



**Republic v Andika (Criminal Case E006 of 2023)
[2024] KEHC 5114 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E006 OF 2023
DO OGEMBO, J
MAY 13, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

LOVIS OWINO ANDIKA ACCUSED

JUDGMENT

1. The accused, Lovis Owino Andika is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 204 of the Penal Code.
2. The particulars of the charge are that on 16/2/2023 at Wichlum Centre, Nyagunda sub location in South Sakwa Location, Bondo sub-county within Siaya County, he murdered one Kelvin Otieno Abayo.
3. The accused has pleaded not guilty to the charge. The prosecution has called a total of 8 witnesses whose evidence was as follows:-
4. PW1 Peris Juliana Opiyo testified that on 16/2/2023 at about 5.00 pm, she had been preparing supper in her house when someone knocked on his neighbour's Kevin's door. She heard her neighbour's wife welcome the knock and the one who had knocked asked for drinking water. That she suddenly heard Kevin shout telling the man to get out and asking him what he had gone to do there and Kevin's wife tell him to leave Lovi because they were friends. That Kevin started pushing the man who was still at the door. She stood at her door and watched as Kevin's wife urged him to leave the man. Kevin then started hitting the man with fists and when the man started running away, he blocked him. The witness then saw Lovi, the accused take a knife and stab Kevin with it on his hand. Accused in the process ran away, leaving his green slippers behind (MFI-1). Kevin was then rushed to hospital. He passed on the following day. The witness identified Lovis as the accused before court.



5. PW2, Vincent Ooko Oule, on his part, testified that on 16/2/2023 at about 5.00pm, he had been in his house when a fight erupted between his neighbor, the deceased and another man, the accused. He saw his neighbor holding his left hand which was bleeding. It is his neighbor who told him it is Lovi who had stabbed him with a knife. He did not witness the incident with his eyes.
6. The wife of the deceased Caroline Achieng was PW3. Her evidence was that on 16/2/2023, at about 5.00 pm she had been inside her house when accused went and asked for water as her husband was sleeping. She gave him water in a jug. That she heard Lovis tell him that they go to drink alcohol. That the moment the 2 got out, she heard them fighting. She came out to see and saw as Lovis was running away. Deceased told her Lovis had stabbed him with a knife. She identified the knife as of the neighbor used for mending fishing nets. She also identified the slippers the accused had left behind. She proceeded to take her husband to hospital. He identified the accused as Lovis and added that the two were friends and were drunk.
7. Peter Were Ajulu was PW4. His evidence was that he is the Chairman of the fishermen. He knows the accused as Lovis Owino. He recalled that on 16/2/2023, at about 5.30 pm, he got a report from the wife of the deceased (Boy) called Caroline Achieng (PW3) who reported that her husband had been sleeping in the house when the accused came. That the two fought and Lovis stabbed her husband with a knife. He traced the deceased's family and informed them. That on 18/2/2023, the Chairman of neighbouring Ubengo Beach called and informed him that the accused has been arrested and taken to Manyuanda Police Station. He went and confirmed some information.
8. And PW5, Dr. Rita Aoko Opondo did the post mortem examination on the body of the deceased. He noted that the body had bruises on both hands and feet, bruises on lateral side of the left arm, and cut wound on the ante lateral region of the left shoulder with swollen left arm and forearm. She also noted massive heamorrhage with blood clot below muscles of left shoulder and arm. She termed the opinion that the cause of death was massive heamorrhage secondary to stab wound. She produced the post mortem form (EXH – 1).
9. Benta Awuor Otieno was PW6. Her evidence was that on 17/2/2023, at about 8.00 pm, she was informed that deceased had been stabbed. She found deceased at Bondo Hospital where he later died. She later also attended the post mortem. PW7 Victor Onyango Ojalo gave evidence that on 18/2/2023 he was at Obende Beach, when as Chairman of the fishermen, his members reported to him that there was a new man at the beach and that he had the information that the man had been involved in a fight at Wich Lum beach and had that the man had killed the other man. He was led to where the man was and the man Lovis Owino introduced himself and admitted that he had been involved in the fight at Wich Lum. After confirming with the Chairman of Wich lum, he took the suspect (Accused) to Manyuanda Police Station.
10. Inspector silas Mutua, PW8 was the investigating officer of this case. He received the accused at the police station and visited the scene where he recovered the green slippers (EXH – 1). He also took witness statements and escorted the accused for mental assessment.
11. He stated that accused had escaped from the scene after the stabbing. He was not able to establish whether the accused was treated at any facility.
12. Upon the close of the prosecution, the court ruled that accused had a case to answer and put him to his own defence. The accused opted to give a sworn evidence in his defence.
13. In his defence, the accused testified that on 16/2/2023, after working till 10.00 am, together with friends, they sat drinking. He left for his house for sleep at 1.00 pm. That he agreed he would pick up his friend in the evening for work. His friend was Kevin Obayo. That at about 4.00 pm he went to pick



his friend from his house. He found the door open and entered. In the house, he found the deceased's wife and asked if Kevin was in. Then he asked her for water. She gave him in a jug and glass. Then as he started drinking the water, he was suddenly hit on the neck and he fell down. That the glass cut him. That the wife held Kevin and asked him not to beat a friend, but he pushed her down. That he tried to run from the house but stepped on the shoes at the door and fell down. When he tried to run again, Kevin snarled him and he fell down. Kevin continued beating him while on the ground. He felt something on the ground. It was a knife next to the fishing net. He picked it. It cut the deceased left hand and deceased fell down crying that he had stabbed him. the accused then ran away but could not work that day since he was also injured.

14. That in the morning, he decided to borrow Ksh3000/= from his welfare group but did not get any. That he met the Chairman of the neighbouring beach. On being asked, he confessed that he had fought someone at Wich Lum. He was then taken to the police station. He summed up that him and the deceased were friends and that they had taken alcohol. While denying that he had escaped, he admitted that he did not report the incident. He did not call any witness.
15. Upon the close of the defence case, Counsel for the accused filed written submissions. It was submitted that the prosecution has failed to discharge its burden of proof. That under Section 203 of the Penal Code, the prosecution is under a duty to prove:-
 - i. Proof of the fact and cause of death of the deceased.
 - ii. Proof that the death of the deceased was direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence.
 - iii. Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the “mens rea” of the offence.
16. That the cause of death is not in dispute as confirmed by PW5, Dr. Rita Opondo and the fact that accuse admitted to accidentally stabbing the deceased.
17. On whether the element of malice aforethought was proved, counsel relied on Section 206 of the Penal Code. And the case of R –VS- STANLEY MUTHIKE TIIRE [2018] eKLR, that malice aforethought connoted an existence of culpability or moral blameworthy on the part of the accused. That there is no evidence that accused has harboured any ill will, motive or guilty intent to murder nor had planned the same. That they were friends and deceased was the aggressor. That the murder weapon did not belong to the accused and lastly that accused did not flee even after learning of the death.
18. The defence further submitted that for the offence of murder to be proved, both the “actus reus’ and mens rea” must be proved by the prosecution. (Joseph Kimani Njau –vs- R, [2014] eKLR. The court was urged to acquit the accused of the charges.
19. On the side of the prosecution, it was submitted that the first ingredient of the offence of murder was proved by PW5. On whether the said death was caused by an unlawful, it was submitted that the evidence of PW3 constituted a dying declaration under Section 33 (a) of the *Evidence Act*. Counsel relied on Philip Nzuk Watu –Vs- R, (2016) eKLR.
20. On the issue of malice aforethought, counsel relied on Daniel Muthee –vs-R (2007) KLR in which the court held;

“When the Appellant set upon the deceased, and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm



to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code:

21. That the nature of the injuries and the weapon used, being a knife confirms the fact that accused intended to cause death or grievous harm and so malice aforethought was proved. The court was urged to convict the accused accordingly.
22. I have considered the evidence on record by both the prosecution and the defence sides. I have also considered the submissions filed by the parties and the authorities relied on.
23. The offence of murder is defined under Section 203 of the Penal Code in the following terms:-

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of the offence of murder.”
24. In effect therefore, for the prosecution to prove the offence, it must prove the existence of the following ingredients:-

“ It is incumbent upon the prosecution to prove the above ingredients so as to prove the offence of murder.”

 - i. Proof of the death of the deceased.
 - ii. Proof of that the death of the deceased was due to unlawful act or omission of the perpetrator.
 - iii. That the said unlawful act or omission was committed with malice aforethought.
 - iv. Lastly, the identification of the accused as the perpetrator of the offence.”
25. With regard to the first ingredient of proof of the death of the deceased, several prosecution witnesses testified and confirmed the fact of death of the deceased. These included, PW1, PW2, PW3, PW6 and PW5. PW5 the Doctor who performed the post mortem on the body of the deceased.
26. She formed the opinion that the deceased died out of massive heamorrhage secondary to stab wound. She duly produced the post mortem form as exhibit in this case (EXH – 1). With this evidence, this court is convinced that the element of proof of the death of the deceased was sufficiently proved by the prosecution. I so find.
27. The 2nd issue subject of proof by the prosecution is proof that the said death of the deceased was caused by an unlawful action of the perpetrator. On this issue, it is important to consider the evidence on record. It was the evidence of PW1, PW2, and PW3 all of whom were present at the scene, and also confirmed by the accused himself in defence, that it is the accused who had gone to the house of the deceased and requested to be served drinking water by the wife of the deceased (PW3). That a fight erupted between the accused, and the deceased who had been sleeping in his house. The fight started inside the house of the deceased. That the deceased overpowered the accused who upon falling down picked a knife lying on the ground, left behind by a fisherman, and stabbed the deceased causing him injuries that led to his death.
28. Several factors are material from this analogy. It is important to note that it is accused who went to the house of the deceased, where the deceased was peacefully taking a nap. It is also worth noting that while the fight broke out between the two, the deceased did not use any weapons. He used his fists to confront the accused who in the process fell down. The accused, on the other hand, chose to pick



up a weapon, a knife, from the ground with which he immediately stabbed the deceased. This court is convinced that the circumstances of the incident afforded the accused an opportunity to run away and escape from the deceased who was beating him up. The accused did not have to pick up a weapon to stab the deceased.

29. It is for these reasons that I find that the act of the accused of causing the death of the deceased in the manner in which he did it was unlawful.
30. The issue of identification of the accused as the perpetrator of this attack on the deceased, has been proved by the prosecution witnesses, PW1, PW2 and PW3 who witnessed the incident at the scene. The accused himself in his sworn defence, has also admitted as much.
31. Lastly, is the issue of whether in causing the death of the deceased, the accused committed the offence with malice aforethought. Section 206 of the Penal Code gives directions on the issue of malice aforethought in the following terms:-

“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 the death will probably cause the death of or grievous harm to some person, whether that is the person actually killed or not, although such knowledge is accompanied by indifference whether the death or grievous bodily harm is caused or not, or by wish that it may not be caused,
- c. An intention to commit a felony
- d. An intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.”

32. Several authorities give guidance to this court on the issue of malice aforethought. In R –vs- Stephen Sila Wambua Matheka [2017] EKLRL, the court held;

“An inference on malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.”

33. The accused in using the knife, a sharp object, obviously intended to cause grievous harm to the deceased. The deceased had overpowered him and in order to get an escape route. Thus, this convinced that the prosecution only proved the element of malice aforethought against the accused. Accused also escaped to a nearby beach to avoid arrest.
34. When put to his own defence, the accused admitted having gone to the house of the deceased and asking the deceased’s wife for drinking water. He also admitted to being engaged in the confrontation with the deceased and stabbing the deceased. His defence was really not a challenge to the prosecution’s case as established by the witnesses. I find no merit in the same and I dismiss it.
35. The standard of proof in Criminal Cases is well settled. The prosecution is under a duty to prove the guilt of the accused person beyond any reasonable doubt. (Miller –vs- Ministry of Pensions [1947])



Zanier 372). In this case, I am convinced that the prosecution has discharged this burden and proved the case against the accused beyond any reasonable doubt as required by the law.

36. I accordingly hereby convict the accused person with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code as charged.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF APRIL, 2024.

D. O. OGEMBO

JUDGE

29/4/2024

Court

JUDGMENT READ OUT IN OPEN COURT IN PRESENCE OF ACCUSED, MS. NDEDA FOR ACCUSED AND MS. MUMU FOR THE STATE.

D. O. OGEMBO

JUDGE

29/4/2024

Ms. Mumu

He has no previous record. He may be treated as a first offender.

Ms. Ndeda

We are ready with mitigation. In mitigation we urge the court to consider that accused is a first offender. He has no previous records. The accused and deceased were friends. On the date in question they were from work together. The accused acted in self defence and he admitted as much. The deceased throw the first punch. It is unlikely that the offence would have been committed. He was under duress. The accused is remorseful. He has indicated as much. Additionally, he is an outstanding member of the society. This is evidenced by the fact that prosecution witnesses did not speak badly on him. He has a family which he supports. We pray for leniency and that he be placed on Probation. That is all.

Court

Court obtain a Probation Officer's Impact Assessment Report cum Pre-sentence report on the accused.

Mention on 13/5/2024.

D. O. OGEMBO

JUDGE

29/4/2024

