



**Republic v Odongo & another (Criminal Case E014 of 2024)
[2025] KEHC 3425 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E014 OF 2024
WM MUSYOKA, J
MARCH 21, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

SHADRACK ODUOR ODONGO 1ST ACCUSED

MESHACK OTIENO ODONGO 2ND ACCUSED

RULING

1. The accused herein, Shadrack Oduor Odongo and Meshack Otieno Odongo, are charged with murder, contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence are that on the 31st day of October 2024, around 20:00 Hours, at Township Village, Nambale Sub-County, within Busia County, unlawfully murdered Owen Boaz Mutanda.
2. 9 witnesses gave evidence in the matter. None of them testified to have had witnessed the accused persons assaulting the deceased or doing something to him which could have caused his death. I shall, for the purposes of this ruling, group the witnesses into 2, those who were at the scene of the crime, or privy to the events at about the time the offence was allegedly committed, on the one side, and the other the technical witnesses.
3. PW1, Stephen Mutanda Boaz, was the grandfather of the deceased. He was not at the scene. He was informed, while in bed, that the deceased had been assaulted, and had been rushed to hospital. PW2, Sophia Nabwire Maende, was the landlady of the deceased. She was informed that he had been hit on the head with a metal bar or implement, and had fainted. She saw him on a motorcycle. She did not see those who hit the deceased and was not given their names. PW3, Daisy Ogana, was a sister of the accused persons, and the reason why there was a fight in the first place. She was not present at the fight where the deceased got hurt.



4. PW4, Millicent Owuor Ogana, was the mother of the accused persons. A group of youths had knocked at her door, pushed her aside after she opened the door, and dragged the accused persons out. A fight ensued between the youths and the accused. One of the youths, who later testified as PW5, had a metal bar or some metal implement. PW5 attempted to hit the 2nd accused with the metal bar, but the 2nd accused ducked, or PW5 missed him, and the bar hit the deceased instead, who fell, and the fight ended.
5. PW5, Kevin Wabwire, was one of the youths involved in the fracas. His testimony was that the accused and PW4 stormed the trading centre, where he and the deceased were, and attacked them. The 1st accused had a metal bar, with which he hit him, PW5, on the right, whereupon he fell, and lost consciousness. When he came to, he was informed, by undisclosed persons, that the deceased had been hit on the head with the metal bar, was badly injured and had been rushed to hospital. PW8, Samuel Peva, was not at the scene when the actual assault on the deceased happened, but arrived after it had happened, for he found the deceased on the ground. He was among those who took him to hospital. He spoke to him, and he said he had been hit on the head, but he did not disclose the person or persons who had hit him.
6. PW1 identified the body of the deceased, for the purpose of an autopsy being conducted on it by PW6, Dr. Jake Ogara. PW6 noted 3 sets of injuries, being a deep cut wound on the head, a cut on the ear separating the ear and bruises on the left cheek. He opined that the cause of death was the severe head injury, due to blunt trauma to the head following assault. PW7, No. 241306, Inspector of Police Lameck Onyango, was the officer, who arrested the accused persons at the police station, after they were brought there by their father, for their own safety, as the community was baying for their blood, as they were considered suspects in the killing of the deceased. PW9, Police Sergeant Daniel Koipiri, was the investigating officer. He was informed of the incident the following morning. When the accused persons were brought to the police station by their father, he charged them with murder.
7. At the close of the case by the prosecution, the parties did not submit.
8. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought. See Republic vs. Patrick Murua Mwangi & 8 others [2022] KEHC 2770 (KLR)[2022] eKLR (Njuguna, J) and Republic vs. Muli & another [2024] KEHC 13802 (KLR)(Mutuku, J).
9. On whether the deceased died, I have the evidence of PW1, his grandfather, he was present at his autopsy, which was conducted by PW6. They confirmed that the deceased had died. He said the cause of death was trauma to the head, caused by an assault. See Republic vs. Lokutan [2024] KEHC 5873 (KLR)(Nyakundi, J) and Mwambire vs. Republic [2024] KECA 865 (KLR)(Murgor, Laibuta & Odunga, JJA). The cause of death was not directly linked to the 2 accused persons, for none of the witnesses, who testified to being at the scene, saw the accused harm or assault or do anything that would have caused the death. See Republic vs. Kadenge & 2 others [2020] KEHC 1377 (KLR)(Nyakundi, J).
10. I need to say a bit more. The prosecution case is built around a fight amongst youths, which involved the accused persons, PW5 and the deceased, with the deceased sustaining fatal injuries in that fight. None of the witnesses testified to seeing the accused persons cause the fatal injury. PW5 speculated that the injury was caused by the 1st accused, for he alleged that the said 1st accused was armed with a metal bar, and he had hit him, PW5, with it. Speculated as PW5 testified that he, PW5, had lost consciousness, before the deceased was hit, for he only established that he had been injured after he, PW5, regained consciousness.
11. There is no direct evidence against the accused persons, pointing to them as the ones who did something to the deceased that led to his death. The allusion, from PW5, that the 1st accused person was



armed with a metal bar, was contradicted by PW4, who said that it was in fact PW5 himself who had the metal bar, and that it was him, PW5, who hit the deceased with it, as he, PW5, made an effort to assault the 2nd accused person. So, who, between the 2, had the metal bar or implement? The prosecution did not seek to resolve that discrepancy, and the same ought to be resolved in favour of the 1st accused.

12. The burden lies with the prosecution, throughout the trial, to establish beyond reasonable doubt that the accused persons caused the death of the deceased. There is no concrete evidence, in this case, that the accused persons herein killed the deceased. The case is built on circumstantial evidence, principally founded on the claim by PW5, which claim was contradicted by the other prosecution witness, PW4.
13. The prosecution should have done more. The fight happened at a trading centre, between the accused persons, on one side, and PW5 and other youths, on the other side. The testimonies pointed to there having been many people present. The only key witnesses presented were from the 2 sides involved in the fracas, the family of the accused persons, and their protagonist, PW5. In such a scenario, only contradictory evidence should be expected, of what exactly transpired. The prosecution should have sought witnesses outside these 2 circles. Of course, I am alive to the fact that, in cases of this nature, many of the individuals, privy to the facts, are usually unwilling to testify, for various reasons, and the resulting weaknesses, in the case by the prosecution, may have nothing to do with the investigators and the prosecutors not doing their very best.
14. On the issue of credibility, as between the testimonies of PW4 and PW5, on who in fact had the metal bar, between PW5 and the 1st accused, I note that PW5 claims that he was hit on the hand or arm with it, and lost consciousness, and that by the time he regained consciousness, the deceased had been hit with the same metal bar or rod, or whatever. No medical documentation was provided to support the claim. I find it curious. Consciousness would usually be lost on account of an assault to the head, and not on other parts of the body. PW8 was an independent witness, in terms of not being affiliated to either side. He was at the scene, and among those who removed the deceased for conveyance to hospital. He did not mention that PW5 had also been badly injured in that fight. The investigating officer, PW9, did not mention that any other person, apart from the deceased, had been injured in that incident.
15. One should be forgiven, for concluding that the alleged loss of consciousness, on the part of PW5, was a red herring, meant to divert attention from the claim that it was him who had the metal implement, and that it was him who, in fact, caused the fatal injury, as he attempted to hit one of the accused persons with the weapon.
16. In the circumstances, I find and hold that no prima facie case has been established, against the accused persons herein, and I find and hold that they have no case to answer, to warrant their being put on their defence.
17. As no prima facie case has been established against the accused persons herein, I shall, consequently, acquit them, under section 306(1) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, of the murder of Owen Boaz Mutanda. They shall be set free from remand custody, unless they are otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 21ST DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates



Mr. Tony Onanda, instructed by the Director of Public Prosecutions, for the Republic.

Ms. Betty Achala, Advocate for the accused persons.

