



**Republic v Odhiambo (Criminal Case E002 of 2022)
[2024] KEHC 3227 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL CASE E002 OF 2022**

**AC MRIMA, J
APRIL 5, 2024**

BETWEEN

REPUBLIC STATE

AND

FRANCIS ESONGA ODHIAMBO ACCUSED

JUDGMENT

1. Francis Esonga Odhiambo was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 1st January, 2021 at Makutano Town in West Pokot County, jointly with others not before Court murdered Celestine Chelangat (hereinafter referred to as ‘the deceased’).
2. When arraigned before this Court, the accused pleaded not guilty to the offence. A trial followed. Three out of the four prosecution witnesses testified before Hon. Korir, J (as he then was). The rest of the evidence was recorded by Yours truly.
3. When the accused was placed on his defence, he tendered a sworn defence without calling any witness.
4. The accused was represented by Learned Counsel Mr. Lowaskou.

The trial:

5. Four witnesses testified for the prosecution. Their case was fairly straight-forward. That, on 30th December 2021, the mother to the deceased, one Mary John Chepsugum (testified as PW1) sent the deceased, her seventh child, to Chepareria market to buy vegetables. The family lived within Chepareria village. That was in the afternoon, immediately after lunch.
6. The deceased went to the market as sent, but never returned home. She was around 14 years old by then.



7. Shocked with the turn of events, PW1 waited until the following morning as she was not sure how to find the whereabouts of her daughter who even did not have a mobile phone. Early the following morning, PW1 began looking for her daughter in the village. She even went to the market without any success. She eventually reported the matter to the Village elder (Mukasa) one John Ringala (not a witness). She was advised to continue with the search.
8. On 1st January, 2022 at around 10 am, PW1 received a call from an unknown number. The caller was a man and he informed PW1 that he was calling from Makutano area. He informed PW1 that he had been given her number by a young girl who said she was PW1's daughter. The caller asked if PW1's daughter was at home and PW1 answered in the negative.
9. The caller asked PW1 to rush to Makutano town around Lutheran area along the Primary School road and to call him once there. PW1 quickly picked a motor cycle and rushed as advised. She reached Makutano town and eventually found the caller. The man led PW1 to a gated compound with two houses inside. There was the main house which was occupied by several tenants and a small house on the side of the main house made of iron sheets. The man asked PW1 to get into the house made of iron sheets to see if her daughter was the one inside.
10. PW1 entered and truly saw her daughter. She was seated on the floor and leaning against the wall. She was vomiting blood. PW1 quickly asked the deceased to get out, but the deceased told her she could neither stand nor walk. PW1 sought the assistance of the man who had called and led her there and they carried the deceased out of the house. Several people came to witness what was happening.
11. PW1 managed to rush the deceased to the Kapenguria County Referral Hospital using a motor cycle. As they waited for the deceased to be treated, PW1 asked her daughter what had happened. According to PW1, the deceased told her that she had met the occupant of the house she was in at the Chepareria market on 30th December, 2021 and who took her to the house in Makutano town. That, the deceased was asked to wash some utensils as the host went to bring some food. The host then returned with three other men.
12. To her utter shock and surprise, the deceased was gang-raped by the four men in turns. She was severely beaten on the chest as she resisted. She sustained serious injuries and vomited blood. Her arm was also broken. The deceased further told PW1 that she had not yet known the name of her host.
13. The deceased was then received at the hospital and treatment began. Shortly thereafter, the deceased passed on.
14. PW1 reported the matter to Kapenguria Police Station. While at the station, the man who had aided PW1 to get her daughter called her to find out about the progress only to learn of the demise of the deceased. He was asked to wait for the police at the scene. The police visited the scene at around 5:00pm.
15. No. 92956 PC Godfrey Kaguthi attached at the DCI West Pokot County was among the police officers who visited the scene. He testified as PW4. He recounted how the scene was and that the police recovered several items inside the house. They were a white-purple underwear, slippers and a duvet bed cover. All were stained with what seemed to be like blood.
16. PW4 also recorded the statements of the other prosecution witnesses in this case.
17. The fact that the accused lived in the house where the deceased was found was attested to by the Caretaker of the houses. She was one Lucy Cheptoo Kisoo who testified as PW2. She, however, lived in another house not far from the houses she managed.



18. It was PW2's testimony that the accused was the tenant who occupied the side house that was made of iron sheets and that he used to sell some water around Makutano town. The accused moved into the house around November 2021 and was religiously paying a monthly rent of Kshs. 1,600/=.
19. PW2 stated that she was called on 1st January, 2022 at around midday and informed that the houses which she took care of had been locked with instructions that no one should access inside until the police arrived.
20. It was PW2's testimony that the houses belonged to one Joseph Ogalo (not a witness).
21. The man who called and informed PW1 what had befallen the deceased testified as PW3. He was one Isaiah Kisur Korinyang. He stated that he was a Watchman within Makutano town and also lived in the houses where PW3 was the Caretaker. His workplace was not far from where he lived.
22. PW3 stated that on the night of 31st December 2021 and 1st January 2022, he was at his place of work. At around 2:30 am he had to rush back to his house to take some medicine. On reaching his room, he heard some commotion in the house occupied by the accused whom he knew as his neighbour. PW3 heard someone groaning in pain and vomiting. Someone was urging the sick person to take something which PW3 readily assumed it must have been medicine. The people were communicating in the Pokot language. PW3 returned to his workplace.
23. PW3 returned to his house at around 7:00am in the morning. He found the house occupied by the accused locked from outside. He prepared breakfast and went out to wash the utensils. He then found the door to the accused's room open. There was also a girl who was lying down outside the room with dirty clothes. The girl was also vomiting some blood. As the door was open, PW3 saw two men sleeping on the floor. He identified them as the accused (who was also known as 'Sonko') and one Daddy, a boda boda rider from within.
24. Disturbed by what he had heard the night before from the accused's house and the state of the girl, PW3 asked the girl whether she was the one who had been unwell the night before. The answer was in the affirmative. PW3 asked if the girl had a chest problem and the answer was in the negative. The girl then narrated what had befallen her.
25. The girl explained to PW3 how she found her way to the accused's room and how the accused brought in his male friends and all raped her viciously as they assaulted her mostly on the chest as the girl refused to have sex with the men. The girl also informed PW3 that she had not had any medication and that she was in much pain. As PW3 talked to the girl, the accused came out of his room and left.
26. PW3 managed to get the contacts of the girl's mother from the girl and called her. The mother was PW1. PW3 eventually managed to link the girl with her mother.
27. PW1 took the girl to the hospital and when PW3 called to find the progress, he learnt that the girl had passed on and that PW1 was at the police station. PW3 informed the village elder and the Chief of what had transpired. Later, PW3 recorded statements with the police and testified in Court.
28. PW4 organized for and a Post mortem exercise was undertaken by Dr. Luke Ambuka at the Kapenguria County Referral Hospital mortuary on 3rd January, 2022. The body of the deceased was identified by John Lokomer and Veronica Chepokaptor.
29. Externally, the deceased had bruises on the left upper arm and the left elbow. There was also evidence of bleeding from the nostrils. There was as well visible bruising on the outer vaginal wall on both sides. Internally, there was blood in the plural cavity and some whitish discharge with some tint of blood in the vaginal canal.



30. Out of the autopsy, it was ascertained that the cause of the death of the deceased was hemothorax secondary to chest wall trauma. Samples were taken for further analysis. The Post Mortem Report was prepared and duly signed. PW4 produced the Report as an exhibit by the consent of the parties.
31. PW4 forwarded the samples collected during the post mortem exercise together with the items recovered at the scene being underwear, the duvet bedcover, the slippers together with the clothes the deceased wore at her death alongside blood samples taken from the accused to the Government Chemist for analysis.
32. In a Report dated 1st September 2022, the Government Analyst confirmed that the DNA profiles generated from the stains on the underwear, the vaginal high swab taken from the deceased during the autopsy and the blood sample of the accused, generated a mixed DNA profile of the accused and the deceased. The Report and the Police Exhibit Memo were all produced as exhibits by the consensus of the parties.
33. PW4 prepared his police file and forwarded it to the Prosecutor who gave the consent for the accused to be charged. The accused was assessed to be mentally fit to stand trial and was arraigned before Court.
34. After close of the prosecution's case, the Court found that the accused had a case to answer. He was placed on his defense.
35. The accused gave a sworn statement and did not call any witness. He denied killing the deceased. He stated that although the deceased was found in his room while injured and eventually died, he used to live with his friends who could explain what had happened since the girl only spoke Pokot language, which language he neither understood nor spoke.
36. On why his DNA profile was found mixed with that of the deceased, the accused stated that his blood samples were taken from him and that he had been bitten by a snake.
37. The accused urged the Court to discharge him accordingly.
38. After close of the defence case, parties did not file any written submissions. The matter was left for judgment.

Analysis:

39. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -
 - (a) the death of the deceased and its cause;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
40. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased:

41. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).



42. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, PW1 vouched that the deceased died while she was with her in the hospital and her body was taken to the mortuary. PW4 also vouched the death of the deceased and stated that he even attended a post mortem examination which was conducted on the body of the deceased.
43. The second way in which the death of the deceased was proved was through the medical evidence in the Post Mortem Report. According to the Post Mortem Form which was filled in by Dr. Dr. Luke Ambuka (not a witness) who conducted the post mortem, the cause of death of the deceased was hemothorax secondary to chest wall trauma.
44. This Court, therefore, finds and hold that the death of the deceased and the cause thereof were proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

45. In this matter, the evidence that etndered to link the accused with the death of the deceased was the alleged dying declaration by the deceased to PW1 and PW3.
46. A look at the law and judicial pronouncements on the legal doctrine of dying declarations is, hence, paramount. The starting point is the law. Section 33(a) of the *Evidence Act*, Chapter 80 of the Laws of Kenya provides as follows: -

33. Statements, written or oral or of electronically recorded of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:

(a) Relating to cause of death:

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

47. Further, Courts have had several occasions and interrogated the above provisions. In *Pius Jasunga s/ o Akumu -vs- R* (1954) 21 EACA 333 the predecessor of the present Court of Appeal discussed the aspect of a dying declaration. In that case, the deceased had been found lying on the road with a stab wound in his chest. He told the police officer who had found him that he had been stabbed by the appellant. The officer took him to hospital from where the deceased's statement was also recorded. In that statement, the deceased stated that he was on his way home when the appellant and another person confronted him. The appellant demanded money from him and assaulted him; he also threatened that he would kill him if he did not give him money. The appellant then drew a knife stabbed the deceased in his chest. He fell down and the appellant and the other man ran away. He died of internal haemorrhage and shock the following morning.



48. In discussing the admissibility of a dying declaration, the Learned Judges in the Jasunga case (supra) had the following to say: -

In Kenya the admissibility of a dying declaration does not depend, as it is in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to the dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England.

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.

The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and... the particulars of the violence may have occurred in circumstances of confusion and surprise calculated to prevent their being accurately observed... The deceased may have stated his inferences from facts concerning which he may have committed important particulars, from not having his attention called to them.

Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (R v. Ramazani bin Mirandu (1934) 1 E.A.C.A 107; R v. Muyovya bin Msuma (1939) 6 E.A.C. A. 128. The fact that the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case: it is no guarantee of accuracy.

49. And, on whether a dying declaration must be corroborated in order to sustain a safe conviction, the Appellate Court had this to say: -

It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R. v. Eligu s/o Odel & Another 1943) 10 E.A.C.A 90; re Guruswami (1940) Mad. 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused... But it is, generally speaking, very unsafe to base a conviction solely on a dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. R v Said Abdulla, (1945) 12 E.A.C.A 67; R v Mgundwa s/o Jalo and others, (1946) 13 E.A.C.A 169, 171.).

In addition to the cases cited above, we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration, unless, as in Epongu's case (Epongu s/o Ewunyu, (1943) 10 E.A.C.A 90) there was evidence of circumstances going to show that the deceased could not have been mistaken in his identification of the accused.

The learned trial judge convicted the appellant based on the assessors' unanimous verdict that the appellant was guilty.



50. Still on the issue of corroboration of a dying declaration and speaking generally, the Court of Appeal in *Aluta v Republic* [1985] KLR 543 stated as follows: -

In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels' speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration.

51. Commenting on the above somehow wavering position of the Court of Appeal on the need for corroboration in dying declarations, the Court in *Republic v James Githinji Wamani* [2020] eKLR had the following to say: -

One theme that keeps recurring whenever evidence of dying declaration is considered is that of corroboration of the declaration. It is apparent from the excerpts of the *Jasunga* case which have been reproduced here that as much as the Court of Appeal for East Africa appeared to downplay the need for corroboration of the evidence of a dying statement, it still acknowledged that "... we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration." Thus, the absence of corroboration may not necessarily be fatal to the prosecution case but it is still relevant all the same; I suppose the degree of its relevance depends on the circumstances in which the declaration was made which in turn vary from one case to another.

52. On the weight to be attached to a dying declaration, the Court in the *Jasunga* case (*supra*) rendered as follows: -

The statement was, apparently taken when the accused was suffering from extreme exhaustion: it was unacknowledged and there is no means of knowing whether the deceased would have acknowledged its correctness or would have wished to alter or add to it, had he been able to do so. If the statement had, on the face of it, been incomplete because the accused had sunk into a coma before he finished it, it would have been inadmissible (*Waugh v The King*, (1950) A.C 203) ... It is not necessary, in order to render a dying statement admissible, that it should be a complete account of the attack, provided that it is, or may rationally be assumed to be, all that the deceased wished to say about it. (Sarkar on Evidence, 9th Edition, p 510). But the weight to be accorded to a dying statement must depend, to a great extent, upon the circumstances in which it is given, and the effects of a wound may dim the memory or weaken or confuse the intellectual powers. (Sarkar on Evidence, 9th Edition pp.303,309).

53. The Supreme Court of India in *Uka Ram vs. State of Rajasthan*, Appeal No. 749 of 2000 declined a dying declaration on account of the mental instability of the deceased. The Court said as under:

..... the dying declaration was not reliable beyond reasonable doubts for reason that existed a doubt about the mental condition of the deceased at the time she made the dying declaration

54. From the foregoing, the following elements of dying declarations arise; that is: -

i. The statement must have been made by the deceased.



- ii. The statement must refer to the accused.
 - iii. The statement must relate to the cause of one's death, or as to any of the circumstances of the transaction which resulted in one's death.
 - iv. Whereas there is no standing rule on the need for corroboration of a dying declaration, extreme caution must be taken in assessing the weight to be attached to a dying declaration.
55. In applying the above to the case at hand, it was the evidence of PW1 and PW3 that the deceased told them that the accused had taken her from Chepareria market and came with her to his house in Makutano. That, the accused brought in his other three friends and they gang-raped her as well as assaulted her on the chest as she resisted the unexpected ordeal. In the process, the deceased suffered chest injuries which led to her death.
56. There was also further corroboration in this matter. It was by way of the medical evidence through the Report from the Government Report. It was proved that the accused DNA was found mixed with that of the deceased in the samples taken from the deceased vaginal cavity during post mortem examination. The accused's DNA was generated from the blood samples taken from the accused on his arrest.
57. The defence tendered by the accused did not create any doubt on the prosecution's case. Even if this Court agrees that the accused was bitten by a snake, that does not explain how his DNA was found inside the vagina of the deceased. The only explanation is that the accused had sexual intercourse with the deceased shortly before death. That, is a confirmation that the deceased and accused were together.
58. This Court has weighed the deceased's declaration with a lot of caution. The totality of it is that the declaration is admissible in evidence, is fully reliable and well corroborated. The declaration is of very high probative value.
59. Therefore, this Court finds that it was the accused who caused the injuries that led to the death of the deceased.

Whether there was malice aforethought:

60. The Court will now consider whether the accused acted with malice aforethought in causing the death of the deceased.
61. Section 206 of the Penal Code defines 'malice aforethought' as follows: -
- 206. 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.

62. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.

63. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs Republic* (1993) KLR 171, held 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 test of which is always subjective to the actual accused; -

- i. The intention to cause death;
- ii. The intention to cause grievous bodily 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 intention were aimed at a potential victim other than the one 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 vs. Director of Public Prosecutions* (1975) AC 55". (emphasis added).

64. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -

- a. The nature of the weapon used; whether lethal or not;
- b. The part of the body targeted; whether vulnerable or not;
- c. The manner in which the weapon is used; whether repeatedly or not;
- d. The conduct of the accused before, during and after the attack.

65. The deceased was gang-raped. The accused confirmed as much when he said that the deceased had been taken into his house by his friends. There is as well evidence that the deceased was severely assaulted by the sexual tormentors. She suffered chest injuries and vomited blood since the night before until when she died the following day.

66. The actions of the attackers were very deliberate. Despite the gang-raping, assaulting someone to such an extent is a clear indication that grievous harm was intended. The chest is a very cardinal part of the human anatomy. It houses very delicate organs and a sustained assault thereon results into injuring the organs. Therefore, the accused and his friends intended to harm the deceased.

67. As the Court comes to the end of this issue, suffice to say that the doctrine of common intention as defined under Section 21 of the Penal Code applies in this case. The provision states as follows: -



When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

68. The Court of Appeal for Eastern Africa in *Wanjiru d/o Wamerio versus Republic* 22 EACA 521 as follows: -

Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

69. The ingredients of common intention were enunciated in *Eunice Musenya Ndui versus Republic*, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows: -

- (1) There must be two or more persons;
- (2) The persons must form a common intention;
- (3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
- (4) An offence must be committed in the process;
- (5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.

70. In *Njoroge versus Republic* 1983 KLR 197 and *Solomon Munga versus Republic* 1965 EA 363, both Courts had the following to say of the elements of the doctrine of common intention: -

If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they factually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.

71. The accused, therefore, in conjunction with his friends purposed to do harm to the deceased. They were all present and acted in unison.

72. By considering the cumulative actions of the accused in the manner the killing of the deceased was executed, it is without any shred of doubt that the accused, with common intention, purposed to kill the deceased.

73. The prosecution, therefore, proved malice aforethought in this case.

Disposition:

74. The above analysis has it that the prosecution was successful in proving that the accused caused the death of the deceased.

75. In the premises, this Court finds and hold that the prosecution proved the information of Murder contrary to Section 203 as read with Section 204 of the Penal Code as against all the accused in this case.

76. The accused herein, Francis Esonga Odhiambo, is accordingly found guilty and convicted of Murder pursuant to Section 322(2) of the Criminal Procedure Code.



77. Orders accordingly.

DELIVERED, DATED and SIGNED at KAPENGURIA this 5th day of April, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Lowaskou, Learned Counsel for the Accused.

Mr. Majale, Learned Prosecutor instructed by the Office of the Director of Public Prosecutions, the State.

Juma/Hellen – Court Assistants.

Judgment – Kapenguria High Court Criminal Case No. E002 of 2022 Page 13 of 13

