



**Republic v Mumi (Criminal Case E029 of 2022)  
[2024] KEHC 2357 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2357 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL CASE E029 OF 2022**

**KW KIARIE, J**

**MARCH 7, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LOVINCE OTIENO MUMI ..... ACCUSED**

**JUDGMENT**

1. Lovince Otieno Mumi is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 30<sup>th</sup> day of August 2022, at Kamwala sub-location in Rachuonyo North Sub County of Homa Bay County, jointly with others not before court willfully and unlawfully, murdered Jared Ochieng Mumi.
3. The body of the deceased was found having been badly mutilated outside his brother's home. Evidence that emerged was that the deceased did not have a house. One version of the evidence was that he was sleeping under a tree, whereas another version was that he was living in one of his brothers' houses.
4. In the evening before his death, the deceased was in the house of Emily Achieng John (PW3) in the company of others, including the accused, imbibing change. The accused was suspected of disagreeing over some chang'aa he had accidentally poured.
5. Lovince Otieno Mumi, the accused, in his defence, contended that when the deceased accidentally poured his alcohol, he only slapped him on the back. He denied any involvement in his death.
6. The issues for determination are:
  - a. How did the death of the deceased occur;
  - b. Whether the accused was involved in his death; and



- c. Whether the offence of murder was proved against any or all the accused.
7. It was in the house of Emily Achieng John (PW3) where the incident leading to the death of Jared Ochieng Mumi is said to have started. According to this witness, she was in her house where the deceased had gone to borrow some salt. It was while she was in her kitchen that she heard the accused and the deceased quarrelling. She went and found the accused holding the deceased. She told the accused to leave the home. The accused announced that he wanted to eat raw liver. When Jared went, the accused was left with Owiyo. The evidence of this witness, however, variously changed during cross-examination.
8. In her recorded statement with the police, she conceded that she had recorded that the deceased had gone to take chang'aa. She equally acknowledged that she did not record in her statement that the accused had said that he wanted to eat raw liver. She also conceded that she did not record in her statement that the accused warned Jared that he would not see her the following day.
9. Besides self-contradicting herself, she contradicted Augustine Otieno Ouma (PW4). This is her husband, who inherited her. Although she testified that it was Jared who left first, PW4 said it was the deceased who went first. This is a witness who dented her credibility and is unworthy of belief. The Court of Appeal in *Ndungu Kimanyi vs Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:
- The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence. I will not attach any weight to her evidence.
10. Augustine Otieno Ouma (PW4) testified of an incident PW3 did not. His evidence was that after the deceased had disappeared into darkness, the beach management chairman hit the accused on the head, and he separated the two. The accused ran into the darkness. When he followed him there, he threatened to finish him. He picked a spotlight and followed the accused to his home. He heard the deceased telling him he knew he intended to kill him. The accused asked the deceased to stop snatching his machete. The accused said he was going to kill the deceased.
11. The evidence of this witness is suspect. He did not tell the court why he followed the accused, yet he did nothing except listen and later testify about what he allegedly heard. Whereas his evidence was that the subsequent conversation he testified on occurred at the home of the accused, it was not clear why the deceased went there. This is the witness who told the court that the deceased had no house and was sleeping under a tree. This contradicted the evidence of Euphemia Adhiambo Otieno (PW1), who testified that the deceased was staying in one of the houses in her homestead. Like Emily (PW3), unless corroborated by some material evidence, his evidence will have very little weight, if any.
12. PC Egialan Hosea (PW8) was the investigating officer. His evidence was that when accompanied by other officers who went to the scene, they found the members of the public had restrained the accused. They were led to the home of the accused. His mother, Jane, directed them to his house. Upon searching the house, they recovered the following items:
- a. A pair of black trousers that was blood-stained;
  - b. A machete with a black handle and which was blood-stained; and
  - c. A handkerchief with blood stains.



An inventory was prepared, and Jane Achieng Juma, the accused's mother, was among those who signed it.

13. Lovince Otieno Juma (DW1) testified that when the deceased accidentally poured his alcohol, he slapped him on the shoulder. This is when Joshua took a stick and hit him. Austin (PW4) then cut him on the head with a machete. Joshua Were (PW7), a Beach Management Unit chair, testified that after he had hit the accused with a stick after he had obstructed him, he left him (accused) and PW3 quarrelling. If we can assume that the machete he contended PW3 used to cut him was the same one used to cut the deceased, there is no logical explanation for how it found its way into his house.
14. When the items recovered from the house of the accused were subjected to DNA examination, the machete and the pair of trousers had mixed profiles of the accused and the deceased. The handkerchief had the blood profile of the deceased.
15. Though the accused denied that he was not involved in the death of the deceased, the DNA profiles generated gave a different story; He was indeed involved.
16. To found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In Black's Law Dictionary, 10th Edition, malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

17. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides: 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.
18. On the material night, the accused and the deceased were taking chang'aa. We can assume that they were drunk. Malice aforethought was not established. I find that the prosecution has not proved the offence of murder against the accused. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit the accused of the charge of murder. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED AND SIGNED AT HOMA BAY THIS 7<sup>TH</sup> DAY OF MARCH 2024**

**KIARIE WAWERU KIARIE**



**JUDGE**

