



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Otieno (Criminal Case (Murder) E016 of 2022)
[2025] KEHC 8225 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE (MURDER) E016 OF 2022**

DK KEMEL, J

JUNE 13, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

FRANCIS STEPHEN OTIENO ACCUSED

JUDGMENT

1. The accused herein Francis Stephen Otieno was 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 night of 15th and 16th day of April 2022 at Masumbi village, South East Alego Sub Location in Alego Usonga Sub County within Siaya County murdered one Born cliff Odhiambo.

2. The prosecution called seven (7) witnesses in support of its case.

3. Angeline Akello (PW2) testified that the accused herein arrived while drunk and attempted to take away one of the bulbs using a security light and that a tussle occurred between him and her daughter Melvin Atieno. That she tried to intervene but that the accused wrestled her to the ground. That her daughter called the deceased on phone and informed him that the accused had attacked them and that he should rush home to help them. That after a few minutes, she received information that the deceased had been attacked at the roadside. That she rushed to the scene and found the deceased groaning on the ground and bleeding profusely while the accused stood nearby. That the body was collected by the police and taken to the mortuary. That she later identified the body during the autopsy.

On cross-examination, she stated that the accused picked a metal bar near her door and went away and that the same metal bar was found near the body of deceased as the accused stood by. She identified the metal rod, which was marked as MFI – 1.

4. Melvin Atieno Odhiambo (PW3) testified that the accused came home and seized a security light bulb and went away. That the following day, the accused came while drunk and that she demanded for the



bulb whereupon the accused slapped her and that her mother (PW2) tried to intervene but that the accused wrestled her to the ground. That she called her brother (deceased) to rush home and assist them. That the accused snatched a metal rod which was near the door to the main house and ran away. That they were later informed that he deceased had been assaulted. That they rushed to the scene and found the body of the deceased lying at the roadside in a pool of blood while the accused stood by. That she saw the metal bar that the accused had snatched from their home as he ran away.

5. Dr. Juma Gabriel Wekesa (PW4) testified that he conducted an autopsy on the body of the deceased on 27/4/22 at Siaya County Referral Hospital. That he noted bone fractures on the parietal area of the head and that there were an intracranial hemorrhage with brain lacerations. He concluded that the cause of death was severe head trauma with a shattered skull (intracranial hemorrhage). He produced the autopsy as Exhibit -1. That the type of injuries could not have been self-inflicted.
6. No. 66783 CPC Simon Likonyi (PW5) testified that he is a scenes of crime officer attached to DCI Siaya. That on 16/4/2022 at 2.30 am while on standby duties, the DCI Siaya requested him to proceed to Kogelo Pap Nyadier village. That on arrival, they found the body of the deceased lying on a murrum road and that a metal rod lay nearby. That the deceased had several injuries on the head. That he took five photographs showing the general view of the crime scene, clear views of the body of the deceased from different angles and the metal rod. He produced the same as Exhibit -2 (a-e) and the report as Exhibit 3.
7. Godwin Waliama (PW6) a government analyst based at Kisumu testified that he received exhibits from PC Mutwiri of Siaya DCI. That he carried out DNA analysis of several items inter alia; a short sleeve navy blue T-shirt (“A”); a short sleeved cream shirt in a brown envelope (“B”); a blue jeans trouser in a brown envelop (“C”); a pair of muddy safari boots (“D”); a rusted metal bar (“E”); fingernail cutting samples of the deceased (“F”); swab from the mouth of accused (“G”) as he was brought physically to the lab; soil samples n a white plastic container (“H”). That he analyzed the specimens on 17/11/2022 and came up with the following results:
 - i. The T-shirt (“A”), T-shirt (“B”) and trouser (“C”) were all stained with human blood.
 - ii. The pair of safari boots (“D”) and soil sample (“H”) were moderately stained with blood of human origin.
 - iii. The metal bar (“E”) was slightly stained with blood of human origin.That he came up with the following conclusion.
 1. The DNA profiles generated from the stains on the shirt, T-shirt, trousers, safari boots and metallic bar all match the DNA profile generated from the referenced buccal swab of Francis Otieno, the accused.
 2. The DNA profile obtained from the stains on the soil samples match the DNA profile generated from the reference nail cutting samples of Bon cliff Odhiambo (deceased).He produced the analyst report as Exhibit 4 as well as the other items namely short sleeves T-shirt, short sleeved shirt, blue jeans safari boots metal iron bar and soil samples as Exhibit 5 (a-f).
8. No. 242306 PC Peter Mutwiri (PW1) testified that he is the investigating officer in the matter. That upon receiving the report of murder, he together with other officers rushed to Siaya County Referral Hospital where the accused was reported to have sought treatment and whom they arrested him soon after being treated. That the accused had two cuts on his head and that his clothes were soaked in blood. That they escorted him to Siaya Police Station where they recovered his blood soaked clothes



comprising of a T-shirt, trouser and pair of a metal rod at the scene; that he recorded statements of witnesses and later established that he accused had visited the home of the deceased and harassed his mother and sister and who contacted the deceased for help and that the accused picked up a metal rod and went away only to attack the deceased when they met on the way. That he later escorted exhibits to the Government Chemist for analysis. He produced the Exhibit Memo as Exhibit 6.

On cross examination, he stated inter alia; that the eye witness one Simon did not heed to summons to come to court and testify; that the accused had two panga cuts on his head; that he established from the accused that he had fought with two strangers and that he had overpowered them; that the blood stains on the accused's clothes did not bear blood of the deceased; that he was present when the accused recorded his statement voluntarily as he was not forced; that the accused in his statement claimed that he was attacked by the deceased and another person; that the accused claimed that the fight had occurred and that he hit the deceased with the metal bar; that the accused had fought with the deceased.

9. At the close of prosecution's case, this court established that a prima facie case had been made out against the accused herein to warrant him to be placed on his defence. He opted to tender a sworn testimony and called two witnesses.
10. Francis Stephen Otieno (DW1) stated that on the material date (15/4/2022) he was at a drinking joint and later went to the home of the deceased in search of a motor cycle to take him home. That on reaching the deceased's home, he found the deceased's mother and sister selling chang'aa. That he tripped and damaged a certain lighting bulb whereupon the deceased's sister Melvin insisted that he pays for the bulb and that the deceased's mother snatched his jacket and took it away and that the deceased's sister Melvin called the deceased and requested him to rush home and help out. That he feared for his life and ran away towards the road only to meet three people who attacked him and cut him on the head and other parts of the body. That he managed to snatch a metal bar from one of them and managed to hit the deceased with it and who fell down. That he learnt that one of the attackers in company of the deceased was Simon. That he defended himself with the iron bar and that the panga fell off. That he managed to seek refuge at the home of one Barack who informed his mother to come and take him to hospital. That he was taken to Siaya County Referral Hospital where the wounds were stitched. That as he made arrangements to go and report to the police, the deceased's sister Melvin and Simon plus DCI officers arrested him and took him to Siaya Police Station. That the deceased and Simon are the ones who attacked him.

On cross examination, he stated inter alia; that he went to the home of the deceased severally and that he was drunk during the incident; that he met the deceased on the road and a fight broke out; that he hit the deceased on the head with a metal rod.

11. Jane Obare (DW2) testified that the accused is her son. That she received a report that her son had been cut and that she rushed there and took him to Siaya County Referral Hospital where the wounds on the head were stitched. That the police picked the accused from the hospital and took him to Siaya Police Station. She identified the treatment notes, patient card which were marked as MFI – 1,2, and 3.
On cross examination, she stated that she did not witness the incident.
12. Dr. Omondi Samuel Odhiambo (DW3) testified on behalf of his colleague Dr. Gabriel Juma Wekesa. He stated that the patient one Franklin Otieno Obare alias Francis Stephen Otieno, had a cut wound on his head secondary to assault. That the patient was sutured and given drugs. He produced the treatment card and notes as DEXH 4 and 5. He formed the opinion that the degree of injury was harm.
13. After the close of the defence case, learned counsels were directed to file and exchange submissions. However, it is only the defence that complied.



14. I have considered the evidence of the prosecution and defence as well as the submissions filed. I find the issue for determination is whether the prosecution proved its case against the accused beyond any reasonable doubt.
15. The burden of proof in all criminal cases is always upon the prosecution to discharge and that the standard is one of beyond any reasonable doubt. See *Woolmington Vs. DPP [1935] AC*.
16. In a charge of murder, the prosecution is under obligation to prove certain essential ingredients inter alia; that there was death of the deceased; that the death was caused unlawfully; that there was malice aforethought; that the accused was the perpetrator of the crime.
17. As regards the aspect of death, the pathologist Dr. Gabriel Juma Wekesa (PW4) testified that there were bone fractures on the parietal area of the deceased's head and that there were intra intracranial hemorrhage with brain laceration. He formed the opinion that the cause of death was severe sharp head trauma with shattered skull (intracranial hemorrhage). He produced the autopsy as Exhibit 1. I find that the prosecution has proved this ingredient beyond any reasonable doubt.
18. As regards the unlawfulness of the death, it is trite law that all homicides are unlawful unless authorized by law. The deceased was a young man then aged twenty (20) years and in god health. The injuries noted by the pathologist left no doubt that the assailant desired that the same would lead to the death. It is instructive that the deceased fell down after being hit with a metal rod once. Hence, I find the death was unlawful and that this ingredient was proved by the prosecution beyond any reasonable doubt.
19. As regards the aspect of malice aforethought, the Court of Appeal in the case of *Nzioka Vs R [1993] KLR 171* held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused: -Intention to cause death.Intention to cause grievous bodily harm.Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

The foregoing authority is a replica of the conditions to be considered whether the ingredient of malice aforethought under Section 206 of the *Penal Code* has been established. It transpired from the evidence of both prosecution and defence that the accused had earlier been involved in a scuffle with the deceased's mother and sister and that the deceased was alerted and requested to rush home to help out and that the accused was later caught up by the deceased who was in company of one Simon and another and that a fight ensued. Indeed, the accused sustained cut wounds on the head leading to his hospitalization at Siaya County Referral Hospital while the deceased also sustained a fracture on the head at the scene of crime but died at the scene. The accused herein in his defence evidence admitted that he hit the deceased with a metal rod. The scene of crime officer (PW5) stated that on arrival at the scene, he found a metal rod near the body of the deceased. It is clear that there was a fight between the accused and the deceased on the material date which led to fatal injuries on the deceased and the accused sustaining bodily injuries. The evidence of the deceased's mother and sister is that the accused left their home as they waited for the deceased only to be informed that the deceased had been killed. Indeed, at the time the accused was at the home of the deceased, his dispute was with the mother and sister of the deceased and not the deceased. It is clear that the deceased upon being informed by his sister that the accused had attacked his mother, promised to rush home quickly to deal with the problem. Apparently, the accused and deceased met along the road and that an altercation ensued whereupon a fight broke out but wherein the accused sustained cuts on the head while the deceased was fatally injured on the head. Indeed, the accused in his defence evidence gave a vivid account of how the fight took place. He has stated that upon being attacked, he snatched a metal rod that was in possession of his attackers and used it to hit the deceased on the head and that as soon as the deceased fell down,



he managed to run away and sought refuge at the house of one Barrack from where he was rushed to hospital by his mother. The accused produced the treatment notes and patient card thought Dr. Omondi Samuel Odhiambo (DW3) which left no doubt that he too was injured in the fight with the deceased. It is unfortunate that the deceased succumbed to his injuries otherwise there would have been a different charge to be preferred by the office of the Director of Public Prosecution. I find that the circumstances of the offences do not establish that the accused had malice aforethought prior to the incident which led to the death of the deceased. I am satisfied that the prosecution did not prove the ingredient of malice aforethought beyond any reasonable doubt against the accused herein. That being the position, I find that the circumstances prove a charge of manslaughter against the accused as confirmed by the fact that the accused was at the time intoxicated and that the injuries sustained by both the deceased and accused were as a result of a fight between the two.

20. Learned counsel for the defence in his submissions has urged the court to dismiss the charges since the witnesses for the prosecution gave contradictory evidence. Whereas there might have been a few contradictions here and there, the same were not that weighty to lead to some doubt on the prosecution's case. It is instructive that the accused in his evidence admitted that he picked up a metal rod and hit the deceased on the head and who fell down and that he ran away. Since the accused has confirmed that he is the one who made the single blow that caused the death of the deceased, the defence contention on the existence of contradictions by the witnesses becomes a non-issue. Even though one of the eye witnesses, namely Simon was not called to testify, i am satisfied that the accused is the one who assaulted the deceased on the material date and that the injuries led to the death of the deceased.
21. In view of the foregoing observations, 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* against the accused herein Francis Stephen Otieno beyond any reasonable doubt. I find him guilty therefor and is convicted accordingly.

DATED AND DELIVERED AT SIAYA THIS 13TH DAY OF JUNE, 2025.

D. KEMEI

JUDGE

In the presence of:

Francis Stephen Otieno.....Accused

Ooro F.....for Accused

Mocha.....for Prosecution

POkumu.....Court Assistant.

