



**Republic v Owino (Criminal Case E009 of 2022)
[2024] KEHC 1074 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E009 OF 2022**

A. ONG'INJO, J

FEBRUARY 8, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

MICHAEL OTIENO OWINO ACCUSED

JUDGMENT

Introduction

1. The accused Michael Otieno Owino faces a charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code.
2. Particulars are that Michael Otieno Owino on the 24th day of February 2022 at Shanzu area, Kisauni Sub-County within Mombasa County murdered Brian Zawadi Kaingu.
3. The prosecution called 7 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1 the cousin to the deceased received a call from the wife of the deceased who informed him someone had stabbed and killed the deceased. He proceeded to Wellness Hospital where he too found the lifeless body of the deceased lying outside the hospital door. That the police collected the body and took it to the mortuary where PW1 later identified it for postmortem.
5. PW2, Kadzo Katana Karisa, the wife to the deceased testified that on 29.02.2022 at 9.30pm, she received a call from someone who asked if she knew Brian. She was then asked to rush urgently. She mobilized her brothers and the cousin to the deceased to go where she was told the deceased was killed. That when she also went to Bush Village which was the scene of the incident, she found her husband



- bleeding and foaming from the mouth. PW2 said the deceased used to take palm wine every day. PW2 said the accused was not known to her.
6. PW3 Dr. Abdul Aziz Mohamed produced the postmortem report prepared by Dr. Intiswar who examined the body of Brian Zawadi and established the cause of death as severe hemorrhagic shock secondary to incisional cut wound on the interior neck with sharp object.
 7. PW4 P.C. Henry Jeffa testified that on 24.02.2022 they were on mobile patrol with CPL Wanje and CPL Maina who was driving the station vehicle when they got information from Chief Inspector Ezekiel Rotich of an incident in Shanzu market area. When they proceeded to the scene at Wellness Medical Centre they found the deceased lying on the floor of the facility in a pool of blood with a deep cut wound on the left side of the neck. The Clinical Officer at the health facility informed them the person lying on the floor was pronounced dead on arrival.
 8. That the Chief Mr. Fondo explained that the deceased was at a Mnazi den drinking with the accused behind the medical facility when a disagreement over a debt of Kshs. 20/= ensued and it escalated to a fight that left the deceased dead. That after taking the body to the mortuary they received information that the accused had been seen returning to his house. Area Chief Sidi Saro led PW4 and his colleagues to the accused persons house and he was identified and arrested. PW4 said the suspect was deep asleep. PW4 said they recovered slippers with dry blood stains and they suspected the suspect had won them at time he committed offence. Accused was arrested and escorted to Bamburi Police Station where DCI Kisauni took over investigations.
 9. PW5 Government Analyst Omar Mwidadi examined a pair of slippers marked B1 & B2 and found they tested negative for human blood. He produced Report to the effect that blood sample from the deceased and that buccal swab from the accused generated profiles that did not match. He said the weapon used to inflict injury was not taken for analysis.
 10. PW6 Athuman Karisa Fondo the Chief of Mwembelegeza Location testified that he received phone call from village elder Eunice Arges the effect Tito had killed Pere the fundi. PW6 called Chairman of Community Policing Mr. Tsui Baya Mwalili and confirmed he was at the scene. PW6 proceeded to scene which was behind Wellness Medical Clinic and found the deceased lying at the verandah of the clinic. PW6 made phone call to OCS Bamburi Police Station and Chief Inspector Maganga the Deputy OCS was send to the scene.
 11. PW6 said that a lady by the name Pamela an attendant was found at the scene-mnazi den owned by Madam Emily. He said they said blood stains from the gate to the mnazi den. That she told them she was inside when she heard someone demand for 20/= from the deceased and then heard the deceased cry out “umenuua”. That when she came out she saw Tito running away. PW6 said that Area Chief traced the suspect and had him arrested on the same night. He said murder weapon was not recovered. PW6 said the accused and deceased were known to him and he was not aware if they had any differences.
 12. PW7 Sergeant Patrick Lumbasi testified that on 24th February 2027 he was on Patrol in company of CPL Chai – Police driver and P.C. Alice Mwarandu when Chief Inspector Makau called and instructed him to proceed to a scene of crime in Shanzu Bush Bar area where they found a dead body lying at the verandah of wellness clinic covered with a green canvass. PW7 said officers from Bamburi had arrived at the scene.
 13. A wallet recovered from the body of the deceased made them identify the deceased. PW7 said the body was taken to the mortuary to await postmortem. PW7 was led to a mnazi drinking den known as Kambi ya Moto and an entry at the gate he saw spillage of blood. On interrogating the owner of the mnazi



den she said she was in the house working when she heard people exchange bitter words outside. PW7 said the pub attendant known as Pamela was nowhere to be seen and her statement was not recorded.

14. When PW7 learnt the accused had been arrested he went to Bamburi Police Station and collected him. On interrogation of the accused he said the accused admitted having differed with the deceased. Chief Inspector Rotich was requested to take accused person's confession and the statement of the owner of mnazi den was also taken. That on the day he went to record statement of the owner of the mnazi den he was able to find Pamela the pub attendant and he recorded her statement to the effect the deceased who was bleeding from the mouth and neck said it was Tito. PW7 arranged for post-mortem on 4th March 2022 and on same day photographs of the body were taken. PW7 took blood sample from the deceased body to match with blood found on the accused persons sandal. He said the accused had an injury on his leg.

Defence Case

15. The accused on his defence gave sworn statement and said he used to see the deceased in the estate in the course of operating his boda boda. He said he didn't kill the deceased. He said he knew 'Kambi Moto Mangwe' as well as bush area. He said he was not with the deceased on 24/02/2022. He said the deceased found him at Kambi ya Moto mangwe. He said his house was raided by Area Chief and police at 2.00am and he was found sleeping. He said the blood stain found on his slipper came from an injury he suffered on his leg.

Analysis and Determination

16. In consideration of the evidence of 7 prosecution witnesses and in consideration of the sworn defence evidence, 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 person was 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 Zawadi Kaingu.



Death was caused by an unlawful act or omission

20. The deceased suffered a sharp penetrating mark between the cricoid cartilage and the sternum angle. Dr. Abdul Aziz, PW3, found massive hematoma on the anterior neck extending on the anterior chest with punctured right lung with massive right sided hemothorax. He also found the deceased person's esophagus was punctured. He was of the opinion that death was caused by severe hemorrhagic shock secondary to incisional cut wound on the anterior neck secondary to sharp object. It is not in doubt that the cause of death was through an unlawful act.

Participation of the accused in the commission of the alleged offence

21. The evidence that tends to connect the accused person to the murder is that of PW6, Chief of Mwembelegeza Location who testified that the village elder Eunice Arges who called and informed him that Tito had killed Pere. PW6 also said that the palm wine den attendant told him that he heard someone demanding for Kshs. 20 from the deceased and in the course of exchange he heard the deceased say "umeniua" and she came out he saw the accused running away and the deceased had fallen.
22. PW4, PC Henry Jefa, was among the first officers to respond to the scene where he found the deceased had been taken to a nearby clinic and was lying in a pool of blood with a deep cut wound on the left side of the neck which was bleeding profusely. That the Chief gave them the name of the deceased as Zawadi and told them the deceased was with the accused taking mnazi brew at a den behind the medical facility when a misunderstanding over a debt of Kshs. 20 arose between them and they started fighting. PW4 said that the assistant Chief of Shanzu known as Sidi Charo called and told him that the accused was inside his house and they went and arrested him. That they found the accused deep asleep and they found slippers which were blood stained suspected to have come from the deceased.
23. PW7, Sgt. Patrick Lumbasi also went to the scene and found the deceased lying dead at Wellness Clinic in Shanzu. He visited the scene at the Kambi ya Moto palm wine den behind the clinic and saw that there was spillage of blood at the entrance of the den. He said he interrogated the owner of the mangwe who owned the place that it was Pamela who was attending to the mangwe when the incident occurred. Pamela was not present at the time and the owner of the palm wine den told him she was inside the house cooking when the incident happened. She only heard people quarreling outside.
24. PW7 said that when the accused was arrested, he interrogated him and he admitted that he had disagreed with the deceased. That he requested Chief Inspector Rotich to record the suspect's confession statement and he recorded the statement of Anne Wamboi as well as Pamela. According to PW7, Pamela heard the accused and the deceased exchanging bitter words and when she came out she found the two holding each other's collars and he asked them to stop and leave the palm wine den. That as she was securing the door with a padlock, she saw the deceased leaning on the entrance with blood oozing from his mouth and neck. When she asked him what had happened, the deceased said with difficulty that it was Tito. Pamela raised alarm and members of the public went to assist Tito to hospital.
25. Pamela, the attendant at the palm wine den did not testify. She is the one who allegedly heard the accused and the deceased quarreling over Kshs. 20 and she is the one who heard the deceased say it was Tito. She is the one who also allegedly saw Tito running away from the scene. The owner of the palm wine den who recorded her statement and said she was in the house when she heard people exchanging bitter words outside did not also testify. PW6 also said that he was called by the Village Elder Eunice Arges and informed that Tito the accused herein had killed Pere the deceased. This village elder did not record her statement and did not attend court to testify.



26. There was the Assistant Chief who led PW4, PC Henry Jefa to the accused person's place at 2.00 am on 25.2.2021 and he was arrested and slippers with dry blood stains recovered. That Assistant Chief did not also testify. PW7 said he requested Chief Inspector Rotich to record the suspect's confession statement but no such statement was produced in court as Chief Inspector Rotich did not testify.
27. There was also the issue of blood stained slippers that was recovered when the accused was arrested and subjected to analysis. PW5, Mwidadi Omar, Government Analyst said that the pair of slippers tested negative for human blood and the blood sample from the deceased and the buccal swab from the suspect generated two different profiles and there was no link found between the blood of the deceased and the suspect's profile.
28. Being that the accused person admits that he was at the palm wine den on the material day and there was strong suspicion that he was involved in the murder but all the material witnesses and evidence were not brought to court to prove this fact beyond reasonable doubt, those who heard or saw him commit the offence were for reasons not known to court were not brought to testify. There is therefore no sufficient evidence upon which this court can find that the accused person is guilty.
29. The accused person is therefore acquitted under Section 322(1) of the Criminal Procedure Code.

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

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Obonyo Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

