



REPUBLIC OF KENYA



**Republic v Okwayo (Criminal Case 14 of 2014)  
[2024] KEHC 1729 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1729 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 14 OF 2014  
PJO OTIENO, J  
JANUARY 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PATRICK OKWAYO ..... ACCUSED**

**JUDGMENT**

1. Patrick Okwayo Okwayo ('accused person') 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 March, 2014 at Wambilishi Sub-location, Wairanje village of Khwisen district within Kakamega County, the accused person murdered Mark Amwoso Amatera.
2. The accused person pleaded not guilty to the charge and to prove its case, the prosecution called a total of four witnesses whose evidence summarizes as below.

**The Evidence**

3. PW1, Simon Karondo Ogola, brother to the deceased, gave evidence that on 10/3/2014, he had left for work at about 1pm and on reaching Bukura he received a call that his brother was dead. He rushed to his brother Zacharia's house where he found the deceased in a pool of blood and confirmed that indeed he was dead. He then made a report a Khwisero Police Station, went to the scene and took the body of the deceased to the mortuary and thereafter he recorded his statement with the police.
4. PW2, Zacharia Okola and a brother to the deceased testified that on 10/3/2014 he had gone to a *changaa* drinking den at the home of Amuro Okwayo where he found the deceased with whom they drank together until 8pm. They then left the den through the accused's home where the deceased requested to be sold more *changaa* by the deceased who indicated that he was not selling since it was late. The deceased then gave accused 200/- for *changaa* he was to take the next day. The accused asked them to leave but since they were not leaving, the accused person left and came back with a *panga*



- which made the witness run away leaving the deceased behind. The deceased then went to where the witness was having been cut on the right side of the head. Together the witness and deceased went to witness's house where the deceased cried all night and in the morning he left the deceased in the house thinking he was sleeping only to be later informed that the deceased had died.
5. On cross examination he stated that the deceased was so drunk at the accused's home that he was removing clothes. He said that the accused hit him twice with the flat side of a *panga* and that's when he ran away.
  6. On being questioned by the court he stated that he was with the deceased when he was cut.
  7. PW3, No. 23xxxx, George Nyaoke, stationed at Khwisero Police Station as the Deputy OCS, testified on behalf of the Investigating Officer by the name of Bernard Omolo who had since retired. He stated that on 10/3/2014, the deceased in the company of his brother, went to the accused person's home to drink *changaa*. They gave the accused person Kshs. 200 to be served with *changaa* for Kshs. 20 which they were never given and when they requested for a refund, a quarrel ensued and the accused person left and came back with a *panga* which he used to hack the deceased twice on the head. The accused fell on the floor of the deceased home and spent the night there only to be discovered dead the next day.
  8. On cross examination he stated that he had not seen any photographs taken by the Investigating Officer.
  9. PW4, Dr. Collins Masika, a Senior Medical Officer stationed at Vihiga County Referral Hospital produced the post mortem report conducted on the deceased as prosecution exhibit 1. He stated that on examining the deceased, he had a cut wound on the scalp extending into the brain and concluded that the cause of death of the deceased was intracranial hemorrhage inflicted by a sharp object following an assault. The doctor's evidence marked the close of the prosecution's case.
  10. The court then ruled that a *prima facie case* had been established against the accused person and he was thus placed on defence. He chose to give sworn evidence without calling any other witness. He told the court that he was a carpenter by profession and that on 9/3/2014 at about 9pm he was selling *changaa* when the deceased and PW2 came to buy alcohol and when he told them he was out of stock they left only for him to be arrested the next day on allegations that he had killed the deceased. He refuted claims that he differed with the deceased and further stated that the deceased did not die in his house.
  11. On cross examination he stated that he came to learn about the death of the deceased, who lived about 200 meters from his house the evening of the next day. He claimed that his wife was present on 9/3/2014 though he left him after his arrest and was not available to give evidence.
  12. The testimony of the accused marked the close of the defense case and the parties proceeded to file their respective written submissions.

### **Submissions By The State**

13. The prosecution submit to have proved the three elements of the offence of murder against the accused to the requisite standards in that a post mortem report was produced which confirmed the death of the deceased and that the report further indicated that the deceased death was occasioned by a wound caused by sharp trauma. It is further submitted that the evidence of PW2 confirms that it was the accused who cut the deceased with a *panga* as the witness was present at the scene and that the use of a *panga* denotes malice aforethought. The decision in *Republic -vs- David Makeli Mutiso* [2017] eKLR was cited on what constitutes an unlawful death for purposes of murder.



### Accused Person's Submissions

14. It is the submission by the accused that PW2 the alleged eye witness is not reliable since they had spent the evening drinking *changaa* and was therefore not in the right state of mind to recall what transpired on the material day and that had they been sober they would have sought medical attention. They further contends that it is not clear where the deceased was assaulted from since the police visited the scene and could not see any traces of blood at the accused person's home.

### Issues, Analysis and Determination

15. The offence of murder is defined and created by section 203 of the *Penal Code* to be committed when any person who, of malice aforethought, causes death of another person by an unlawful act or omission.
16. Therefore, for the prosecution to sustain a conviction, all the ingredients contained in section 203 of the *Penal Code* ought to be proved beyond reasonable doubt. The ingredients are now established to be, the fact of death, connection of the death with the unlawful acts or omissions by the accused, and the premeditation by the accused.
17. For the instant case therefore, it was incumbent upon the prosecution to prove that the person named as the deceased, Mark Amwoso Amatera, is dead; that his death is attributable by the unlawful acts or omission by the accused and that the accused in committing such acts or omission, he was propelled by malice aforethought.
18. The death of the deceased has been confirmed not only through the production of the post mortem report dated 21/3/2014 but also oral evidence of PW1 & 2 and the evidence of the accused himself. The death is therefore not in doubt.
19. It was the evidence of PW4, Dr. Collins Masika, that on examining the body of the deceased he had a wound on the scalp extending into the brain and concluded that the cause of death of the deceased was intracranial hemorrhage inflicted by a sharp object and this makes the actions leading to the death of the deceased not only unnatural but also unlawful. In law death is only lawful, when it occurs naturally, when done in a lawfully justifiable manner pursuant to a sentence by court or intowards the defence of a person or property. When death occurs by the action of another outside such perimeters, the same is ipso facto unlawful.
20. In this matter the key prosecution witness, PW2 testified that when they were accosted by the accused, he ran away leaving the deceased behind. He however upon cross examination that he saw the accused hit the deceased before he ran away.
21. The facts leading up to the death of the deceased as narrated by PW2 is that the deceased and PW2 were on a drinking spree and decided to head to the home of the accused which was a drinking den and since the accused was closing up, he asked them to leave and return the next day which they refused and became rowdy. In an attempt to chase them away, the accused came with a *panga* with which he hit PW2 on the blunt side before cutting the deceased and forcing PW2 to run away and leave the deceased behind.
22. The accused in his evidence denies the account of PW2 and in submissions argues that PW2 was too drunk to remember what happened. However, from the testimony of PW2 he admits to have been drunk but not to the extent to have affected his recollection of the events of that night. The court finds that the account by the PW2 was more credible than that of the accused. The court finds that PW2 even after taking *changaa* retained his faculties and was able to judge danger and escape by running away.



23. PW2 further narrated that after he ran away, the deceased joined him with a cut on the right side of the head and that when they went to sleep the deceased cried all night as he was in pain.
24. Piecing out the facts that the accused accosted the deceased and PW2 with a *panga* and that PW2 ran away after being hit with the blunt side of the *panga* by the accused leaving the deceased who later joined him having been cut on the head, there is no doubt in the mind of the court that the attacker who inflicted the fatal injury was and could only be the accused. The court thus finds that it was the accused who inflicted the cut wound upon the deceased, unlawfully and caused his death.
25. By law, Section 206 of the *Penal Code*, malice aforethought shall be deemed to be established by evidence proving; among other matters; 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; 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.
26. The Court of Appeal in *Nzuki v Republic* [1993] KLR 171 illuminated and interpreted what the statutory provision determining malice aforethought and said: -

“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.”
27. Malice aforethought can also be inferred from the manner of the attack, the extent of injuries and the targets of such injuries. The Court of Appeal in the case of *Abanga alias Onyango v Republic* Cr. Case No. 32 of 1990 observed and 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 though the next 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 dorsten 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 PW4 that on examining the body of the deceased, he had a wound on the scalp extending into the brain and concluded that the cause of death of the deceased was intracranial hemorrhage inflicted by a sharp object. That evidence demonstrates that the deceased was severely and savagely attacked on the head and the object used was a *panga*, which is known to have lethal effects, especially when aimed on the head of a person and its very sensitive and delicate organ called the brain. The use of a panga aimed at the head, infers the existence of malice aforethought on the part of the accused. The accused in effecting the attack must have been deemed to have expected to inflict grievous harm if not outright death to the deceased. He was propelled by malice aforethought.
29. I thus find that the prosecution has proved beyond reasonable doubt the offence of murder against the accused, with the result that the accused is found guilty of the offence of murder as charged. He is convicted accordingly.
30. Let the presentence report be compiled and filed by the Probation office within thirty (30) days from today. Matter stood over to 11.3.2024 for the mitigation and sentence.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF JANUARY, 2024.**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

Mr. Munyendo for the Accused

Court Assistant: Polycap Mukabwa

