atieno who confirmed seeing the deceased on the night of 26<sup>th</sup> December 2020 at the house of 1<sup>st</sup> accused when she went to buy a mattress at the house of 1<sup>st</sup> accused and the 2<sup>nd</sup> accused carried for her the mattress, then the 1<sup>st</sup> accused and the deceased remained behind



at the 1<sup>st</sup> accused's house. The police then recorded other statements of witnesses after the autopsy was carried out, before charging the accused persons with the murder of the deceased. He also referred to inventories dated 1<sup>st</sup> January 2021 signed by the 2<sup>nd</sup> accused, Amos Ogada Oyier for items recovered at his house and also duly signed by him. It was also his testimony that in the course of the investigations, they established that the two accused persons killed the deceased on assumption that he was a thief. The witness produced the items recovered from the scene together with those taken to the Government Chemist for analysis and the inventory as exhibits.

59. On cross examination, he stated that the accused persons were interrogated face to face with the advice of advocates who told them not to record confessions. Further, that DNA samples were taken from them to see if there was genetic relationship with the items recovered from their respective houses but that none of the DNA profiles of the accused persons were found on the recovered items which were recovered at the house of Amos Ogada Oyier which was made of mud, partially done, no doors and one room had papyrus door. He added that the access to the house was not hindered.
60. Further testimony was that there were blood spats in the house of Ayub Ogada Omollo whose DNA Report gives conclusions on items recovered from his house, matching the DNA profile of the deceased. Further, that from the evidence gathered, the body was first dumped at the 1<sup>st</sup> accused's house and that from the scene, which was bushy and depression environment (shallow), there were signs of decomposition.
61. He also stated that it was not clear whether the deceased and PW3, Benter Hongo, reunited with the deceased after the occurrence at the house of Amos.
62. He stated that no photographs of the scene were taken and that he could not tell where the deceased resided. He stated that in subsequent inventories, it was only him and the accused persons who were present and the same were signed in his presence. He stated that he forgot to cause the other persons present to sign the other inventories. Further, that despite the items being recovered having the deceased's blood, he did not determine how the blood got onto the recovered items and that it was the accused persons who led them to the recovery of the items produced. Further, he confirmed that he had no doubt that the two accused persons committed the murder of the deceased because the accused persons led the investigators to recover of all the listed and produced items.

### **The Defense's Case**

63. Placed on their respective defences, the accused persons gave sworn testimonies as follows:
64. DW1 Ayub Ogada Omolo testified on 3<sup>rd</sup> December 2024 and stated that he was a heavy commercial driver and lived in Usare village, Kanyawidhi Sub-location, Kisumu County. He recalled that on the night of 26<sup>th</sup> and 27<sup>th</sup> December 2020 at around 5.00pm he was at Pap Olango taking changaa, a local brew. He stated that he was with many people including Amos Ogada Oyier whom he used to work with, together with the deceased person, who was also taking local brew.
65. It was also his testimony that he got so much drunk and found himself being escorted to his house by Amos Ogada, his friend. Further, that two other people including the deceased and another, Mr. Awuor his in-law, Benta who testified here came, but that Benta left with the accused person's mattress in the company of the deceased, the 2<sup>nd</sup> co-accused Amos and Awuor.
66. The first accused stated that he remained in his house and never met them again. He stated that since he was so much drunk, he couldn't tell if blood was in his house and that he never heard of any commotion. He reiterated that his daily routine was to take changaa.



67. He stated that on 1<sup>st</sup> January 2021, he went to the changaa place to drink and Jesca found him lying down and asked him why he was lying down. He then got to the house and got out to go for short call. He stated that he then was arrested and was not hiding and was also not present in his house when evidence was being taken. Further, he stated that he did not sign any inventory on what was recovered from his house. He denied meeting Abiola again until he was arrested in connection with his the death.
68. On cross examination, he stated that he did not record a statement and that the statement with the police was what he was trying to recall after the incident happened and that the last time he saw George was when he was being escorted to his house by his friends.
69. He also stated that the items were not recovered from his house. It was also his testimony that the deceased was not his friend but only drank with him at the same spot and volunteered to escort him home with Amos.
70. Amos Ogada Oyier, the 2<sup>nd</sup> accused person testified as DW2 and stated that he resided in Usare village, Kanyawidhi Sub-location, where he was a farmer and did menial jobs. He recalled that on 26<sup>th</sup>/27<sup>th</sup> December 2020, he went to Kahongo where he was taking changaa with Ayub Ogada, the owner of the home Everlyne Hongo and other revelers. That thereafter, Ayub left and they parted ways at around midday. He stated that later in the evening, Benta informed him that she had bought Ayub's mattress and wanted DW2 to go to Ayub's house to assist her carry the mattress. He stated that Ayub was drunk when he met him. He stated that he was also drunk. He added that at around 7.00pm, he told Benta, after visiting her homestead to accompany him to Ayub's house to collect the mattress. They then met Ayub on his way from Papalanga and denied being among the people who volunteered to escort Ayub to his house. He stated that they were at 2 different places at the time and that he came with Benta around 7.30pm.
71. It was his testimony that the persons present in Ayub's house when Benta was picking her mattress was him, Ayub and Benta. He stated that he was told to go to the store and pick the mattress. He further stated that he did not leave Ayub's house with Abiola and that he only left the house at 8.00pm together with Benta and that Awuor and Ayub were left in the latter's house. He stated that when they reached Ayub's home, Abiola came staggering and Benta told him to go away to where he lived at the Lake. He then left them behind and that Ayub remained with Awuor when he and Benta left. It is his statement that he did not see Abiola at Ayub's house and they only met him on the way staggering.
72. He reiterated that Abiola was neither with them in the house of Ayub, nor at Papalanga and that neither did Abiola partake changaa at Hongo's home. He stated that on 1<sup>st</sup> January 2021 they were ushering in a new year and waiting for a body to arrive when Lazaro approached him saying that his house was full of police officers. He stated that he was shocked. That he then went through the home of the Assistant Chief, met the wife who told him that a dead body had been found in his house. He stated that he went and found many people and some were at Ayub's house.
73. The 2<sup>nd</sup> accused admitted that where the body was found was his house and was still under construction, having no windows or bed. He stated that he got inside and saw a T-shirt which had Anyang Nyong'o photo and was blood stained, which he claims that anybody could have it. He also admitted that there were dragging to his house as it had rained the night of 1<sup>st</sup> January 2021 but that he did not know how the body of the deceased found itself in his house.

### **Analysis and Determination**

74. I have considered the evidence adduced by the prosecution witnesses and the defence proffered by both the accused persons. The main issue for determination is whether the prosecution has proved its case



against the two accused persons or any one of them beyond reasonable doubt. In other words, the question is whether all the elements of the offence of murder have been proved against each of the accused persons beyond reasonable doubt.

75. The accused persons are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Section 203 provides that the following elements have to be fulfilled in order to prove murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought. I shall consider each of the elements as below:
76. The first element of the offence of murder is that of the fact of death and its cause. In this case, there is no dispute as to the deceased's demise as this has been corroborated by all the evidence tendered by all the prosecution witnesses, more so the evidence of PW8 who carried out the postmortem on the deceased's body and after the examination, reached to the conclusion that the cause of death was due to head injuries by multiple cut wounds as a result of a sharp object. The DNA Analysis on the body part of the deceased and his minor son Fabrigas Otieno Otieno established paternity hence, the true identity of the deceased whose body was initially of unknown African male person was also established.
77. The next element is whether the death of George Otieno alias Abiola was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. The postmortem report prepared by PW8 revealed that the deceased's cause of death was due to head injuries by multiple cut wounds as a result of a sharp object. There is no evidence of the deceased whose body was found partially buried in a shallow grave inside an incomplete house belonging to the 2<sup>nd</sup> accused person's house was accidental or that the injuries sustained were self-inflicted upon which he buried himself in a dug grave.
78. In the circumstances, I am persuaded beyond reasonable doubt that the deceased died out of an unlawful act.
79. The next essential element of the offence of murder is whether it was the accused persons herein who unlawfully killed the deceased. None of the prosecution witnesses actually saw the accused persons kill the deceased. In essence, the prosecution's case was based on circumstantial evidence. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”



80. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“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 Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

81. In this case, PW2, testified that on 28<sup>th</sup> December 2020, Ayub went to her place and asked for a cigarette and informed her that he had killed a person and left him in a house and that he was going to report it to the Assistant Chief. However, on 29<sup>th</sup> December 2020, when Ayub was asked the question by PW2, Amos quickly responded saying that ‘they had killed people with alcohol’. Later on, the body of the deceased was found in Amos’ House, to which PW1’s evidence also corroborates.

82. PW3 testified that she went to Ayub’s house on the night of 26<sup>th</sup> December 2020 to pick up a mattress that was sold to her for Kshs. 1800. She stated that she found Ayub with the deceased, George together with Amos. She later left with Amos who helped her carry the mattress but noticed that the deceased person was following them. She then requested him to go back and sleep but could not tell whether the deceased was reunited with Ayub at Ayub’s house or not. She also stated that she was not certain if Amos went back to Ayub’s house or not.

83. However, all the prosecution witnesses confirmed that the body of the deceased person which was decomposing and beyond recognition was found in the house of the 2<sup>nd</sup> accused person, Amos Oyier. PW4 and PW5 further confirmed that it had rained the previous night and that there were visible marks of dragging from Ayub’s house to Amos’ house, where the body of the deceased was discovered. Further, PW4 testified that they retrieved several items including a panga, jembe, curtain, shirt, cushion, green sacks and cement paper, from Ayub’s house which the Principal Chemist and Government Analyst confirmed to have had the DNA of the deceased person.

84. From the evidence adduced by the prosecution, it is clear that the accused persons were with the deceased on the night of 26<sup>th</sup> December, 2020 and that the 2<sup>nd</sup> accused person was the last person to be with the deceased, when the 2<sup>nd</sup> accused helped PW3 carry her mattress from the 1<sup>st</sup> accused person’s house to her house that very material night.

85. In the 2<sup>nd</sup> Accused person’s defense, he stated that he was not aware of how the body of the deceased got to his house but admits that the body of the deceased was found in his house. The 1<sup>st</sup> Accused person stated that the items heavily stained with the deceased blood were not recovered from his house.

86. I have carefully considered the testimony by the Assistant Chief who involved the police in the investigations after being alerted of the presence of the body of a dead person in the house of the 2<sup>nd</sup> accused person, and the evidence by Chief Inspector Masika coupled with the testimony by the Government analyst on the items allegedly recovered from the 1<sup>st</sup> accused person’s house which turned out to have blood and DNA of the deceased. That evidence was consistent and there is nothing to



suggest that the 1<sup>st</sup> accused was framed for the murder of the deceased, who was even not known in the area.

87. That evidence was believable, that the items recovered came from the 1<sup>st</sup> accused person's house. The statements made to PW3 by the 1<sup>st</sup> accused and the intervention on the subsequent day by the 2<sup>nd</sup> accused which was prior to the discovery of the body of the deceased in the house of the second accused, which statement was made in the ordinary course of business and interactions between PW3 and the accused persons that they had killed someone are not confessions. They were however made prior to the discovery of the deceased and in my view, they corroborate the discovery of the deceased in the 2<sup>nd</sup> accused person's house and the bloody items recovered from the house of the 1<sup>st</sup> accused.
88. The accused persons also conceded that there were dragging of the body from the house of the 1<sup>st</sup> accused to the house where it was discovered buried. No photographs were taken and produced but that in itself is not fatal. However, the items found in the house of the 1<sup>st</sup> accused including a panga and jembe which are possible murder weapons and which were stained with the blood found to match the DNA of the deceased are a clear indication that the deceased was in the company of the 1<sup>st</sup> accused when he was brutally killed.
89. Based on the doctrine of last seen alive, Ayub and Amos should be in a position to provide an explanation as to what happened to the deceased person or how the blood and DNA of the deceased person and decomposing body respectively, were found in the houses of the two accused persons.
90. In the Nigerian case of *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:

“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 person was the last 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 give an explanation relating to how the deceased met her death in such circumstance. 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.”

91. Similarly, in the Indian case of *Ramreddy Rajeshkhanna Reddy & Another v 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, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

92. The accused persons in this case were thus required to offer an explanation on how the deceased met his death, considering that there is evidence of the deceased's DNA and body found in their respective houses and the dragging from the home of the 1<sup>st</sup> accused to that of the incomplete house of the 2<sup>nd</sup> accused, both of whom were with the deceased the night before. Sections 111(1) and 119 of the [\*Evidence Act\*](#) provides 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 evidence given by the prosecuting, 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 likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

93. In the circumstances of this case, the accused persons’ defence has failed to offer any credible explanation as to how the deceased might have met his death or how the items stained with blood were found in the house of the 1<sup>st</sup> accused person or how the body of the deceased was found in the house of the 2<sup>nd</sup> accused person. Furthermore, the evidence of the 1<sup>st</sup> accused that he was escorted from the chang’aa den by the 2<sup>nd</sup> accused person and one Awuor was denied by the 2<sup>nd</sup> accused who stated that he never escorted the 1<sup>st</sup> accused person.
94. The allegation by the accused persons that they were drunk and that they did not know what was happening does not hold any water. A drunken person cannot do what was done to the deceased. Furthermore, the mental assessment report on the accused showed that they were mentally sound and despite the initial report on the 2<sup>nd</sup> accused stating that he had psychiatric/ mental issues, the subsequent assessment even before any treatment was administered to him revealed that he was mentally sound.
95. Motive for the murder is immaterial but from the evidence on record, the two accused persons had a common intention to unlawfully kill the deceased for ritualistic purposes noting the manner in which his body was found, evidence of torture and external body genital parts missing.
96. I am satisfied that on the circumstantial evidence adduced as a whole, there is sufficient evidence to link the unlawful killing of the deceased to the accused persons herein and no one else.
97. Finally, on the question of whether there was malice aforethought on the part of the accused persons, when they unlawfully killed the deceased, Section 206 of the [Penal Code](#) defines Malice aforethought as follows:
- “ 206. 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.”

81. The Court of Appeal in *Joseph Kimani Njau v R* [2014] eKLR, held as follows regarding malice aforethought as an essential element of the offence of murder under section 203 of the *Penal Code*:

“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 subject;

- 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...”

98. In the instant case, PW8 who carried out the postmortem on the deceased’s body testified that his examination revealed that the cause of death was due to head injuries by multiple cut wounds as a result of a sharp object. The jembe and the panga which were recovered from the house of the 1<sup>st</sup> accused must have been the primary weapons used to kill the deceased as they were found to be stained with the blood whose DNA matched the DNA of the deceased. The external genitalia were also missing from the body and the body was skeletal yet it had not taken long before being discovered, an indication that the deceased could have been killed for purposes of rituals. I am satisfied that the accused persons intended to cause the deceased grievous harm or death.

99. In the circumstances I find and hold that the prosecution has proved beyond reasonable doubt that there was malice aforethought on the part of the accused persons when they unlawfully killed the deceased.

100. Consequently, I find and hold that the prosecution has established and proved all the elements of the offence of murder against the two accused persons herein Ayub Ogada Omolo alias Khan and Amos Ogada Oyier alias Genge whom I hereby find to be jointly Guilty of the offence of murder as charged. They are accordingly convicted of the murder of the deceased George Otieno Odao alias Abiola under section 203 of the *Penal Code*.

101. Sentence shall follow after records and mitigation.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY VIA MICROSOFT TEAMS  
THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2025**

**R.E. ABURILI**



**JUDGE**

