



**Republic v Likalamu (Criminal Case 24 of 2012)
[2024] KEHC 713 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 24 OF 2012
PJO OTIENO, J
JANUARY 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

CETRIC LIKALAMU ACCUSED

JUDGMENT

1. The accused person, Cetric Likalamu, 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 9th day of July, 2012 at Shivagala area in Kakamega South District within western province, the accused person unlawfully killed Glorious Owino.
2. He pleaded not guilty to the charge and in order to discharge its burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from five (5) witnesses. For the defense, the accused gave sworn testimony without calling any additional witness.

The Evidence

3. PW1, Susan Atieno Asango, the mother to the deceased and aunty to the accused, testified that on 9/7/2012 she woke up and prepared her other child, a son, for school. After the boy left, her and the daughter, the deceased, went to fetch water from the river. When they returned from the river, the deceased, then aged four years, placed her water in a container and went out. They didn't come back and the witness remembered that earlier that day the child had informed her that she was go to the accused person's house because the accused had promised her 'mandazi'. The deceased left the witness a few moment after 9 am and at midday, having not seen the child, the witness decided to go looking for the child in neighbours' houses including the house of the accused. She found the door to accused person's house locked with a padlock and returned home to prepare lunch. After preparing the lunch, her husband received a call asking him whether he knew the deceased and the accused person. He was



- asked to go to the house of the accused. The witness, her husband then headed to the accused's home in the company of others. At the home, she peeped through a hole on the wall and was able to see the clothes her daughter was wearing that day. Her husband broke the door open and the body of the deceased was found under the bed with the mouth tied using a piece of cloth. The accused was not at the scene when the body was recovered but the witness added she had seen the accused that morning. She said her home was about 100 from that of the accused.
4. On cross-examination, she stated that the accused had a good relationship with her children and that she had lived with the accused since he was a small boy and that the body of the deceased was found inside the house of the accused which was locked with the use of a padlock. She said that the broken padlock was not taken by them and that the police took photographs of the scene. On re-examination, she said that she was unaware if the accused harbored any grudge against her children
 5. PW2, Charles Ashiundu Likalamu and father to the deceased testified that on 9/7/2012 he was at home having lunch with his wife and sister when he received a called from a police officer by the name of Otieno from Kakamega Police Station who asked him if his daughter Gloria was in the house and when he responded in the negative, the police officer asked him to go to the house of the accused which he did with his wife and sister in law. When he got to the house the padlock was hanging and he pushed the door open and found his daughter's body under the bed with a piece of cloth tied around the mouth. The mouth was bleeding so he removed the cloth and found the tongue was cut.
 6. On cross examination he stated that he did not find the piece of tongue that had been cut off in the house. He further stated that he had a good relationship with the accused and so were his children.
 7. PW3, Jeritah Shirerero Indeche testified that on 9/7/2012 at 2PM she was at home when she saw PW1 and PW2 rushing towards the house of the accused and on inquiring they told her that they had received a call from the police to go to the home of the accused. He attended post mortem examination at which him and accused identified the body.
 8. PW4, No. 223427, CI Philemon Otieno stationed at Luyangalani police station in Marsabit County and formerly of Kakamega Police Station testified that on 9/7/2012 at about 2:30PM the accused was brought to his office by officers from the report office. The accused appeared confused and he calmed him down. He told him that at about 9AM he had given the deceased Kshs. 20/- to get him sugar and when the deceased returned, she neither had the money nor the sugar. He then made a report about the death of the deceased and this prompted him to call the deceased's father who later confirmed that they had discovered the deceased's body in the accused's house. On cross examination he stated that he was not the investigating officer but that he received the report of death and alerted the deceased's father.
 9. PW5, Dr. Mchana Dixon, a consultant pathologist for Kakamega County, General Hospital testified that he conducted an autopsy on the body of the deceased on 10/7/2012 at the then Kakamega Provincial Hospital and that on observing the body, the deceased had a triangular brown cloth around the neck which was blood stained and her dress was partially torn. Externally, the body had minor bruises on the front of the neck and on both sides of the chest. There was amputation of the tongue at the tip meaning a fragment was missing. Internally, the body had blood clots under the skin extending to the left 3rd rib, on the head and on the surface of the lung which was a sign of asphyxia. The brain was mildly swollen with congestion of the blood vessels. He then formed the opinion that the deceased died due to asphyxia secondary to strangulation. He produced the autopsy report which was marked as PExh 1.
 10. On cross examination he stated that there were blood clots because blood was not flowing and the injury on her head suggested being knocked.



11. After the court ruled that a prima facie case had been established against the accused person and placed him on his defence, the accused opted to give sworn testimony without calling any other witness.
12. In his Defence the accused who testified that on 9/7/2012 he woke up at about 7AM and went to the house of PW1 to borrow tea leaves which she did not have. He then gave the deceased Kshs. 20/- to get him sugar and tea leaves from the shop. She returned without them and when he asked about it she turned and hit herself onto the door frame and fell on a meko with her face and chest. She did not wake up and she started foaming and bleeding from her mouth. He then went to the PW1's house but did not find her and this prompted him to report the incident at the Kakamega Police Station where he gave the officers the deceased's father's number. He was then detained and asked to record his statement. He stated that at the time of the incident he was alone with the deceased at his house and that he decided to report with the police because he feared he might be beaten by the public since he had been previously attacked on allegations that he was a thief. He further refuted claims that he killed the deceased.
13. On cross examination, he indicated that his house had two rooms. The first room had a meko and two jericans whereas the other room was his bedroom. He claimed that when the deceased entered his house, he was in his bed leaning backwards and when he asked her about the items he had sent her, she became afraid and knocked herself on the door and in turn fell on three cooking stones. When she fell, blood and foam started oozing from her mouth and nostrils and that is when he took out his handkerchief and wiped the blood off her chest. On re-examination, he stated that it was not true that he beat up the deceased or even strangled her.
14. The testimony of the accused person marked the close of the defense case and the parties proceeded to file their respective written submissions.
15. It is the submission by the prosecution that their case is hinged on circumstantial evidence since no one saw the accused kill the deceased. They submit that circumstantial evidence can form a strong basis for proving the guilt of an accused person and place reliance on the case of *Chirangu & another v Republic* (Criminal Appeal No. 104 of 2018) (2021) eKLR on three tests to be met by circumstantial evidence.
16. It is added that all the ingredients for the offence of murder as set out in section 203 of the *Penal Code* have been proved in that the post mortem report by Dr Mchana confirmed that Glorious Awino is deceased. The autopsy report further indicated that the death of the deceased was caused by an unlawful act, namely asphyxia. They assert that it was the accused who killed the deceased since it was his testimony and that of PW4 that he was the only one with the deceased at his house at the time of her death. They stress that the narration by the accused that the deceased fell down and knocked her head leading to her death is discounted by the evidence of the doctor who confirmed that the cause of death was asphyxia secondary to strangulation. They question how the accused would have had cooking stones adjacent to his bedroom yet he had another room. On the element of malice aforethought, the prosecution argues that the extent that the deceased was strangled, her tongue cut off and her head hit infers that the accused had the requisite malice to cause grievous harm to the deceased leading to her death. The decisions in *Rep v David Makali Mutiso* [2017] eKLR or what constitutes unlawful death.
17. For the accused, it is his submission that he was arrested, charged and prosecuted purely on suspicion and circumstantial evidence and that no matter how strong the suspicion is, it cannot be the basis of inferring guilt. He places reliance on the case of *R v Philip Onsingo* (2015) eKLR, *Isaac Maina Ngunia v Republic* (2017) eKLR and *David Munyui Chiragu & another v R* (2021) eKLR for the proposition of the law that suspicion however strong is never a basis to convict.



Issues For Determination

18. For the prosecution to achieve a conviction, all the ingredients contained in section 203 of the penal code ought to be proved beyond reasonable doubt. The prosecutor must prove; the death of the deceased; that the death was a consequence of unlawful acts by the accused and that in committing the acts of omission or commission, he was propelled by malice aforethought.

Whether Glorious Awino is deceased?

19. The normal and straight forward means of proving death and its cause is through the production of a post mortem report as was observed in the case of *Ndungu Vs Republic* (1985) eKLR where it was held as follows: -

“..... where a body is available and the body has been examined, a post mortem (report) must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing the post mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross –examined.”

20. PW5, Dr. Dixon Mchana confirmed the death of the deceased through the production of a post mortem report dated 10/7/2012. The death of Glorious Awino was further confirmed by all the prosecution witnesses and the accused. The death is thus not in doubt.

Whether his death was caused by unlawful acts or omission by the Accused?

21. This is a case where there is no eye witness to the killing of the deceased. The prosecution thus relied on circumstantial evidence to allude that it was the accused who killed the deceased. The question then is whether the evidence led, being not direct, points unerringly to the accused as the perpetrator.
22. The Court of Appeal in the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR settled the law on application of circumstantial evidence and the test to be applied to determine whether or not circumstantial evidence can sustain a conviction. The Court said:-

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

“...Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the



offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

23. It was the testimony of the accused person that he was with the deceased when she fell down and died. The accused person narrated that the deceased fell down on a ‘meko’ that is, three stones that he used for cooking after which she started oozing blood from her mouth and nostrils and the action that followed was that the accused rushed to Kakamega Police Station where he recorded the events that took place and this prompted PW4 to call PW2 to head to the accused person’s home, where PW2 and PW1 discovered the body of the deceased.
24. The accused person in his submission argued that the inference that he was the one that killed the deceased is a mere suspicion.
25. The court is not convinced and persuaded with this account. His narration of how the deceased died contradicts that of the PW5, the doctor who conducted the autopsy of the deceased concluded that the deceased died due to strangulation. Following the death of the deceased, the accused person locked his house and left for the police station and it was this move that led to the discovery of the body of the deceased. The court entertains no doubt in that the accused killed the deceased. He then panicked, locked the body in the house but instead of informing the parents, very proximate to him, surrendered to the police. The court is not persuaded that the injury identified by the doctor to have caused the death was the result of a fall. To the contrary the court finds that the accused unlawfully assaulted the deceased leading to the death. A fall could not have amputated the tongue.

Whether the accused was actuated with malice afore thought in causing the death of the deceased?

26. The principle of malice aforethought was explained by the court of appeal in *Nzuki v Republic* [1993] KLR 171 where it was observed as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the rest of which is always subjective to the actual accused:

- i. The intention to cause death.
- ii. The intention to cause grievous harm.
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences, to ensue or not in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct



is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman v DPP* [1975] AC 55).”

27. Malice aforethought can also be inferred from the manner of the killing as was observed by the court of appeal in the case of Abanga alias *Onyango v Republic* Cr. Case No. 32 of 1990 where it was held as follows;

“The deceased in this case was stabbed severally with a sharp object apparently the knife recovered by PW6. The knife once used for a commission of the offence like grievous harm or murder is a lethal weapon. It is clear from the postmortem report that the accused targeted the head, neck anteriorly and posteriorly. The medical doctor described the interior stab wounds in the following manner:

3 stab wounds anteriorly on the face, right chest, 2 stab wounds measuring 5cm and 4cm in length, a through and through stab wound through the neck anteriorly measuring 15 cm running from left to right. Four stab wounds to the head and neck, the largest being a 10 cm through and through wound to the nape of the neck being left to right on the neck. A 6 cm stab wound between the shoulder blades. A 4 cm stab wound over the left scapula and 5 cm stab wound over right scapula.

On the right shoulder a 5 cm and 7 cm deep stab wound on the dorsum of the right hand and 3 cm long stab wound.

There is no dispute that the assailant herein had an opportunity and time to inflict the extensive injuries. He was not a person in a hurry. The vulnerable parts of the body were targeted.”

28. It was the testimony of Dr. Mchana that externally, the body had minor bruises on the front of the neck and on both sides of the chest. There was amputation of the tongue at the tip meaning a fragment was missing. Internally, the body had blood clots under the skin extending to the left 3rd rib, on the head and on the surface of the lung which was a sign of asphyxia. The brain was mildly swollen with congestion of the blood vessels. He then formed the opinion that the deceased died due to asphyxia secondary to strangulation. All the disclosed injuries are gravely inconsistent with a fall but point to a deliberate and premeditated plan to maim if not kill outrightly.
29. The deceased was a helpless four-year-old girl who died a terrible death. The manner in which she was killed by the accused infers the existence of malice aforethought on the part of the accused. The accused intended to finish the little girl ending her life before her time. The court discerns grave and unexplainable malice and ill-will.
30. The court finds that the prosecution has proved beyond reasonable doubt the offence of murder against the accused, he is found guilty of the offence of murder as charged and is convicted accordingly.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JANUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Osango for the Accused



Ms. Chala for the Prosecution

Court Assistant: Polycap

