KENYA LAW
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Republic v Oluoch & another (Criminal Case 35 of 2015) [2025] KEHC 12652 (KLR) (25 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL CASE 35 OF 2015

GL NZIOKA, J

AUGUST 25, 2025

BETWEEN

REPUBLIC .... PROSECUTOR

AND

GEORGE ONYANGO OLUOCH .... 1ST ACCUSED

ZAKARIA MUIRURI NJOGU .... 2ND ACCUSED

JUDGMENT

1. The accused were as arraigned in court on 21st day of May 2015, charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya.

2. The particulars of the charge are that on 13th day of May 2015 at the Government of Kenya Maximum Prison in Naivasha Sub-County within Nakuru County jointly murdered Francis Wahineina Kiragu.

3. The charge was read to each accused to which they pleaded not guilty to the charge and the case proceeded to full hearing. (PW1) No. XXX PC Michael Cheserem, a Prison Warder at the Naivasha Maximum Prison, testified that on the 13th day of May 2015, while on duty at the remand block in the company of Sergeant Julius Mwendwa, he was called by two inmates whom he has identified as the accused herein and informed that they had killed somebody.

4. That PC Cheserem informed (PW2) N0. XXX PC Leonard Wambua Mbaka of the incident and both went to where the inmates were but they could not see inside as the little ventilation had been covered with a blanket.

5. That both warders notified the security personnel of the incident and (PW3) No. XXX, Sergeant Dennis Wandati Masimbo. He testified that when he went to cell No. 10, he saw the ventilation box was sealed with a blanket and when he managed to peep in, he saw the first accused person holding an improvised knife in his right hand which was soiled with blood. The 2nd accused was also in the cell

and someone else was lying down covered with a blanket and who turned out to be the deceased. PW3 notified (PW4) No. XXX SP Joseph Nyamai, who was in charge of the officers on duty.

6. Subsequently the cell door was opened and (PW5) Joseph Wambugu the clinical officer who examined the person lying down and confirmed that he was dead. The matter was reported to the police. (PW7) No. XXX IP Joseph Maina who testified that he visited the scene found the accused persons had been removed from the cell, but the deceased's body was still in the cell.

7. (PW7) No. XXX IP Joseph Maina moved the deceased's body to the morgue after the scene was processed by the scene visiting officer who had accompanied him. In the meantime, the two accused were held as suspects and arrested for further investigation.

8. As part of investigation, (PW7) IP Maina took the two recovered metal knife and blade to the Government Chemist for analysis. The analysis was carried out by (PW8) Margaret Wahu the government analyst examined the two metals and prepared by a report dated 11th April 2017 which confirmed that the metals were heavily stained with the human blood, established to belong to the deceased.

9. In further investigation, the post mortem was carried out on the body of the deceased by (PW9) Dr Titus Ngulungu who confirmed that the cause of deceased's death was as a result of the stab wounds he sustained on the neck. At the conclusion of investigation, the accused were charged accordingly.

10. At the conclusion of the prosecution case each accused was placed on his defense. The 1st accused testified that he was not in the remand block where the deceased's death occurred. That he was in block S and that the prosecution did not produce any evidence to show that he was at the scene of crime or in the same cell with the deceased. That in any case the deceased was unknown to him and he had no reason to kill him.

11. The 2nd accused person testified that he was serving a death sentence and had served six (6) years by then and that condemned prisoners are kept in block S and P, consequently he was not in cell number 10 where the incident herein took place.

12. That he could not have accessed the workshop where the metals herein could be found and argued that he is associated with this matter out of a grudge he had with the prison warder. That he no motive to kill or want to murder the deceased.

13. At the conclusion of the trial the accused tendered submissions while the prosecution relied on the evidence adduced. The 1st accused in submissions dated 19th September 2024, raised a defence of alibi and reiterated that at the time of the offence he was imprisoned within cell block S, at Naivasha Maximum Prison while the offence was committed in the remand block, a fact established by both the prosecution and accused and confirmed to the court during the site visit.

14. That, cell block S is a section designated for condemned prisoners and is physically and administratively distinct from the remand block and therefore he could not have accessed the remand block without authorization.

15. That, the prosecution had the burden to prove its case as held in the case of; Woolmington v. DPP [1935] UKHL 1 that the burden of proof never shifts to an accused person even in the case of an alibi defence. He relied on the case of; Peter Okello v. Republic [2014] eKLR where the Court of Appeal cited with approval the decision of Sekitoleko vs Uganda [1967] EA 531 where it was held that that the general rule of law is that, the burden of proving the guilt of a prisoner beyond reasonable doubt never shift and that the burden of proving an alibi does not lie with the prisoner.

16. The 1st accused argued that, the accused persons having intimated from the start of the proceedings that they were raising a defence of alibi, the prosecution had an opportunity of discrediting the defence by producing the prison records to show that the accused were held in the remand block, cell No. 10.

17. That (PW1) PC Cheserem testified that he was responsible for doing a head count of all prisoners in the remand block an indication that records were available for scrutiny. However, the prosecution failed to avail any such records.

18. That the prosecution's failure to avail the record raises an assumption that, had the records been availed, it would have confirmed that the accused persons were not in the remand block and would have embarrassed the prosecution. That in the circumstances, the accused persons must benefit from such doubt. Furthermore, the defence of alibi has not been rebutted and has raised doubt in the mind of the court that is not unreasonable.

19. The 1st accused further submitted that there was no direct evidence linking the accused persons to the commission of the offence. That (PW8) Margaret Wahu Maina the Government Analyst in her report confirmed that the accused persons' DNA was not matched to any of the items from the scene and/or the scene its self. Furthermore, the accused clothes were not presented for forensic analysis to determine the presence of bloodstains. The absence of such evidence gives credence to the defence of alibi.

20. That the prison officers who gave evidence merely described events subsequent to the discovery of the deceased's body. Further, the prosecution claimed to have taken photographs of the scene however, despite being given adequate time they failed to avail the said photographs in support of their case.

21. The 1st accused submitted that the investigations were conducted poorly in light of the allegations by the accused that prison officers may have colluded to cover up the actual occurrence of the offence and framed them.

22. It was argued that, the police officers failed to record statements from fellow inmates who were present in the vicinity of cell No. 10, and who could have offered material evidence of whether there was a commotion or not considering the brutal manner in which the deceased was murdered.

23. Furthermore, that the prosecution witnesses lied under oath that, the cell door was locked from the inside. That during the site visit by the court, it was observed that the cell door in question could only be locked from the outside giving credibility to the allegations that there is an attempt and/or collusion to defeat the course of justice.

24. The 1st accused submitted that, the prosecution's case wholly relied on circumstantial evidence and that the prosecution had to prove that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt.

25. However, that the prosecution case was riddled with glaring inconsistencies in the evidence tendered and quality of the prosecution witnesses and therefore did not meet the threshold required.

26. The 1st accused urged the court to invoke section 119 of the *Evidence Act* (Cap 80) Laws of Kenya which vests the court discretion to presume the existence of any fact that is likely to have happened in the normal course of natural events, human conduct and public and private business. The 1st accused urged the court to presume the facts presented in his defence as the only likely facts in the circumstances of the case and find that the prosecution failed to establish the guilt beyond reasonable doubt.

27. The 2nd accused in submissions dated 14th October 2024, argued that the burden to prove the charge against him beyond any reasonable doubt lie squarely with the prosecution. He cited section 203 of the Penal Code and submitted that, the prosecution was required to adduce evidence to establish the

ingredient of the offence of murder being that; the accused person inflicted the injuries on the deceased and that he had formed the necessary intention to either cause death or grievous harm on the deceased.

28. That the prosecution failed to adduced critical evidence in support of their case. That having denied that he was in the remand block where the offence occurred but was held in the segregation cell, the prosecution was required to produce the cell register to prove that he was remanded and/or confined with the deceased but failed to do.

29. Further, that the prosecution failed to produce photographs of the scene of crime and the curtain allegedly used to cover the ventilation of the cell door.

30. Furthermore, that the prosecution failed to call prisoners in the adjoining cells as eye witnesses. That following the site visit by the court, it was clear that it would not have been possible for someone to be murdered without other prisoners hearing the commotion. Further, the other prisoners could have confirmed that the accused called the prison officer and informed him of the offence.

31. The 2nd accused faulted the prosecution for relying solely on the testimony of prison officers, raising the possibility that there was a cover up. That the deceased could have been murdered elsewhere before his body was transferred and dumped in the cell. That, there existed bad blood between himself and (PW1) PC Cheserem which could have led him to be framed in order to exonerate and/or cover up for the prison officers involved.

32. The 2nd accused quoted section 206 of the Penal Code on what constitutes malice aforethought and submitted that the prosecution had failed to establish any motive to the killing. That he had testified that he did not know the deceased neither was there any bad blood between them.

33. That, for the charge of murder to be proved, the prosecution is required to prove the accused's conduct in the cause of the death. However, in the present case the prosecution had failed to prove both mens rea and actus reus. He relied on the case of, Joseph Kimani Njau v. Republic [2014] eKLR where the Court of Appeal stated that in all criminal trial both mens rea and actus reus require to be proved by the prosecution beyond reasonable doubt.

34. Lastly, the 2nd accused submitted that, the prosecution evidence was based on circumstantial evidence and relied on the case of Republic vs Micahel Muriuki (2014) eKLR where the Court of Appeal cited with approval its earlier decision in Sawe vs Republic (2003) KLR 364 where it laid out the principles a court is to consider before relying on circumstantial evidence being that; the facts relied upon are wholly incompatible with the innocence of the accused and incapable of any other reasonable explanation, there is no other existing circumstantial evidence exist that weaken the circumstances relied on, and that the burden of proving such facts to the exclusion of any reasonable hypothesis of innocence rests entirely with the prosecution and does not shift to the accused at any stage.

35. That in the present case, there was no proof on who inflicted the injuries on the deceased. Further, it was not enough for the prosecution to allege that the accused's clothes were stained with blood. In the circumstances there was no proof that he participated in the act or that his participation was to such a level that he caused the death of the deceased.

36. He urged the court to find that the prosecution failed to prove the case beyond reasonable doubt and acquits him under section 215 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

37. At the conclusion of the case, I note the accused is charged with the offence of murder provided for under section 203 of the Penal Code as follows: -

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"

38. The ingredients of that offence are settled through several court's decision including the decision of the Court of Appeal in Joseph Githua Njuguna vs Republic (2016) eKLR, where the ingredients were stated as: a) proof of occurrence and cause of death, b) whether the death was lawful or unlawful, c) proof of commission of the offence by the accused and d) malice aforethought.

39. In relation to the 1st element, I find that, the evidence of prison officer who testified as PW1, PW2, PW3, and PW4, is that they found deceased's body lying on the floor covered with a blanket. PW5 the clinical officer testified that when he was called into the subject cell he examined the deceased and confirmed he was dead.

40. Similarly, the deceased's sister (PW6) Emma Wanjiru who identified the deceased's body for post-mortem and the pathologist (PW9) Dr Ngulungu who performed the post mortem on a dead body confirmed he was dead. As such the occurrence of death is not disputed.

41. As regard, the cause of death, the post mortem report indicates that cause of death was neck puncture injuries involving the trachea/vessels and nerves with blood loss due to sharp/semi-blunt force trauma to the neck in keeping with homicide. Consequently, the cause of death is established.

42. The next issue to consider is whether the accused committed the offence. In dealing with this issue, I note the evidence of PW1 and PW2 the prison warders who testified that the accused called them and told them that they had killed someone. That in fact, they told PW2 to blow the whistle because they had killed someone.

43. The afore evidence amounts to a confession but it cannot be admissible or used against the accused as it is does not comply with the threshold and requirements of confession.

44. The other evidence produced regarding the involvement of the accused in the commission of the offence was led by PW1, PW2 PW3 and PW4 that when they accessed cell No. 10 where the deceased was, they found the two accused therein.

45. The witnesses further testified that they found the 1st accused holding improvised knife in his hand, and the hand had blood stains. Further before the took the accused out of that cell, they asked them whether they had any other weapon and the 2nd accused told the 1st accused to surrender all the weapons and the 1st accused directed the officers to check behind the door to the cells and a further metal blade was recovered. Pursuant to the afore the prosecution evidence is that the recovered weapons were murder weapons.

46. The further evidence is that when the deceased was examined by PW5 the Clinic Officer, he noticed that he was injured on the neck. Furthermore, PW4 also testified he saw the deceased had blood on the neck while PW5 testified that the deceased had a sharp wound on the left neck which was penetrating and blood was oozing from the wound while PW6 also observed that the deceased's body had a cut on the neck.

47. In addition, the prosecution case is that, two metals recovered in the cell where the deceased met his death were subjected to forensic examination by (PW8) Margaret the Government Analyst, and found to be stained with human blood belonging to the deceased. At this point it is worth observing that

these two metals are the ones that are said to have been recovered from the two accused persons. The question is: Is there any doubt that indeed these two weapons were used to kill the deceased.

48. Based on the afore said, it is evident that the fatal injuries the deceased suffered were occasioned by a sharp object which resonate with the metals recovered.

49. Pursuant to the afore, it is important to knit the thread and/or tie the up the evidence. The deceased is said to have been found dead in a cell where only two other occupants who are identified as the accused were. It is noticed he had sustained a sharp penetrating fatal stab wound on the neck. Further, two sharp metals were recovered therefrom, which are believed to have been used to kill him as confirmed by the evidence of the Government Analyst.

50. The question that arises is this: Who else other than the two accused persons can explain how the deceased met his death?

51. However, the accused are raising the defence of alibi that they were not in cell No. 10. The accused argue that the prosecution did not produce any evidence to show that they were in the same cell with the deceased.

52. In considering the aforesaid, I note that indeed the prosecution did not produce any record to prove that the accused were in cell No. 10. However, from the evidence of the prosecution witnesses No(s) 1-5, they all confirmed that they found the accused locked up in cell No. 10. The question is: why would the first five witnesses implicate the accused?

53. I note that although the 2nd accused attributed his charge to a grudge with the prison warders, he doesn't explain where the grudge arose from. It remains an allegation.

54. Furthermore, from the cross examination of these witnesses there was no clear indication the defence was raising the defence of alibi as the witnesses were cross examined on a wide range of issues negating the defence of alibi.

55. Further, the accused allege that they had no motive to kill the deceased but the law is settled that motive is immaterial in murder case. That was so held in the Court of Appeal in the case of; Anne Waithera Macharia & 5 others v Republic (2019) eKLR where the court stated that: -

> " It is not necessary under our law to prove motive for murder since malice aforethought is defined in Section 206 of the Penal Code in broad terms that do not include motive. Where it is proved to exist, however, especially in a case dependent on circumstantial evidence, it assumes great significance. as this Court aptly put it in Libambula vs. Republic [2003] KLR 683 cited by the learned Judge;
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> > " Motive is an important element in the chain on presumptive proof and where a case rests purely on circumstantial evidence and may be drawn from facts though proof of it is not essential to prove a crime."

56. Pursuant to the aforesaid, I find adequate evidence that the accused committed the offence.

57. The last question is whether they had malice aforethought. The law on malice aforethought is settled. Section 206 of the Penal Code states: -

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

58. The Court of Appeal in Odio v Republic [2024] KECA 1544 (KLR) stated that: -

> " 20. Malice aforethought may be express or implied. Express malice aforethought refers to when a deliberate intention is manifested to take away the life of a person unlawfully. Implied malice aforethought applies when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice aforethought must be proved. Malice aforethought cannot be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice aforethought, no other mental state need be shown to establish malice aforethought. In Nzuki vs. Republic [1993] eKLR, this Court defined malice aforethought as:
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> ...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237."

59. Furthermore, in the case of; Tubere s/o Ochen {1945} 12 EACA 63 the court in considering whether there was malice aforethought, stated that the trial court should look out for characteristics such as; the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted whether vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also Dafasi-Magayi v Uganda {1965} 1 EA 667).

60. In the instant case the deceased was injured on the neck and critical vessels injured. Clearly the body part targeted indicates the motive to murder. The deceased died on the spot. The prosecution case is that the murder weapons were not easily available in prison. That they could only be found in the industry section of the prison. As such for the accused to have obtained them whichever way, then they must have armed themselves with intend to injure or murder as the case herein.

61. Furthermore, it is in evidence that the deceased was not domiciled in cell No. 10, therefore it is likely he was lured therein. Finally, there were no defensive injuries on deceased body as such he seems to have been defenseless. PW1 and PW2 described the deceased as calm, social, sickly and elderly. It is therefore unlikely that he provoked the accused.

62. The upshot of the afore is that I find both accused guilty as charged and I accordingly convict each one of them of the offence of murder.

DATED, DELIVERED AND SIGNED ON THIS 25TH DAY OF AUGUST 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Atika for the State

Mr. Wairegi for the 1st accused

Mr. Owuor for the 2nd accused

The accused present virtually

Mr. Komen: court assistant