



REPUBLIC OF KENYA



**Republic v Ongalo (Criminal Case 13 of 2019)  
[2024] KEHC 1071 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1071 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 13 OF 2019**

**A. ONG'INJO, J**

**FEBRUARY 8, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BRIAN OTIENO ONGALO ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused Brian Otieno Ongalo faces a charge of murder contrary to Section 203 as read together with Section 204 of the [Penal Code](#).
2. Particulars of the offence are that Brian Otieno Ongalo on the 7<sup>th</sup> day of July 2019 at Shauri Yako area, Nyali Sub-County within Mombasa County murdered Brian Kavogi Nyaleso.
3. The prosecution called 6 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

**Prosecution Case**

4. PW1, Agnes Wambui Maina, said that she lived in Shauri Yako in Nyali and the accused was her neighbour while the deceased was an employee at Lollipop Café in Shauri Yako. She said that on 7.7.2019 at about 7.20 pm, she was beside the road where she does business when the deceased left the hotel carrying ugali to take to a customer nearby. That PW1 saw the accused following the deceased and when he went back to the hotel, she saw them stand and the deceased shouted saying

*“wacha kunifuata. Wachana na mimi sitaki vita na wewe. Ni sawa wewe ni mwanaume”*

PW1 said that the road where she does business has street lights and she was able to see them and she heard what the deceased was saying although the accused was talking in low tones. She said that the



deceased pushed the accused but he did not fall. That the accused approached the deceased with a folded fist and when he pushed the deceased, the deceased held his abdomen and bent. That the accused then started retreating towards where they were and PW1 saw his hand holding a knife, the hand had blood and PW1 started shouting

*“Huyu ana kisu! Huyu ana kisu!”*

That the knife had a black handle and PW1 identified it in court.

5. PW1 testified that the customer who had been served with Ugali intervened to snatch the knife but the accused threw it over a perimeter wall nearby. That customers then apprehended the accused and took him to the village elder. That they remained at the scene and got a motorbike which was used to take the deceased to Coast General Hospital. PW1 said that when the deceased was stabbed, he fell and had to be supported while on the motorbike as his condition was not good. That they followed the deceased to hospital and found he had been taken to the emergency room and when PW1 was called after 5 minutes, she found he had died. PW1 said that from the hospital, they rushed to Nyali Police Station where they found the accused had been placed in the cells and they were advised to go the next day and record statements.
6. PW2, Zakiya Hamisi Suleiman, said that she knew both the accused and the deceased and that the deceased was her employee at Lollipop Hotel. That the accused was also known to her as he was a resident within Shauri Yako Estate. She identified the accused in the dock. PW2 said that on 7.7.2019 at about 7.30 pm, she was seated at the entrance of the hotel and the deceased was standing outside next to an electricity pole talking to the accused. That she then heard the deceased tell the accused

*“Nimekubali umeshinda. Wewe nu mwanaume.”*

That the accused told the deceased

*“Wewe huwezi nitisha na buo mwili wako”*

PW2 said that her hotel is along the road and there were street lights and her hotel also has electricity and security lights.

7. PW2 testified that within a short time, the accused and the deceased started holding each other and when PW2 stood up to go and intervene the deceased did not talk but raised the shirt and showed her a stab wound. That the accused person had a knife in his hand and when PW2 raised alarm to attract people to go and help disarm the accused, he threw the knife over the wall into an empty plot. PW2 identified the knife in court. That someone held the accused and he was taken to the village elder as PW2 took the deceased to hospital but he died on arrival. That when PW2 went to Nyali Police Station to record her statement, she informed the police that the accused had thrown the knife over the wall. That PW2 led the police to where the knife was thrown and it was recovered.
8. PW3, Francis Mnyangi Kavala, said that on 7.7.2019 at about 10.30 pm on a Sunday, he received a phone call from the father of the deceased. That he told him that he got a report that his son had been killed in Shauri Yako. PW3 said that the deceased was known to him as they were cousins. He testified that on 8.7.2019, he went to the scene at Shauri Yako where the deceased had been stabbed. That he then proceeded to Coast General Hospital mortuary where he identified the body of the deceased for postmortem. That when he saw the body of the deceased, it was swollen as it appears there was internal bleeding. That there was a stab wound on the right side of the chest.



9. PW4, Irene Waringa, the Government Analyst from the Government Chemist Mombasa said that on 11.7.2019, PC Anthony Mwangi No. 49940 went to the Government Chemist Mombasa with an exhibit memo form with exhibits that included exhibit marked D – a knife, exhibit marked Q – blood sample from the deceased, and exhibit marked A – buccal swab from accused – Brian Otieno. That the analysis of blood stain on the knife was done and it tested positive for human blood. DNA analysis was carried out and DNA profile generated tabulated. That both exhibits D – the knife and exhibit Q generated the partial male DNA profile. That PW4 prepared the report on 28.2.2020 and she produced it as ExP3(a) and the Exhibit Memo as ExP3(b).
10. PW5, No. 49940 CPL Anthony Mwangi from Nyali Police Station said that he was the investigating officer and that on 7.7.2019 at about 2100 hours, he was with his colleagues at Maweni area patrolling when they received a call from the station and were informed that somebody had been killed within Sahuri Yako area in Nyali and they were required to go there. PW5 said that they were joined by the OCS but they did not get the accused or the deceased at the scene. That they were informed the accused had been arrested and taken to the station and the deceased had been taken to Coast General Hospital where he had passed on. PW5 said that they established the deceased had been stabbed outside Lollipop Hotel where he used to work. That they interrogated members of the public who informed them how the deceased was killed by the accused using a knife.
11. PW5 informed court that Hamisi told them the accused threw the knife to the next plot after stabbing the deceased. That they started searching for the knife and found it about 10 meters from the scene. That the knife had blood stains and they took it as an exhibit. PW5 said that they went to Coast General Hospital and found the body of the deceased in the mortuary. That there was a stab wound on the left side of the chest. That they went back to the station and found the accused had been booked for the offence of assault and PW5 commenced investigations. That on 10.7.2019, PW5 visited the mortuary and the postmortem was conducted. That blood sample was collected from the body of the deceased and together with blood sample from the accused and knife, they were forwarded to the Government Chemist for analysis. That however, the blood sample from the accused was rejected and PW5 was instructed to personally take the accused to the Government Chemist.
12. PW5 said that after completing investigations, he learnt that the accused killed the deceased because he was having a love affair with his girlfriend. That at the time the knife was recovered, it had a lot of blood. That PW5 was with Chief Inspector Kemboi, the OCS Nyali when he recovered the knife. That on the material day at 5.00 pm, the deceased went to the video show where the accused was working. That the accused person's girlfriend was also at the video show and he suspected that the deceased went for the girlfriend. That the accused person told him the name of the girlfriend as Violet and admitted that the knife was his. PW5 produced the knife as ExP1.
13. PW6, Dr. Gabriel Mngola from Coast General Hospital said that he had the postmortem report in respect of the body of Brian Kavogi. He said that the postmortem was conducted by Dr. Anthony Irungu Njuguna who was known to him and that they worked together. He said that the postmortem was conducted on 10.7.2019 at 10.30 am and Dr. Mbiko signed the postmortem on behalf of Dr. Njuguna. He said on external examination, there was a deep gaping wound in the right upper chest approximately 10 cm long, muscle exposed and gaping.
14. PW6 said that on internal examination, the respiratory system had a wound on the right chest 10x7 cm and 5 cm deep penetrating into the pleural cavity. That the cardiovascular system had massive haemothorax. That on the right side, there were lacerations on the right superior and middle lobes of the lung, pericardium torn and hemopericardium noted. That the 5<sup>th</sup> rib was cut, the right atrium cut approximately 4 cm long and extending to the right ventricle. PW6 said that as a result of the



examination, Dr. Njuguna formed the opinion that the cause of death was haemorrhagic shock, exsanguination secondary to penetrating stab wound of the chest. PW5 produced the report as ExP6.

### **Defence Case**

15. The accused, Brian Otieno Ongalo, said that on 7.7.2019, he went to work as usual at 6.00 am and that at 4.00 pm, someone not known to him went by and that the person was drunk and caused a scuffle. That he spoke to the person and the person went away. That at 6.00 pm, the drunk person went back and started causing a scuffle, and that he went and reported to the village elder. That at 8.00 pm when they closed business and he was on the way home, he saw someone lying on the ground by the road. That 8.45 pm, Nana, the Bodaboda Chairman went and told him that something had happened that required him to go to the police station. That they went to Nyali Police Station where they were arrested. That the deceased was not known to him and that he learnt in court that he had been accused of murder.

### **Analysis and Determination**

16. In consideration of the evidence of 6 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
17. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -
- “any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
18. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
- i. That the deceased died;
  - ii. That the death was caused by an unlawful act or omission;
  - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
  - iv. That there was malice aforethought.

### **Death of the deceased**

19. There is no dispute as to the death of the deceased Brian Kavogi Nyaleso.

### **Death was caused by an unlawful act or omission**

20. The deceased suffered a deep gaping wound on the right upper chest measuring approximately 10 cm long and there was massive hemothorax on the right side. There were lacerations on the right superior and middle lobes of the lungs, there was a cut on the 5<sup>th</sup> rib and Dr. Njuguna who performed the postmortem was of the opinion that death was caused by hemorrhagic shock exsanguination secondary to penetrating stab wound to the chest. The injuries were not self-inflicted and they were not accidental. It is no doubt that the injuries that caused the death of the deceased were as a result of an unlawful act.



## Participation of the accused in the commission of the alleged offence

21. PW1 and PW2 saw the accused confront the deceased. They saw him punch the deceased and it was after the punch that they saw that he was armed with a knife and his hands were having blood stains. When alarm was raised so that he could be disarmed, the accused person threw the murder weapon over the wall into an empty plot. Alarm was raised and the accused was arrested at the scene of the murder by members of the public. The knife was recovered and subjected to DNA analysis and it was found to be positive for human blood. The knife was identified by PW1 & PW2 as the one that the accused person used to stab the deceased with.

## Malice aforethought

22. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.
23. On the element of malice aforethought in respect to Section 206 of the [Penal Code](#), the court held as follows in the case of [Isaac Kimathi Kanuachobi v R](#) (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

24. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

25. The fact that the accused confronted the deceased and pursued him even when the deceased was walking away from him and the fact that he used a sharp object to inflict injuries on vital parts of the deceased body is proof that this is a crime that was premeditated and the accused person intended to



cause grievous harm and/or fatally injure the deceased. This court finds that express malice was proved by the prosecution.

26. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly pursuant to Section 322 (1) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Ogwel- Court Assistant

Ms. Nyarinda for the State

Mr. Ganzala Advocate for the Accused

Accused person present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Ms. Nyarinda: We do not have accused person's previous records

Mr. Ganzala: I pray for a copy of the judgment. I also pray for a date for mitigation.

**Order:** Mention on 26.2.2024 for mitigation, Victim Impact Statement and Statement. Copies of judgment to be supplied to defence and prosecution.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

