



REPUBLIC OF KENYA



**Republic v Opetoka (Criminal Case E003 of 2024)
[2025] KEHC 4293 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E003 OF 2024
WM MUSYOKA, J
APRIL 4, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JERONIM EKEMERI OPETOKA ACCUSED

JUDGMENT

1. The accused, Jeronim Ekemeri Opetoka, faces a murder charge. It is alleged that on 7th June 2024, at Kamolo River, within Kamolo Village, Kamolo Location, North Teso Sub-County, within Busia County, he murdered John Ekakoro, contrary to section 203, as read with section 204, of the [Penal Code](#), Cap 63, Laws of Kenya. He denied the charges. A trial ensued. 9 witnesses testified.
2. PW1, Timothy Ekesa Ekemel, was a cousin of the accused and the deceased. He saw both at the burial on 7th June 2024, and he later entertained them at his house thereafter, where they ate and drank. It started raining, and he went to sleep, leaving them at the seating room, when he woke up, they had left. He later heard, on 10th June 2024, that the deceased had not gotten to his home. His body was later found at Kamolo.
3. PW2, Bernard Okiru Odewa, was also at the burial, which the accused and the deceased had attended. After the funeral, he did not know how the 2 left. He got information, on 12th June 2024, that the deceased never got home. As he and others were searching for the body, he met the accused at Kiriko, who allegedly told him that the family should search for the body of the deceased at Kamolo River.
4. PW3, Christopher Okoch, attended the burial. He walked there with the deceased and saw the accused there. He did not go home with either of them. Later that night, at 10:00 PM or 11:00 PM, the accused knocked at his house, and spent the night with him, and he left early in the morning. He later heard that the deceased never got home from the funeral and later he heard that his body had been found.



5. PW4, Francis Olude Ekisa, was a son of PW1. He was also at the funeral and saw the accused and the deceased there. The 2 later came to their house, where they entertained them. It started raining, and they got into their house. PW1 retreated to bed, leaving him with the accused and the deceased. The 2 left at about 10:00 PM. He explained that there were drinks, and they had drunk them. He later heard that the deceased never got home, and that he was later found dead at Kamolo.
6. PW5, Casmir Omaria, was also at the funeral. He saw the accused and the deceased there, but did not know when they left. The wife of the deceased later contacted him, to inform him that her husband had not gotten home. He later heard that the body of the deceased had been found at Kamolo. On the way there they met the accused, who asked them to go tell Didi to leave him alone, for he was carrying the load of the deceased, and advised them to look for the deceased at Kamolo.
7. PW6, Alfred Eketon Ididi, was also at the burial. He testified that after the burial he and the accused and the deceased retreated to Edume's home and started drinking chang'aa. He then left them to go and fuel his motorcycle, on the understanding that he would come back and give them a lift home. When he went back, they were not there, and he went home alone. After 2 days, the wife of the deceased contacted him, with information that the deceased never got home. He telephoned PW2, who informed him that the accused and the deceased had left together, and he referred the wife to the accused.
8. He testified that a daughter of the deceased saw the accused with a hat, which she claimed was that of the deceased, and the accused had become hostile. PW6 said that he did not see the hat himself. He also testified that PW2 and PW5 had told him to inform the wife of the deceased that she should stop harassing him, and search for the deceased in Kamolo River. He said that the body of the deceased was found at Kamolo River, and that the accused had surrendered himself to the police.
9. PW7, Dr. Omondi Barack, was the medical officer who performed autopsy on the body of the deceased and produced the post-mortem report. The body was decomposed by the time postmortem was being done. The eyeballs and lips were missing, and maggots were on the body. There was blood or haematoma in the abdomen. He described the cause of death as haemothorax. He said the cause of death was asphyxia, secondary to haemothorax, or severe blood trauma to the chest. He stated that haemothorax could be caused by many factors, including assault by being hit on the chest with a blunt object, or road traffic accident, or falling on a rock in water. He explained that the body lost life 5 weeks before it was retrieved from the water.
10. PW8, No. 109245 Police Corporal Shem Othoo, developed photographs from a memory card, of the body of the deceased upon retrieval from the river. PW9, No. 89977 Police Constable Harrison Kazungu, was the investigating officer. He was in the team of police officers who went to where the body of the deceased had been found. It had been hooked on shrubs, at the bank of the river. It was at a stage of decomposition. It was intact, still fully clothed, and wearing a wristwatch. The body was removed from the river and taken for preservation at the mortuary. Witnesses were interviewed, and post-mortem was done. The accused later surrendered himself to the police, fearing for his safety, following threats from members of the public. After interrogating him, he said that he was together with the deceased at the funeral, and had lunch at the home of PW1, but it was not clear where the 2 parted ways.
11. I put the accused on his defence, on 29th January 2025. He testified on oath, on 3rd March 2025, and called no witnesses.
12. The accused testified as DW1. He denied killing the deceased. He testified that he was with the deceased at the burial, after which they went to the home of PW1 for lunch. PW1 gave them busaa and chang'aa,



- which they drank. PW1 later gave them Tusker beer, which they also drank. It then started to rain, at which point many of the other people in that compound left, leaving 5 of them behind, being him, the deceased, PW1, his wife and a daughter. At 10:00 PM, it was still raining, and the deceased asked him what they should do, whereupon he proposed they should spend the night. PW1 asked him to leave, which he did, leaving the deceased behind.
13. He went to the home of PW3, where he spent the night. He left in the morning. He found River Kamolo swollen. He got home at 7:00 AM. The wife of the deceased later telephoned him, to enquire about the deceased, and he explained to her what had happened. He was summoned by the Assistant Chief. The body was later found, and he was advised by the police to stay at home. The police later advised him to go to the police station for his safety. He said that he did not know how the body of the deceased ended up in the river.
 14. Neither party submitted orally, nor filed written submissions.
 15. The elements, for the offence of murder, are proof of the death, the cause of it, the involvement of the accused in the causation, and the fact that the accused caused the death with malice aforethought. See *State vs. FOO* [2021] eKLR (Aburili, J), *Republic vs. Henry Kaithia* [2022] eKLR (Cherere, J) and *Republic vs. Kipkemei* [2024] KEHC 2388 (KLR)(Nyakundi, J)
 16. On the death, there is proof that the deceased died. None of the civilian witnesses testified to seeing the body, as some just said that they went to the scene where the body was found, but did not talk about seeing it. The investigating officer, PW9, did see the body and gave descriptions of what he saw. The body was later identified by the relatives of the deceased, to him and to the medical officer who conducted post-mortem on it. None of those who identified the body, for post-mortem purposes, testified. Post-mortem was conducted on the body, said to be of the deceased, by PW7.
 17. On the cause of death, the medical officer of health, PW7, testified that the body was decomposed. He concluded that the cause of death was asphyxia, secondary to massive haemothorax. He explained that haemothorax could be caused by assault, traffic accident or even falling on a rock in the water.
 18. On the role of the accused in the causation, I note that the case by the Republic is built around circumstantial evidence. None of the persons who testified were eyewitnesses to the accused assaulting the deceased, or doing anything to him, that would have led to his death. The case hangs on 2 strands of evidence. The first is that the accused was the last person to be seen with the deceased. The second is that some witnesses testified that he told them to inform the wife of the deceased that she should search for the deceased in Kamolo river. Related to that is the claim that the accused was seen wearing the hat of the deceased.
 19. On the accused and the deceased being seen last together, there is overwhelming evidence. PW1 entertained them with food and drinks at his home, and they were together when he retired to bed. PW4, a son of PW1, escorted them out of their home. They had been drinking there. The accused conceded that he and the deceased were at the home of PW1 and PW4, and that they ate and drank there, but he testified that he left alone and spent the night at the home of PW3. The river where the body was found was said to be 5 kilometres away, or 2 hours walking distance, from where the burial, attended by the accused and the deceased, was.
 20. Did the accused walk that distance with the deceased, did something to him, and then walked back to the house of PW3, and slept there? The accused testified that he did not. He had suggested, to the deceased, that he and the deceased ought to spend the night at the home of PW1, due to the rains, but PW1 chased him away, so he chose to go sleep at the home of PW3, and that he went straight there, leaving the deceased at the home of PW1.



21. So, who was telling the truth? According to PW1, he went to bed, and left everyone there, and when he woke up, they had all left. According to PW4, the accused and the deceased remained at the home until about 10:00 PM, when he escorted them out. The accused said he was chased out and he left the deceased behind. There was drinking of alcohol at the home of PW1. The timelines are not very clear as to when that started, but it is clear that it ended at about 10:00 PM. PW1 and PW4 were not specific on what was being drunk, but the accused mentioned busaa, chang'aa and Tusker beer. It could be that the parties were quite drunk by 10:00 PM, hence their narratives of what exactly happened at or around 10:00 PM might not be clear.
22. What is clear is that after the accused left the home of PW1, whether with the deceased or alone, he ended up at the home of PW3. PW3 was emphatic that he came alone. The accused was also emphatic that when he left the home of PW1 he was headed for the home of PW3, as he had been chased away. PW3 did not notice anything unusual with the accused, to suggest that he could have done something bad to someone. The narrative by the accused, in defence, appears to fully explain himself. That he did not travel home that night, as it had rained heavily, and he chose to spend the night, at the home of PW3. I agree with PW9, the point at which the accused left the deceased is unclear, as no one saw him with the deceased at the riverbank, where the body was found. But I find the fact that the accused and PW3 spent the night together quite profound.
23. Then there is the issue about the accused telling PW2 and PW5 that the family of the deceased should look for the deceased at Kamolo River. Such information could be a cause for raising suspicion, and the suspicion of the 2 witnesses was perhaps aroused. However, none of them appear to have had approached the police with that information, before the body was found. Secondly, those remarks were allegedly made when the search for the deceased was ongoing. It has not been demonstrated that the same could not have been made innocently and in good faith, given that at the time the 2 were last seen together it had rained heavily and the 2 were very drunk.
24. The defence by the accused was that he left the deceased at the home of PW1, and his remark could very well have been a suggestion that the deceased might have decided to walk home alone, that night, only to end up in the swollen river. I do not find anything concrete, to suggest that the accused knew that the deceased was in that river. Curiously, when he testified under oath in defence, the prosecution chose not to ask him any questions and passed up the chance to hear his version on that claim. The fact that he was not confronted at cross-examination would mean that his version was not controverted.
25. About the hat that PW6 spoke about, said to have been of the deceased, that the accused was seen by the daughter of the deceased wearing, I note that PW6 himself never saw the accused wearing the said hat. He was not clear whether he was present when that daughter confronted the accused. The said daughter did not testify, and that evidence should remain in the realm of hearsay.
26. There is also the matter of the accused person taking himself to the police station. Some witnesses suggested that that was surrender, connoting some element of guilt on his part. However, PW9 explained that he did so as he feared threats from members of the public. The accused also explained that it was the Officer Commanding the Police Station who advised him to seek safety at the police station. The accused did not confess to any crime or offence, when he turned himself in at the police station, neither did the police suggest that he did. Nothing much should be read from that.
27. The prosecution relies on circumstantial evidence. The fact that the 2 were last seen together. See *Chiragu & another vs. Republic* [2021] KECA 342 (KLR) (Makhandia, Mbogholi-Msagha & Omondi, JJA). Only PW4 saw them together last. But PW3 says that the accused, at about the time he left the home of PW1, knocked at his door, which suggests that he did not walk with the deceased to Kamolo, which was 5 kilometres or 2 hours away. Therefore, that element of circumstantial evidence



- does not point inexorably to the accused. See *Mwangi vs. Republic* [2024] KEHC 3113 (KLR) (Magare, J) and *Odhiambo vs. Republic* [2024] KECA 571 (KLR)(Murgor, Laibuta & Odunga, JJA).
28. The other bit of information, on the remarks by the accused about the family searching for the deceased in Kamolo River, again does not point to guilt on the part of the accused. He was not the one who led the police to where the body was in that river. The remarks, if he made them at all, could only raise suspicion. It is trite that suspicion alone, without more, cannot provide basis for a conviction, however strong that suspicion might be. See *Kanyi vs. Republic* [1991] eKLR (Amin, J), *Kevin Kiswiki Kyongi vs. Republic* [2018] eKLR (Odunga, J) and *Republic vs. Juma* [2024] KEHC 816 (KLR)(JN Njagi, J).
 29. The last consideration should be whether the accused caused that death, if at all, with malice aforethought.
 30. What constitutes malice aforethought is defined in section 206 of the *Penal Code*. One, it is a direct intention to cause death, usually signified by a verbal expression of a desire to kill. Two, it is an intention to cause grievous harm, or to cause a bad injury, which results in death. This is usually inferred from the circumstances. Three, it is knowledge that the act causing death could cause death, or grievous harm, but the perpetrator is indifferent to the consequences. Four, it is an intention to commit a felony, such as assault or battery or whichever. These four would suffice for the purposes of this discussion. See *Republic vs. Ali Kajoto Ali* [2021] eKLR (Nyakundi, J), *Republic vs. Henry Kaithia* [2022] eKLR (Cherere, J) and *Republic vs. Kipkemei* [2024] KEHC 2388 (KLR)(Nyakundi, J).
 31. The question then is, were the injuries inflicted on the deceased herein so inflicted with an intention to kill him, or with an intention to cause to him a bad injury, or were the injuries caused recklessly and indifferently, or was the intention to commit some sort of felony?
 32. The killer blow was the injury to the chest, the lungs in particular, which led to the bleeding into the abdomen. The injury in this case was to 1 of the lungs, which is a vital body organ. A blow, to that area or region of the body, must have been calculated and intended to cause death, or to cause a very bad injury, or there was recklessness as to whether injury was caused or not. If that injury was caused by a human being, then the death was caused with malice aforethought.
 33. However, there is insufficient evidence pointing to that injury being caused by the accused, given that the evidence as to whether he and the deceased walked together all the way to Kamolo, where the body was found, is hazy. There is a real possibility that they parted ways at the home of PW1, for the accused ended up spending the night at the home of PW3. Secondly, although motive is not always an element for murder, and other offences, it is relevant in cases where there is no direct evidence of the culpability of the accused. In this case, the evidence adduced has not brought out any element of motive, which would have animated the accused to kill the deceased. See *Dishon Litwaka Limbambula vs. Republic* [2003] eKLR (Tunoi, O’Kubasu, JJA & Onyango-Otieno, Ag JA)
 34. In the end, it is my finding and holding that the offence of murder has not been proved, against the accused person herein, and I do hereby find him not guilty, and acquit him, under section 306 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, of the murder of John Ekakoro, contrary to section 203, as read with section 204, of the *Penal Code*. If he be in remand custody, he shall be set free forthwith, unless he is otherwise lawfully held. If he is out on bond, then any security, held by the court, shall be returned to whoever deposited it.
 35. It is so ordered.

DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA ON THIS 4TH DAY OF APRIL 2025.



W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

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

Ms. Waswani, Advocate for the accused person.

