



REPUBLIC OF KENYA



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**Republic v Owuor (Criminal Case E042 of 2023)
[2025] KEHC 3611 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E042 OF 2023**

DK KEMEL, J

MARCH 24, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

RICHARD OTIENO OWUOR ACCUSED

JUDGMENT

1. The accused herein Richard Otieno Owuor has been charged with an offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars are that on the 28th day of November 2023 at Sihayi village, East Ugenya location, Ugenya Sub- County within Siaya County he murdered one Christopher Olunga.
2. I took over this matter from where Justice Ogembo left. Parties agreed to proceed from where the case had reached.
3. The prosecution called six witnesses in support of its case which was as follows:
4. Francis Obiero Obiero (PW1) a resident of Sihayi in Ugenya testified that on 2/11/2023 at night, he was in house when Christopher Olunga (deceased) came home from his work as a boda boda operator at about 9.00 PM and who kept his motor cycle in his (PW1) house. That the deceased was his son. He stated that the deceased then went to his house and removed his clothes to be washed. That he went to sleep as the deceased went on with washing his clothes. However, at about 6.30 AM he heard screams. A neighbor, a lady came to his home while screaming. She approached him and enquired from him as to whether he knew that Olunga was dead. That he was not aware about and that is when she briefed him that Olunga had been killed and that the body had been taken to a certain mortuary in Segwa. That they went to the nearby police post at Sihayi while some people went to Segwa. That he remained at Sihayi.

On cross-examination, he stated inter alia; that he recorded a statement at Ukwala police station which he identified in court and that he had given it in Kiswahili; that he went to sleep and left the deceased



washing clothes and that he did not know when he left home; that the deceased used to sleep at about 10.00 pm; that the deceased was not married; that At the home, they also stayed with his brother's wife who has since gone away; that the deceased's brother's wife was present when the deceased was washing his clothes; that the lady who viced him had claimed that the deceased had been killed by Richard Otieno; that Oyengo, the village elder informed him about it and that he too had been told; that he accompanied them to the scene where there was blood at the road near the home of Richard Otieno; that blood was coming from the direction of the home of Richard Otieno; that he did not know if his son had any differences with the accused; that his son used to drink alcohol; that the deceased was a boda boda rider.

5. Benedict Mulama Athieno (PW2) I stay at Sihayi testified that he recalls on 28/11/2023 at 8.00 AM that he left home and went to a nearby school where he was in charge of a building at Sihayi Primary School and that later at about 2.00 PM, he went to Sihayi Garden Resort to have drinks where he found friends at the bar who included Lucas Owino Juma, George Omondi alias Japan, and another young man. That the four of them went on taking alcohol. That later at about 7.00 PM, the accused herein Otieno Oduor entered the bar and was already drunk and who joined them in drinking. That he even discussed with him the work he would do the following day. That they went on drinking. That at about 9.00 PM, the accused started accusing him for not paying him for the work he had done at school. That he pleaded with him to let them discuss the matter outside. That the accused usually turns violent when drunk. That the accused insisted on shouting. That it was then that the caretaker of the bar came and held him and pulled him out of the bar. That when they reached the gate, the deceased, Christopher joined in pulling the accused out of the gate. That the deceased was helping the caretaker. They pulled him out as we continued drinking. At about 10.00 PM, the accused came back again to where they were and again started quarrelling him. That he claimed that he was with him and that he would not leave him. That the caretaker came again and pushed him to the gate and then outside the gate. Shortly, the caretaker came running and claimed that the accused had stabbed him with a knife on the head. That he advised him to use a water-soaked cloth to press the wound as he was then bleeding. That he advised him to go report to the nearby Sihayi police station. That he and Japan remained behind. That after about twenty minutes, the OCS came with one officer and that they briefed him on what had happened. That the OCS and many other officers later came back about twenty minutes later and informed them that someone had been killed at the road outside. That the police officers took them to where the body was where he saw the body of the deceased lying down about fifty metres away from the gate of the resort. That he saw the body had a stab wound on the left side of the chest. The police tried to arrest the accused who managed to escape. That he did not see the accused having a weapon but it is possible that he had hidden it.

On cross-examination, he stated inter alia; that he is a former NIS Officer, No. 830555911 whose last station was Bondo; that he worked for about 36 years; that they were drinking alcohol at Sihayi Garden Resort and that he joined them at about 2.00 PM; that the deceased was part of the group who evicted the accused during the first incident; that during the first incident, deceased helped push accused out of the hotel; that the accused joined their table and even took drinks before stating the quarrels at about 21.00 hrs; that when accused was pushed out the second time, he did not see the deceased; that he could not tell how the deceased got out; that after the second incident, the accused did not come back; that the body was about 50 metres from the gate; that the body was about 100 metres from the home of the deceased, and about 10 metres from the gate of the accused.

The police tried to intercept the accused at his home, but did not get him; that the accused is his relative; that the deceased was not with them at the gazebo as they took their drinks as he did not come to where they were; that he could not tell if the accused and deceased had any grudges between them



6. David Odhiambo Ayudo (PW3) testified that on 2/8/2023, he was at See High Resort working as a barman and as caretaker of the customers to whom he sold alcoholic drinks. That they stayed till about noon when gave order for lunch. That at about 7.00 PM, he was asked to help remove the man called Oteino who had joined them. That the said Otieno lived next to the resort. That a certain boda boda operator called Olunga tried to intervene but that the said Otieno attacked him. That the customers gave him first aid. That he later showed the police to home of Otieno nearby. That they all went to the road where they found Olunga, the bodaboda already dead and who lay just a few metres from the gate and who had deep stab wound on the left side of the chest. We did not find the knife used at the scene. They put the body in a vehicle. That he informed the police that Olunga had followed Otieno while asking him as to why he had stabbed him. That he identified Otieno as the accused in the dock.

On cross-examination he stated inter alia; that the whole group had been drinking and were drunk; that the first time, he pushed Otieno and that he went but then came back and that the customers who were buying him alcohol felt that he was disturbing them; that he was known to the customers; that the said Otieno stabbed him on the head with a knife; that the deceased had followed accused outside; that the gate had not been locked; that as he left for the police station, he did not see any body at the gate or hear of any screams; that the police took them to where the body was, about 10 metres from the gate of the resort; that he gave his statement in Kiswahili and signed it; that there was a lot of blood where the body was; that the body faced the direction of the school; that he does not know why the accused came once and twice; that he did not see accused stabbing the deceased; that he saw him with a knife the second time he came back to the resort; that the accused removed the knife from his trouser and stabbed him with it; that there are security lights inside the resort and at the gate facing the compound.

7. No. 77984 Sgt. Nelson Nyawate of Sihayi Police Station testified that he remembers on 28/11/2023 at around 11.00 PM, he was with his two colleagues on patrol along Sihayi – Kobondo road, about 40 metres from Sihayi Resort, when they found a body on the road. That his colleagues were able to identify the deceased. That they informed the OCS who came. As they were at the scene, they heard people at Sihayi resort. they proceeded there and found three men drinking at a cottage. That they could see blood spots on the ground. That the men informed them that one Richard Otieno had stabbed the care taker David and that David had left to report the incident. They claimed that they had seen six people and that the caretaker had escorted Otieno at the gate.

On cross-examination, he stated inter alia; that they had been on routine patrol; that the body was about 40-50 metres from the gate; that the resort had dim security lights; that the body lay on blood; that there was blood on the ground at the resort; that he did not see any blood samples being taken; that at the resort, they were informed that David and Olunga had escorted the troublesome man outside and that David came back having been stabbed with a knife; that the ones inside did not see what had happened outside; that he did not see any photographs being taken at the scene; that the accused presented himself at the police station the following day; that when they came across the body the deceased was unconscious.

On re-examination, he stated that the deceased was not breathing as he looked like he was dead.

8. Dr. Ted Timon Thura (PW5), testified that he conducted a post mortem examination on the body of the deceased on 5/12/2024 at 12.40 PM. That it was the body of Christopher Olunga. On general observation, he noted that there was a stitched wound 5 cm long between 3rd and 4th ribs. That there were bruises on right hand and right knee. That on internal examination, on respiratory system, there was a sub-cutaneous hematoma between 3rd and 4th ribs, massive left sided hemothorax with left lung collapse, massive hematoma in the mediastinum area where the heart is, massive pericardial hematoma, blood clot, penetrating wound on left ventricles on the head, 2 cm. Digestive, urinary



system, head, nervous system, spinal collum and court were normal. He formed the opinion that the cause of death was obstructive/cardiogenic shock due to penetrating wound on the heart ie massive tempnale with massive left hemothorax as a result of penetrating chest injury. He produced the post mortem form as exhibit one.

On cross-examination, he stated inter alia; that they usually remove the stitches during the post mortem; that as a doctor, he only come in at the time of post mortem and that he could not say how the body is handled before this; that the wound was on the left side; that on the heart, the wound was approximately 2 cm; that injuries are either open or closed which are blunt trauma; that post mortem cannot identify the weapon used, but can only estimate; that this was a penetrating chest injury; that post mortem is not to identify the object of assault; that from the wound, it was an object with uneven edge.

9. No. 99804 PC Jacob Suyianka (PW6) testified that he is the new investigating officer in this matter since the original investigating officer Corporal Musa is on transfer to Gatanga. He stated that on 28/11/2023 at about 2300 hrs one CPL Musa received a call from the Sub-County Criminal Investigations Officer, David Wanjama who informed him of a murder incident at Sihayi area. CPL Musa, himself and PC Masai proceeded to the scene where they found the OCS, Sihayi police station and other officers having secured the scene. That they proceeded to a Resort a few metres from the scene. That they found two customers who were drinking alcohol. They were George Stephen Omondi and Benedict Mulama Othieno. They were in a makuti shed. There were blood stains at the entrance of the shed. That they informed them that the caretaker had been stabbed on the head by the accused and that the caretaker had gone to report at Sihai police station. That the care taker returned to the resort through a short cut and that they interrogated him and asked him about the whereabouts of the deceased and who informed them that the deceased had pursued the accused and never returned to the resort. They all went to the scene and found a body lying in a pool of blood and that they identified him as Christopher Olunga.

That they pursued and searched for the suspect and went to his house, but they missed him. At the scene, they saw that the deceased had been injured on left side of the chest. They took the body to the mortuary. The following morning, CPL Musa received a call from the DCI that the suspect had been arrested after he surrendered himself at Sihayi police station.

That they interrogated him and who that he had been attacked by the caretaker and the deceased, and that he defended himself using a lightning arrester. That the post mortem was done on 5/1/2023. The suspect was then charged and that he identified him in the dock. He also added that the accused had some injuries on the head.

On cross-examination, he stated inter alia; that the caretaker was given first aid and was not given any treatment note; that the caretaker reported at Sihayi police station; that at the makuti gardens, there were blood stains at the door steps of the makuti; that the caretaker had returned to the resort while bleeding but that he had no DNA of the blood; that the body was a few metres about 20-30, from the gate; that CPL Musa was present when they collected the body; that they did not recover the murder weapon; that the caretaker stated that the suspect stabbed him using a knife; that they visited the scene after the incident had happened; that accused's home is almost opposite the gate of Sihayi Gardens, about five metres away; that the accused disappeared that night and that they visited his house but found that he had run away; that the customers found were drunk.

10. Vide a ruling of this court dated 31/10/2024, the accused was found to have a case to answer and was thus placed on his defence. He opted to tender a sworn testimony. He stated that on the material date, he went to Sihayi resort and met with on George Omondi alias Japan who welcomed him for a drink and that he was served by the caretaker (PW3) and that they remained at the bar up to 7.00 pm. He



stated that he was later attacked by the said caretaker and that he sought treatment. That he did not attack the said caretaker. He denied having been ejected from the resort and that he did not know the whereabouts of the deceased at the time. He stated that the deceased hailed from his area but that he was not at the bar and that he did not attack him as alleged. That he was taken to hospital by the investigating officer but who kept the treatment notes.

On cross-examination, he stated inter alia ; that he was at Sihayi resort; that there was a disagreement after he got drunk; that he was not ejected out of the resort as he voluntarily left for his house; that it is not true that he caused a fracas at the resort; that he was not that drunk and thus could understand everything that he did at the time; that he took himself to Ukwala police station.

11. Parties were directed to file and exchange submissions. However, it is only the defence counsel who complied.
12. I have considered the evidence tendered by both prosecution and defence as well as submissions filed. The issue for determination is whether the prosecution has proved its case against the accused herein beyond any reasonable doubt.
13. It is trite that the burden of proving the guilt of an accused person charged with a criminal offence rests with the prosecution throughout and that the standard of proof is one of beyond reasonable doubt. In a charge of murder, the prosecution is under a duty to prove the following essential ingredients.
 - a. That the deceased died.
 - b. That the death was unlawfully caused.
 - c. That it was actuated by malice aforethought.
 - d. That the accused person is the perpetrator of the crime.
14. As regards the issue of death, the evidence of pathologist (PW5) left no doubt that indeed there was death of the deceased herein. It was his testimony that upon examining the body of the deceased, he found that it had a stitched wound between the third and fourth ribs and that the lung had collapsed and further that there was a penetrating wound on the left ventricle. He formed the opinion that the cause of death was cardiogenic shock due to penetrating wound on the left heart. He produced the autopsy report as an exhibit. I find that the prosecution proved this ingredient beyond reasonable doubt.
15. As regards the issue of whether the death was unlawful, it is trite law that every homicide is unlawful unless expressly authorized by law. Article 26 of *the Constitution* enshrines the right to life upon every person. The deceased herein was a boda boda operator and that he had been hired to deliver some alcohol to Sihayi Resort on the material date and that he was requested to assist the Bar attendant cum caretaker to eject the accused person herein who was then drunk and unruly. The deceased is reported to have driven away only for his body to be discovered lying a few metres from the resort. It was discovered that he had been stabbed with a knife in the chest and died on the spot. The deceased who was earlier on in good health did not deserve to die in the manner that he did. The injuries inflicted upon the deceased as narrated by the witnesses were so severe to suggest that the assailant did not wish the deceased to survive at all. Indeed, the deceased died at the scene. It is clear therefore that the death was unlawful in the circumstances and that the same was proved by the prosecution beyond reasonable doubt.
16. The third issue is whether the death was actuated with malice aforethought and that the perpetrator actually intended to kill the deceased. I have evaluated the evidence on the record as presented by the prosecution witnesses as well as the defence. It is clear that the accused herein was drinking alcohol



at Sihayi Resort on the material date and that he had gotten too drunk and became unruly. It also transpired that the accused herein had quarreled one of the patrons whom he had worked for earlier in the day as he was demanding for his wages. Due to the accused unruly behavior, the Bar patrons together with the caretaker decided to have the accused ejected from the bar. Apparently, the deceased had arrived at the bar and delivered some alcohol which had been ordered for by the proprietor and that the said deceased was requested to assist the caretaker in ejecting the accused out of the bar. Indeed, they managed to do so. However, the accused turned against both the caretaker and the deceased in that he stabbed the caretaker on the head with a knife and then pursued the deceased who had left the bar and managed to attack him with a knife. The body of the deceased was discovered later a few metres from the resort. Looking at the evidence holistically, it is clear that the accused did not plan to kill the deceased prior to the incident. I find that the incident was spontaneous and arose from the scuffle between the accused and the deceased while he (accused) was being ejected from the bar. It is obvious that the accused was not amused by being ejected from the bar against his will and therefore vented his anger on the caretaker and the deceased. This therefore implies that the accused did not have the intention (*mens rea*) to kill the deceased prior to the incident. It is therefore my finding that the element of malice aforethought was not proved by the prosecution beyond reasonable doubt.

17. As regards the last issue namely whether the accused was placed at the scene of crime as the assailant, the evidence of the witnesses left no doubt that he was at the scene. Indeed, the accused himself confirmed in his defence evidence that he was at Sihayi Resort on the material date. Even though the accused has vehemently denied assaulting the deceased, the evidence is that he was the last person to be with the deceased after he had assaulted the caretaker. The accused was definitely incensed by the conduct of the deceased and the caretaker in ejecting him out of the bar against his will. The evidence of the witnesses was quite cogent and believable and that they were not shaken on cross examination. It also transpired that there were no differences between the accused and the deceased so as to suggest a frameup. Indeed, the accused in his defence evidence confirmed on cross examination that he and the deceased hailed from the same village. I find the defence alibi is not truthful since the accused was squarely placed at the scene of crime. His defence evidence did not shake or cast doubt upon that of the prosecution. I am satisfied by the evidence tendered that the accused was the assailant. I find this ingredient was proved by the prosecution beyond reasonable doubt.
18. The sum total of the evidence tendered leaves no doubt that the same proves a charge of manslaughter under Section 202 as read with Section 205 of the [Penal Code](#). The evidence does not support a charge of murder under Section 203 as read with Section 204 of the [Penal Code](#).
19. In the result, it is my finding that the prosecution has not proved the charge of murder under Section 203 as read with Section 204 of the [Penal Code](#) but that it has proved a charge of manslaughter under Section 202 as read with Section 205 of the [Penal Code](#) beyond reasonable doubt. Consequently, I find the accused herein Richard Otieno Owuor guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the [Penal Code](#) and is hereby convicted accordingly.

DATED AND DELIVERED AT SIAYA THIS 24TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:

Richard Otieno Owuor.....Accused

Oduor for Mshindi.....for Accused

Soita.....for Prosecution



Mboya.....Court Assistant

