



**Republic v Otieno & another (Criminal Case 29 of 2015)
[2024] KEHC 4784 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 29 OF 2015
HI ONG'UDI, J
MAY 8, 2024**

BETWEEN

REPUBLIC STATE

AND

MELANIE AKINYI OTIENO 1ST ACCUSED

GEORGE ODHIAMBO OTIENO 2ND ACCUSED

JUDGMENT

1. Melanie Akinyi Otieno and George Odhiambo Otieno hereinafter referred to as the 1st accused and 2nd accused respectively are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars being that the 1st and 2nd accused on the 13th April, 2015 at Naka Estate Nakuru Town in Nakuru District within Nakuru County jointly murdered Martin Kimani Muchunga.
2. They denied the charge and the case proceeded to full hearing with the prosecution calling a total of eight (8) witnesses. When the accused were placed on their defence they elected to give sworn evidence with one witness to call.
3. The deceased was the 1st accused's wife while and 2nd accused is a brother to the 1st accused. Monica Njeri Njoroge (PW1) and Gladys Waithera (PW2) lived on the Point Flats Nakuru with both the 1st accused and the deceased. It was their evidence that they had heard screams early 14/4/2015 morning. They went upto the house of the 1st accused which was on the ground floor at different times but their evidence of what they found and saw in the house is similar.
4. It is their evidence that on entering the said house they found the 1st accused screaming in the sitting room. On being asked what it was she said the deceased had committed suicide in the bedroom bathroom. PW1 ran to the said bathroom and saw a body in a sitting position on the floor. She then left for her house from where she called the police.



5. It was PW2's evidence that when he went to the 1st accused's bathroom he found the deceased leaning on the bathroom wall, and there was a rope round his neck. The rope was attached to the shower pipe.
6. PW1 and PW2 confirmed that when each of them went to the 1st accused's house they found both accused persons there. The house had not been disturbed.
7. PW3 Jane Muthoni Duncan is the deceased's mother. She testified that on 14/4/2015 at 6.00 am she received a call from the 1st accused who was the deceased's wife. She informed her that the deceased had committed suicide. She immediately called a neighbor who brought her to Naka Estate where the 1st accused and deceased lived. She was met by the 2nd accused who led her to the bedroom. In the ensuite bathroom she found the deceased lying there dead. There was no blood on the floor and the shower had fallen down.
8. Police officers came to the scene and took away the body. Two days later she identified the body for post mortem. She stated that the pathologist told them that the deceased died as a result of being hit by a blunt object. She saw a Kibelion knife on the bed in the master bedroom. It was her evidence that the 1st accused and deceased used to have problems but not serious ones.
9. In cross examination she said the deceased lay against the bathroom tap. She did not see any reason that would make the deceased want to commit suicide.
10. PW4 Dr. Daniel Wainaina of Ministry of Health Nakuru East and West sub counties conducted the post mortem which was witnessed by Dr. Omagore (PW5) and Dr. Jandaga. All the three (3) doctors signed the post mortem report which was produced as P.EXB 1. They found the following injuries on the deceased's body: A large bruise around the right eye (back eye) Bruise on frontal region of face Swollen scalp Large bruise on the right lateral aspect of thigh with bleeding under the skin upon internal examination noted Extensive bleeding over the right eye extending to the right temporal region and right occipital region – blood dots on right side of skull. Swollen brain issues. The cause of death was found to be a head injury caused by multiple blows by the blunt object on the head.
11. In cross examination he said as a doctor he was trained in pathology, though not forensic pathology. He was aware that Dr. Ngulungu who is a trained pathologist conducted a second autopsy in the matter. He stated that most of the injuries he saw were on the right side of the body. He added that contact with a wall cannot cause the extent of the injuries he saw on the body. He explained that when a body falls against a metallic tap and knocks its head it would cause an injury depending on the impact. He further stated that it was unlikely that contact with a wall would cause the injuries he saw on the deceased's body.
12. PW5 Dr. Omagore Sam associated himself with all the findings by PW4 as he witnessed the autopsy. In cross examination he said there was swelling on the deceased's scalp due to injuries inflicted on him. Further that the horizontal groove on the anterior aspect of the neck was not consistent with hanging. To him suicide by hanging was ruled out.
13. PW6 Inspector Smith Kimathi Njeru No. 68996 of Bondeni police station testified that he was the investigating officer in this case. He testified that on 14/4/2015 him together with other officers visited a scene of crime at Naka Estate. Inside the master bedroom bathroom in an apartment as directed they found a dead body. There was a sheet tied to the shower and the body was sliding on the bathroom floor as it hang. The sheet was produced as PEXB 2. He identified the photos taken at the scene. He interrogated neighbours who recorded statements. A second post mortem was undertaken by Dr. Ngulungu.



14. In cross examination he said his initial observation was suicide as investigations were not complete. He had found the house disorganized as if there was commotion. He explained that he charged the accused with murder because of the position of the body in the bedroom. It lay horizontally and the sheet was hanging from the shower which was not broken. That there was no indication of a weight that may have pulled it down.
15. He confirmed that a 2nd post mortem was conducted on the request of the accused. He attended the said post mortem PW7 Dr. Ngulungu Titus registration No. 54741 a pathologist at Nakuru level 5 hospital performed the 2nd post mortem on 21/4/2015. He found the cause of death to be lack of oxygen to the body tissues due to neck pressure that denied the brain oxygen. He said there was no major difference in the two post mortem reports.
16. In cross examination he said not every doctor is a pathologist. He did not know if the doctors who did the first post mortem were pathologists.
17. PW8 No. 85551 P. C Kareb Simbiri testified that he was gazetted Scenes of Crime Officer since the year 2013. On 14/4/2015 at about 7.30am he was called to Naka Estate at Onpoint Park to a scene at an apartment where he found the body of a male adult in a master bedroom bathroom. He documented the scene and took 26 photos which he produced as PEXB 3, A – Z together with the certificate PEXB 5. He observed that the weight of the body led to the bending of the shower post (photos No. 13 & 16). So, the body came down with the shower.
18. In her sworn defence the 1st accused Melanie Akinyi Otieno introduced herself as a social worker dealing with children. She testified that on 13/4/2015 she requested the deceased (her husband) to come home after his work of dropping school children so that she could attend a meeting she had with the Provincial Children’s Officer Mr. Yusuf. The request was made because they had no house help and they had two (2) children. The meeting was around 10 am – 11 am. She had also asked her brother (2nd accused) to come and assist with the chores before the deceased arrived. The 2nd accused came, and around 11.00am the deceased called to inform her that he would be late since he was unwell and was at the hospital.
19. He explained to her that the doctor was saying he had a Sexually Transmitted Infection (STI). She however told him their son had similar symptoms which turned out to be a Urinary Tract Infection (UTI). The deceased arrived a few minutes to 11.00am, and she left but it was late and she did not find the officer she was to meet. She however met a friend of hers (Anne) at a cafeteria at 11.30am and while there she received a text message from the deceased. The message read:

“I hope when you went to Rwanda you did not have too much fun”.

She did not respond to this message as she knew what he meant. She however showed her friend Anne the message. It is true she had been to Rwanda 2 weeks prior.
20. She returned home after lunch to relieve the deceased. Upon arrival, she requested him to come home after work for they needed to talk. He returned at 6.45pm and she followed him to the master bedroom. She told him they had been friends longer than being married. So, she wanted a separation. Understanding this was because of the message he had sent he told her he did not mean what he said and he was sorry.
21. It was her evidence that a year prior to this she had discovered that the deceased was having affairs, and they had to go for counselling. That twice before the counselling the deceased had tried to commit suicide. The first time she had found him trying to hang himself while the 2nd time she found him



- mixing rat and rat in the bathroom. The counselling they attended was by Madam Regina of Nakuru (DW1). While still in the bedroom the deceased started crying same to their one (1) year old son.
22. The deceased then left the bedroom and sat on their big corridor, threw down his specks and continued crying. This was not new to her, but she still pleaded with him to calm down. He got up and went to the master bedroom bathroom where he locked himself up and refused to open the door. She went to the kitchen to prepare dinner while the 2nd accused was outside checking on the clothes, as he prepared to go work. He too checked on the deceased but he was not responding.
 23. Her daughter who had been out playing returned and she sent her to call the deceased for dinner. She returned saying her dad was not responding to her. She had dinner with the children and took them to bed. She called the deceased's sister (Pauline Mukabi) & informed her of what was happening. She encouraged her to be patient. She went to sleep in her daughter's bedroom, and woke up at 3.41am. and rushed out to check on the motorbike and found it there.
 24. From there she went to the master bedroom and knocked on the bathroom door, and even spoke but there was no response. She called Pauline Mukabi who did not respond. She opted to call her own sister who advised her to have the door broken. She called the 2nd accused who arrived and went knocking at the bathroom door, checked on the bathroom windows without success. He used a knife to cut part of the door board which enabled him to open the door from the outside.
 25. On the door being opened, she saw the deceased's body with a bedsheet on the neck and hanging from the broken shower. There was a brick from the wall on his face. His tongue was hanging and had changed colour. On realizing he was no more she fell down and started screaming. Two neighbours came. She called his sister and mother. The mother (PW3) with his two uncles came that morning but her sister had arrived earlier. She notified the police who came and they inquired on what happened. The body was then taken away in a blanket, together with the bedsheet.
 26. The accused requested for 2nd opinion on the autopsy, which the court allowed. The 2nd report showed the deceased died of asphyxia, while Dr. Wainaina a friend of the deceased's family said the deceased had been hit by a blunt object. She denied killing the deceased.
 27. In her cross examination she said the couple had lived together for 7½ years before his death. They had lived at Naka estate since 2014. She said they used to resolve their issues without violence and they remained friends. Further that since the departure of their house help, they would ensure one of them remained home with the children. The 2nd accused came to assist in washing clothes and later hanging them.
 28. She said she was heart broken to learn of the deceased's side affairs. He had once confronted a guy friend of hers whom he suspected to have an affair with her. She cut off communication. She explained that what the deceased did in remaining quiet in the bathroom was quite normal since he would remain there for upto to four (4) hours. She claimed to have been arrested because of the first post mortem report by Dr. Wainaina. Finally, she stated that the two post mortem reports had different results which were contradictory.
 29. The 2nd accused George Odhiambo Otieno in his sworn defence said he is a caretaker within Naka Estate. In 2015 he was a caretaker at a construction site. The 1st accused is his sister while the deceased was his brother in law. On 12/4/2015 he was at his house at Pipeline but went to the 1st accused's house after she requested him to go and assist her wash clothes. At around 11.00am the deceased came and requested him to wash the motorbike which he did. He left to go and do class examinations. He quickly returned around 7 pm to the 1st accused's house to assist in hanging clothes before leaving for his place of work. As he prepared to leave the 1st accused told him the deceased had locked himself in



- the bathroom. He went and knocked three (3) times, but there was no response and he notified his sister and left.
30. At 4.00am he was called by the 1st accused who appeared distraught. He learnt from her that the deceased had not left the bathroom. He went and found the deceased's motorbike outside the gate. The gate was opened for him and he entered the house, and master bedroom and went knocking and calling at the bathroom door, loudly with no response. He went outside the bathroom and used a "Kabambe" phone to peep. He saw a big wire/cable hanging. He saw a hole on the wall and there was a bedsheet tied to the shower and on the deceased's neck. He returned to the house and took a knife which he used to make a squareline invasion on the door and he pushed it. What he observed is similar to what the 1st accused said she had seen. The 1st accused started screaming and what happened is as expressed by her.
 31. In cross examination he said he did not hear the conversation between the accused and deceased. From the outside of the bathroom he saw a broken part of the wall from the inside. He admitted having made dents on the door as seen in the photos. It was not possible to open the door as the keys were on the inside part of the door. Though he never witnessed any violence between the 1st accused and deceased, he would sometimes see the 1st accused crying because of what the deceased did to her. The deceased's moods used to change now and then and he'd even punch switches.
 32. The defence called one witness Regina Mwabila a clinical psychologist who testified as DW1. She said she had a Masters degree in Clinical psychology and had practiced for ten (10) years, and is currently based at Nacha Plaza Nakuru. She testified that in June 2013 the 1st accused came for services from her due to a family challenge involving her husband. Theirs were marital issues. She requested to meet both parties, which happened on 28th June, 2013. She just had a session with the husband then both of them. She only met the husband Mathew Kimani (deceased) twice.
 33. DW1 informed the court that her first interview with a client is about their health, family interaction etc. In their discussion the deceased told him he lost his dad and he valued his marriage. He said he was not on drugs though he had attempted suicide. He wanted to work on himself and his marriage. She found the deceased to be disturbed about a number of things including being jobless. She produced her report as DEXB 1.
 34. In cross examination she confirmed that during her interaction with the deceased he had raised an issue concerning his father's death. There was also concern about his infidelity. The couple was struggling financially.

Submissions

The Prosecution's submissions

35. These were filed by prosecution counsel Mr. James Kihara and are dated 3rd January, 2024. He submitted that he had compared the evidence by both parties. He questioned why the daughter to the couple now aged 14 years did not come to testify to support what the mother had told the court. It was his submission that going by the evidence of the first accused, the deceased ought to have been injured on the left side of the body. However, the injuries as per the 1st post mortem report were on the right eye, right thigh, bruises on the face, swollen scalp and bleeding in the inner skin. The cause of death was a head injury with multiple blows by a blunt object.
36. Counsel argued that contact with the wall cannot cause the injuries seen on the deceased. Thus, the indicator is that prior to meeting his death he had been assaulted while in the house and was later hanged to make it look like suicide. Further that there was no evidence to show that the deceased had returned from his duties that day.



37. In reference to the 2nd Post-mortem, counsel submitted that the doctor opined that the deceased died due to lack of oxygen to the body tissue and neck pressure that denied the brain oxygen. The doctor also noted that the body had other injuries and referred to the examination report and stated that due to the limitations, he could not carry out the post mortem.
38. Counsel further submitted that there was no evidence to support the claim that the 1st accused had gone for any meeting on the material day. There was also no evidence to show the 2nd accused's movements. Its his argument that there is no explanation for the fresh injuries on the deceased's body. He queried the evidence of DW1 the psychologist saying she had allegedly seen the deceased in the year 2013 and there was nothing to connect that to the happenings of 13/4/2015.

The Accused Persons' Submissions

39. These are undated and were filed by Mr. Gordon Ogolla advocate. Counsel set out the core issues for determination which include:
- a. The fact of death
 - b. The probable cause of the death of the deceased and whether it was a result of either the unlawful act or omission of the accused.
 - c. Who caused the death of the deceased
- In setting out these issues he relied on the cases of: *Republic v Henry Obisa Auko* [2018] eKLR; *Anthony Ndegwa Ngari v Republic* [2014] eKLR, and *Noolmington v DPP* [1935] AC 462.
40. He submitted that the fact of death had been proved by the evidence of PW1 – PW3, PW6 and PW8. That the Post- mortem reports by PW4 and PW7 provided additional proof of the death of the deceased.
41. On the 2nd issue counsel referred to the evidence of PW4 who produced the 1st Post-mortem report, (PEXB1) and PW7 who produced the 2nd Post-mortem report (P EXB 4). Counsel submitted on the importance of medical evidence on the cause of death save for cases where the cause of death is so obvious. He referred to the case of *Republic v Josephat Kipruto Bett* [2015] eKLR in which Kanyi Kimondo J made reference to the case of *Ndungu v Republic* [1985] KLR 487 where the Court of Appeal made an emphasis on the same issue stating thus:
- “Of course there are cases for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”
42. Counsel submitted that the evidence of PW7 falls under the category of expert opinion evidence as provided for under section 48 of the *Evidence Act*. He made reference to a number of cases urging the court to consider the evidence of PW7 as thriving above that of PW4 and PW5 (both are doctors). The cases referred to are: *Maina Thiongo v Republic* [2017] eKLR; *Mutonyi v Republic* [1982]. KLR 203; *Earnest Tsuma & 2 others v Republic* [2020] eKLR. He thus contended that PW4 was only a medical practitioner. That in his statement he had not stated that he was a pathologist.
43. On the evidence adduced counsel contended that PW2 testified that there was a rope around the neck of the deceased. On the other hand, PW6 and PW8 stated that they saw a bed sheet tied to the neck of the deceased. Further that PW3 stated that the shower had fallen while PW6 stated that the shower had not broken. He thus urged the court to acquit the accused persons based on the above arguments.



Analysis and determination

44. I have considered all the evidence availed in this case alongside the submissions by both counsel as set out above. The issue for determination is whether the prosecution proved the charge against both accused beyond reasonable doubt.
45. Section 203 and 204 of the [Penal Code](#) under which the accused are charged provide for the offence of murder and the punishment. Section 203 provides:
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.
- Section 204 provides:
- “Any person convicted of murder shall be sentenced to death”.
46. From the above provisions of the law and the cases cited by the defence at paragraph 38 of this judgment the ingredients to be established in a murder charge are:
- i. The fact of death
 - ii. The act of killing (actus reus)
 - iii. Whether malice aforethought (intention to kill – mens rea) was established.
47. The fact of death:
- There is no dispute about the fact of death. PW1, PW2, PW3, PW6, PW8 and both accused, testified on this. Two Post-mortem reports (P EXB 1 & P EXB 4) were produced by PW4 and PW7 respectively confirming the death.

Whether the 1st and 2nd accused persons killed the deceased.

48. The deceased was the husband of the 1st accused and a brother in law to the 2nd accused. From the evidence of DW1 (Psychologist) plus the 1st accused the couple had some marital issues. From the 1st accused’s evidence there was an issue between the couple on this material day after the 1st accused had gone to town to meet a certain officer. She arrived late and so missed the appointment. She however met her friend Anne and they hang out together. She arrived back home between 2-3 pm. From her reaction when the deceased arrived home at 6.45 pm she was angry and followed him to the bedroom. She did not give him even a minute to settle down.
49. It is noted that the officer the 1st accused was to meet in town plus Anne were not called by the defence as witnesses to buttress 1st accused’s story. The issue, is whether indeed the 1st accused ever went to town that day.
50. The movement of the 2nd accused is also critical here. It was alleged that he first left to go and do exams. Then again, he left around 7pm to go where he worked as a care taker. This was happening on the same date of incident. Again, there was no evidence to prove that indeed the 2nd accused was a student and a caretaker. When he was allegedly called by the 1st accused to come back to the house at 4.00am did he abandon his caretaking duty?
51. From the evidence of the 1st accused, the deceased entered the bathroom around 7 pm and never responded to her pleas, those of the 2nd accused and those of their daughter. She however continued preparing dinner, ate and went to sleep in their daughter’s bedroom, leaving the unresponsive husband



- in the bathroom. The reason she gave was that, he used to stay there for even upto 4 hours. From her narrative, by the time she went to sleep, in her daughter's bedroom the deceased had been in that bathroom for a long time while not uttering a word. Did that not cause her any concern as to what could have been happening to her beloved husband and father to her children?
52. Coming to the most critical issue which is the findings and the cause of death the evidence on record reveals this:
- i. Two Post-mortem reports were produced by PW4 and PW7 both of whom are doctors. The defence has submitted that the 2nd report should override the first one because it was done by a pathologist.
 - ii. PW4 testified that though not a specialist in pathology as PW7 he trained in pathology as part of his training for Medicine and pathology is part of his Medical degree.
 - iii. PW4 observed several injuries on the deceased's body as outlined in this judgment at paragraph 10. PW5 who attended the same post mortem confirmed observing all these injuries on the deceased's body.
53. PW7 who conducted the 2nd post mortem on the request of the defence, concurred that the deceased's body had other injuries as shown in the examination report. The two Post-mortem reports clearly reveal that the deceased had serious external injuries. Infact the report (PEXB 4) reads: cause of death was:
- “Asphyxia due to gravitational pressure to the upper neck in a body with injuries at the back of the head and upper back. These findings are best correlated with the circumstances surrounding the death”.
- PEXB1 – shows the cause of death as:
- “Head injury caused by Multiple blows by blunt object(s) – Homicide.”
54. The defence is that the deceased had suicide tendencies and so had committed suicide. The main question here is, did the deceased commit suicide after inflicting all these injuries on himself? At what point were the observed injuries inflicted and at what point did he commit suicide by hanging himself?
55. There was no blunt object which was recovered from the bathroom which could be alleged to have been used by the deceased to injure himself then commit suicide. My humble finding is that the deceased did not commit suicide.
56. The evidence before court is therefore circumstantial evidence as nobody witnessed the killing. In the case of *Sawe v Republic* [2003] I KLR 365 the Court of Appeal held as follows:
- i. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
 - ii. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on
 - iii. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypotheses of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.
57. Further in *Nyakundi v Republic* [2003] KLR 700 the Court of Appeal held thus:



- i. This court was not satisfied that the evidence of the only witness which the judge relied on to convict the appellant left no doubt in the entire case as to lead to a conclusion that the inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis other than that of guilt.
 - ii. There was no proper evidence to conclude that the accused was carrying a panga with which he had killed the deceased.
58. Lastly in *Nzivo v Republic* [2005] 1 KLR 699 the Court of Appeal held thus:
- (v) In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.
59. Is the circumstantial evidence adduced herein sufficient to sustain a conviction? The evidence reveals that the deceased was at home with both accused persons on the material day. There is no evidence to show that any of the accused was not in the house when the deceased met his death. It is clear that the deceased was killed and thereafter placed in the bathroom with a sheet tied around his neck to make it appear that he had committed suicide. The reason for this act was the marital issues between the 1st accused and the deceased.
60. I am satisfied that the evidence points to none other than the 1st and 2nd accused as the persons who killed the deceased. For my part I find both of them guilty and convict them of the offence of murder as charged, under section 215 of the [Criminal Procedure Code](#).
61. Orders accordingly

DELIVERED, DATED AND SIGNED THIS 8TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

