



REPUBLIC OF KENYA



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**Republic v Omukala (Criminal Case E037 of 2022)
[2025] KEHC 5761 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E037 OF 2022**

REA OUGO, J

APRIL 10, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

CHARLES MAKUNDA OMUKALA ACCUSED

JUDGMENT

1. Charles Makunda Omukala (the accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence are that, on the 10th day of December 2022, at around 2000hrs at Moka area in Bungoma South Sub-County within Bungoma County, murdered Philip Ongamo.
2. The accused denied the offence, and the prosecution called 9 witnesses to prove their case.
3. Lillian Nafula (Pw1) testified that the deceased Philip was her neighbour. She knows the accused, and she used to live in their plot. On 10.12.2022 at 8.00 pm she was lightning a jiko. She saw Charles and Philip struggle. Charles was pulling Philip, telling him to leave. The accused pushed the deceased and he fell and hit his head. The deceased informed the accused that he would not leave until he was paid his 200/-. The accused went to his house and came with an iron bar (chuma) and hit the deceased on the back of his head and neck area, and then he carried the deceased and took him outside the gate. The accused was alone. She went to sleep. They have lights outside, and also outside the accused's place and other houses. In the morning, she heard people say that the person who was out there, the deceased, was not talking. The deceased's landlord called Levo, carried him and took him to his house. The deceased's mother and sister later collected him and took him to the hospital, and he died at 5.00 pm. PW1 recalled the accused's father passed by and warned him not to kill another person's child.
4. Florence Wanjiru Ongamo (Pw2) testified that on 10.12.2022, her child, the deceased, was murdered. She knows the accused person. He is a neighbour. The deceased and the accused were friends. On



- 11.12.2022, she was called by the deceased's landlord, Levo, who told her that the deceased was not in a good condition that the deceased had been thrown in the forest, and that the deceased would not survive. She went to the place and found the deceased in his house. The deceased did not respond when she called his name. The deceased had been beaten at the back of his head and all over. She called Dinah her daughter, and they took the deceased to the hospital. Pw1 told her who did that to the deceased. She reported to the police.
5. Harriet Nafuna (Pw3) testified that on 11.12.2022, a person called Kihara told her he had passed a person lying on the road. She accompanied him to check who it was. She recognised the person, it was Philip the deceased. He did not respond. She decided to go and tell his landlord, Levo, who carried the deceased to his house. The deceased had injuries at the back of his head, and his ears were swollen.
 6. Dinah Auma Ongamo (Pw4) testified that the deceased is her brother. On 11.12.2022, she took the deceased to the hospital. He died. Later on, she attended the post-mortem and identified the deceased's body. The accused is their neighbour at home.
 7. Gabriel Lebo Kereka (Pw5) testified that; she knows the accused and the deceased too. The deceased was his tenant. The accused and the deceased were friends. On 11.12.2022, a neighbour called and told him that a person was lying there. He went and found the deceased. He had been hit on the head and he was lying on the ground. He carried the deceased into the premises and sent for his mother.
 8. No. 239389 Inspector Boniface Mashibi (Pw6) testified that; on the 11.12.2022, he was called by the OCS Chief Inspector Odongo and told that there was an incident that had occurred at Moka area and that a suspect had been taken to the station. He went to the station and found the accused Charles Makunda. He visited the scene with the deceased's mother Florence and he met Lillian (Pw1) and she showed him the house the deceased lived in. P. C Mugare who was with him took photos and they searched for the murder weapon. They found nothing linking the accused. They found blood stains in the accused's house, and samples were taken by P. C Mungare. They noticed there was evidence of commotion as things were scattered in the house. They also went to the place where the deceased was taken outside, but he did not see blood stains. It had rained. They went to Mission of Mercy hospital and found the body of the deceased. There was blood oozing from his head. The body was taken to Bungoma hospital. On going back to the station, they found the accused's wife, Saumu Evalyne, who was also a suspect. The accused was booked, and they recorded the statements of the witnesses. A post-mortem was done. He asked the doctor to remove toe nails from the deceased's to be subjected to DNA analysis together with the blood taken to help establish that the accused was at the locus. The ODDP later recommended that the accused be the only one to be charged. His wife was released. Later, he attended the post-mortem and sent the samples to the government analyst.
 9. Doctor Cyprian Wekesa (Pw7) testified as follows: he did a post-mortem on the body of Philip Ongamo on 14.12.2022 at Bungoma Referral Hospital. The body had rigor mortis. On external appearance, the body was swollen, scalp with dotted blood visible at the head. The skin looked okay. He had not lost a lot of blood. There was no abnormality in the respiratory, cardiovascular, digestive system, and genitourinary system. On the head, the scalp was swollen, and there was a large bruise with a large scalp hematoma. On the nervous system, there was a large hematoma. The brain was normal with no bleeding. He formed the opinion that the cause of death was due to a large bi-frontal subdural that is a large bleeding within the covering of the brain.
 10. No.110883 PC Gregory Munari, a scene of crimes officer, testified that on 11.12.2022, together with other officers, they went to Mercy Mission hospital where they found the body of Philip Ongamo. He took photos of the body, and they later went to Moka area to the scene alleged to have been where the deceased was murdered. He took 15 photos at the scene, exhibits 3 (a) to (o).



11. Godfrey Khamala Walima (Pw9) a government analyst based in Kisumu, testified as follows: he received a request from Inspector Boniface Machibi from DCI Bungoma South to examine some exhibits they had submitted through a DNA examination of biological evidential material. The items submitted were; 2 cotton swabs with blood stains marked “A” and A(i) and nail cutting samples of Philip Ongamo(deceased) marked B’. He did a DNA analysis of the said items and he established that the red stains marked ‘A’ an ‘A(i)’ in the cotton swabs tested positive for the presence of blood origin. His further finding was that the DNA profiles generated the blood stains on the cotton swabs items ‘A’ and ‘A1’ is a mixed DNA profiles of Philip Ongamo and unknown persons. He produced his report as exhibit no.5. In cross-examination, he told the court that he did not know the unknown persons. Before handling the exhibits, there is a possibility for contamination but he cannot tell that there was contamination of Philip’s blood and that of the unknown persons.
12. Dw1 Charles Makinda Omukala testified as follows: on the 10th December 2022, he left his home and went to work. He is a builder. He worked till evening. After work, he went for his evening meal and also took changaa for 50/- . He was with his friend called Juma. He left at 8.00 pm to go home. His wife was home. He gave her money to go get some food. His wife asked him to accompany her to the auntie’s place. She wanted to visit her aunt. He told her he could go with her as he was tired. She left returned with food prepared it and then left. He remained at home. She returned the next day in the morning. She found him at home and he asked her to accompany him to the shamba. He had to report to work first. On the way, he met a boy called Anwar who told him to accompany him. He went to inform his wife. He waited for his wife. Nyumba Kumi came chasing the boy and reaching his gate they said he was the one. He had no neighbour called Lillian Nafula he does not know her, he was just picked and informed he was involved in the murder of Philip. During cross-examination, he admitted knowing Lillian and said he had seen her at the drinking place for about one month. That Lillian lied in court. he does not know why Lillian would lie against him. he would not know why Levo would lie against him. He was home when Philip died. His wife was not home then. His father was home that night. His father did not go to his home that night. He knows Philip. Philip is a tenant of Levo. There were no blood drops in his place. No one was injured in his house that night.
13. Mildred Iddandisa (Dw2) testified that she is a village elder, she is trained in community health, and is a health promoter. She knows all the people who live in her area. In her records, she has no person called Lillian Nafula. Mzee Joseph is a resident of her area Mandizini. She has been to the said boma and she knows all the people who stay there. She knows the accused because he used to do roofing of houses. Joseph Ashihama Omukala testified that he does not know all the names of the persons who stay in his boma. He does not know Lillian Nafula, none by the name Lillian stays in his home. The accused is his son. The accused stays with him in the boma. On 10.12.2022 he was in his boma. He did not hear anything.
14. The prosecution and defence filed written submissions. I have considered the said submissions. The prosecution submitted that the death of the deceased was proved. The deceased’s death was unlawful and unjustified. It was submitted that from the evidence of Pw1, a credible eyewitness who saw the accused hit the deceased and who knew both the accused and deceased it was clear that it was the accused who killed the deceased over 200 as narrated by Lillian. The blood samples collected from the place confirmed that it was the deceased’s blood and that there was no proof of contamination or interference that has been presented by the defence. The accused hit the deceased on the head at the back a critical part of the body, malice aforethought was thus proved. Reliance was made in the case of *Nzuki vs Republic* [1993] KLR where the Court of Appeal set out principles of determining whether one has murdered by establishing mens rea. On the defence it was submitted that it was a total sham, a futile attempt to escape liability by the accused, and that the evidence adduced by the defence did



not shake the cogent evidence tendered by the prosecution. The accused could not explain why Pw1 would fix him. Dw2 was not an honest witness nor was Dw3.

15. Mr. Webo for the accused, submitted that the prosecution failed to prove their case against the accused beyond a reasonable doubt. It was submitted that the death of the deceased was proved. On whether the death was caused by an unlawful act of omission of the accused person it was submitted that the prosecution did not adduce any direct evidence linking the accused to the offence, none of the prosecution witnesses saw or heard the accused doing the alleged act. Pw1 did not witness the accused hitting the deceased with a blunt object on the back of the head. Pw1 could not explain why she did not seek help from other neighbours. She did not prove she was a tenant living in the premises where the accused was. From the evidence of Dw1, Dw2, and Dw3 it emerged that Pw1 was not a tenant at the accused's compound. There was no murder weapon produced. The investigators did not investigate the case well. The prosecution relied on circumstantial evidence (see principles set by the Court in the case of *R vs Kipkering Arap Koske & another* 16 EACA 135. The DNA test results indicated the blood of the deceased and unknown persons. This should cause the court to give the accused the benefit of doubt. The prosecution has assumptions and suspicions and suspicion however strong cannot sustain a conviction.
16. On malice aforethought, it was submitted that there was no malice aforethought on the part of the accused. There was no intention to kill proved. No weapon was produced in court. the accused was not the assailant of the deceased.

Analysis And Determination

17. I have considered the prosecution evidence and the defence, the submissions and the law. The accused is charged with the offence of murder. The prosecution has the task of proving the following; the death of the deceased, that the death was caused by an unlawful act of commission or omission by the accused, and that the accused had malice aforethought.
18. On the death of the deceased, Pw2, Pw4 and Pw7 testified on the death of the deceased. Pw7 the doctor who did a post-mortem on the deceased's body testified that the deceased died as a result a large bi-frontal subdural hematoma.
19. On whether the accused caused the unlawful death of the deceased. The evidence tendered by the prosecution that links the accused person to the death of the deceased is Pw1's evidence. Pw1 testified that she saw the accused hit the deceased, this was her evidence;

‘On the 10/12/2022 at 8.00pm I was lighting a jiko. I saw Charles and Philip struggle. Charles was pulling Philip telling him to leave. The accused pushed the deceased and he fell. Philip told Charles he would not leave until he was paid his 200/-. When he fell he hit his head that is Philip. Philip was still lying there. Charles went to his house and came out with a chuma and hit Philip at the back of his head, neck area. Then he carried Philip and took him outside the gate. Charles was alone.... yes, it was 8.00pm. We have lights at the accused person plus outside there and other houses too.’
20. This evidence was direct evidence and not circumstantial evidence. Pw1 further testified that she was a tenant at the place where the accused lives and that she even saw his father warn him not to kill the child of another person. The accused was a person known to her and she lived in their plot, she told the court that she had been there for 8 months. During cross-examination, she testified there were other tenants and it is only his father who came out. She stated there was sufficient lighting for her to see what was happening that it also rained and that the accused's door was next to her door. She knew Philip was a friend of the deceased and that she saw them struggle. Pw1 evidence was the only evidence that linked the accused to the death of the accused. I recall the defense counsel subjected her to



intense cross-examination. She was consistent all through her evidence and cross-examination too. The accused is a person she knew, identification was by way of recognition. It was not upon Pw1 to prove she was a tenant at the premises where the accused lives. The accused did admit in his defence that he was home that night but denies the incident. I find no reason why Pw1 would lie against the accused. She was a truthful, reliable, and consistent witness. The fact that she did not seek any help from the other neighbours does not in any way weaken her evidence. I do warn myself of the danger of relying on the evidence of a single witness. Pw1 happened to be the only one out then, she saw the accused and the deceased struggle, then the accused approached the deceased after he fell and hit him on the head and next area with a chuma. The post-mortem report does confirm that the deceased suffered injuries on the head there was a large bruise and large scalp hematoma present and that the cause of death was a large bi-frontal subdural hematoma.

21. It was alleged that Pw1 was not a resident of the area. The accused whilst being cross-examined by the prosecution admitted that he knew Lillian and that he had seen her at the drinking place. Dw2 and Dw3's evidence did not assist the accused. Dw2 had not a single record to show that she knew all the residents of her location, nor was Pw1 pointed out to her in court to confirm that she did not know. Dw3's evidence did not discredit the evidence of Pw1. On the DNA test, Pw9 tested that the blood of the deceased was on the cotton swabs and was the blood of the deceased and unknown persons. Pw 6 visited the scene the next day with P. C Mongare took blood samples and photographs too. The officers visited the scene the next day not the actual night the deceased was killed. Pw 9 who examined the blood samples testified during cross-examination that he could not tell that it contained the combination of Philip's blood and that of the unknown person. I find that the evidence of Pw1 which is direct evidence proves that the accused caused the unlawful death of the deceased. The accused's evidence and that of his witnesses does not in any way cast doubt on the prosecution case.
22. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before the Court. The East African Court of Appeal explained the circumstances in which malice aforethought can be inferred in the case of *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 as follows: The nature of the weapon used; whether lethal or not, the part of the body targeted, whether vulnerable or not, the manner in which the weapon is used, whether repeatedly or not, the conduct of the accused before, during, and after the attack. Pw1 saw the accused hit the deceased with a chuma at the back of his head after the deceased fell. The accused's action was deliberate. One does not take a chuma hit to the back of the head of another individual and expect that he will not sustain grievous injuries. The weapon used was dangerous, and it was used to cause grievous harm to the deceased. I find that malice aforethought has been proved.
23. I find that the prosecution proved their case beyond reasonable doubt against the accused person. I find Charles Makunda Omukala guilty and convict him of the murder of Philip Ongamo as charged accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 10TH DAY OF APRIL 2025.

R.E.OUGO

JUDGE

In the presence of:

Charles Makunda Omukala/ Accused

Mr. Webo -For the Accused Person

Miss Matere -For the State



