



**State v Oidho (Criminal Case E019 of 2022) [2024] KEHC 7312 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7312 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E019 OF 2022  
DO OGEMBO, J  
JUNE 13, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**STEPHEN OTIENO OIDHO ..... ACCUSED**

**JUDGMENT**

1. The accused person, Stephen Otieno Oidho is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. That on 11/5/2022, at Awelo market, Barkowino sublocation, Bondo sub-County, within Siaya County, he murdered Salim Amollo Opany. He pleaded not guilty to the charge. In support of the charge, the prosecution has called a total of ten (10) witnesses whose evidence were as follows:-
2. PW1 Jared Omondi Odala testified that on 21/12/2021, he was at his place of work at Awelo, where he met Stephen Otieno at about 2.00 pm. That Stephen (accused) asked him for a rental house in Awelo, where he was the caretaker. That accused stayed in the premises from 21/12/2021 to May 12<sup>th</sup>, 2022, when he moved out. That on the same day at about 3.00 pm while at the funeral away in Nyakach, his wife Belyne Akoth called and told him that someone had been found murdered at Awelo market. He duly informed the Assistant chief Edwin Jackin Olima. That later, on coming back from Nyakach, he led the investigators to the house where Stephen had lived. He saw blood on the wall and also at the veranda. He identified the accused as Stephen Otieno.
3. PW2 Jackline Atieno Omoke, testified that on 11/5/2022 at 6.00 pm, she had been selling bread in her shop in Bondo with assistance from Salim and Isaac. That they parted after work at 6.00 pm. Salim would leave work at 6.00pm and report back at 6.00 am. That when she reported to work on 12.5.2022, she found bread still at the verandah. She waited for Salim in vain. She was then informed by one friend of Salim, Elisha that Salim's friend had brought the motor cycle of Salim. That one Linnet, her Mpesa attendant then informed her that Salim's friend had gone to her and asked her for Salim's identity



- card number and that the man had Salim's phone which was blocked and the man wanted to have unblocked. She learnt 4 days later that Salim had been murdered, and his body found at a mortuary.
4. And Linnet Adhiambo Ochieng, PW3, an Mpesa attendant recalled that on 12/5/2022 at about 9.20 am, one Steve approached her and told her that Salim had sent him to pick a guest from the stage and given him his phone, which he had inadvertently switched off and blocked. That Steve requested her for Salim's identity card number so that he could unblock the phone. This witness knew Steve as he used to accompany Salim while depositing money in Mpesa. She refused to give out the identity card number of Salim and she proceeded to tell her boss of the incident (PW2). She learnt of Salim's death 4 days later. She identified the accused as Steve, who had come with Salim's phone, an itel. She also re-affirmed that accused came and showed her Salim's blocked phone.
  5. PW4 Edwin Jackino Dima, the Assistant Chief of Barkowino sub location, testified that on 12/5/2022 at about 3.00pm, he received a call from PW1 that a dead person had been found in Awelo village. He confirmed same when he went to the scene.
  6. He duly informed the police who came and took the body away to the mortuary. He saw the body lay on its belly with a rope in the neck and also cuts on the palms. It lay about 100 m from rental houses where PW1 was caretaker. And George Odhiambo Odalo, PW5, a Total Pumb attendant, Bondo, recalled that on 15/5/2022 at about 7.00 pm, he had been looking for his missing brother Salim Amollo and he reported to Bondo Police Station. Later on 16/5/2022, he was able to identify the body of his brother at the mortuary. He later witnessed the post mortem examination of the body on 19/5/2022.
  7. PW6, Inspector Silas Mutua of DCI, Bondo, testified that on 12/5/2022, following a report by PW4, he proceeded to the scene at Awelo Market where he found body of the deceased, hidden in a thicket. It had cut wounds on the head, and hands.
  8. After the scene was processed, he took the body to the mortuary. He witnessed the post mortem on 19/5/2022. That on 17/5/2022, a suspect was brought to the police station. He is the accused. That on proceeding to the house accused had vacated at Awelo market, the officers found blood which was taken for forensic analysis and a bag of clothes, the accused said belonged to the deceased. That the accused also had two phones, 1 itel, and a techno. The accused confirmed that the ITEL belonged to the deceased who was his friend and who visited him regularly. He summed up that accused recorded a confession before C.I. Mbithi and that the other suspects are still at large.
  9. PW7 Salvin Cheruto Kapkoi, the Government Analyst produced the analyst report PExh 1 (a) (b). It was her evidence that the DNA profile generated from the swap sticks presented matched the DNA profile of Salim Amollo, the deceased. The scene of crimes, Officer PCL Simon Lioni was PW8. He had gone to the scene and took the blood samples which he handed over for DNA analysis. He also took photographs of the scene which he produced as exhibits Exh. 2 (a) (b).
  10. And PW9, Thomas Ogola, recalled that on 12/5/2022 at about 1.00 am, a motor cycle came from the direction of the bank and he identified the rider as a friend of Salim and he asked the man where Salim was. The man told him Salim was putting on a jacket. Out of suspicion, he proceeded to Salim's house but did not find him. He later learnt that Salim had been killed. He identified the accused as the man who had Salim's motor cycle.
  11. The last prosecution witness was PW10, Dr. Daniel Wanjovu Juma, who produced the post mortem report. His evidence was that the cause of death was heamorrhagic shock, due to massive heamorrhage secondary to multiple cut wounds (Exh- 1).
  12. Upon the close of the prosecution's case this court made a ruling that the accused had a case to answer and put him to his own defence.



13. In his defence made on oath, the accused testified that on 11/5/2022, he woke up and went to work. That on the way home in the evening, he met his friend, the deceased who had a motor cycle parked by the road. That the two boarded the motor cycle to go home and met one Jemmo on the way. That reaching home, Jemmo and Jose joined them at about 9.45 pm. That Jemmo called Salim outside and ongoing out to check, he could not find Salim. That once outside, Jemmo cut Salim with a sharp object as Jose also hit him. That when he asked the two why, the two threatened to beat him also. He witnessed as they beat him and take his money from his pocket. Also his two phones. That Jemmo then entered their house and touched the wall with the blood on his hands smearing on the wall. That out of fear, he did not intervene or scream for help. He vacated the plot the following morning and duly told the landlord. He however, did not tell about the attack because the two had warned him against telling anyone.
14. That on being arrested in his new house, he told the police what had happened leading to the arrest of Jemmo two days later. That the DCI demanded Kshs 50,000/= from him, which he did not have. Jemmo, on the other hand, paid and was released. In his evidence, the deceased was murdered by Jemmo and Jose.
15. On cross examination, the accused confirmed that he was friends with the deceased and that the deceased had been in his house. He maintained that the police tortured him to write the statement or that he is the one who gave Jemmo and Jose a rope to take Salim away. He took the deceased's motor cycle into his house. That when Jemmo entered the house and touched the wall, Jemmo did not tell him anything, just coming into the room and leaving. That he did not report to the police after the warning by Jemmo and Jose. Neither did he surrender the motor cycle to the police. He confirmed remaining with Salim's phone. He denied going to the Mpesa shop to get Salim's identity card number. He however did not surrender the phone to the police. Also that he did not take the phone and the motor cycle to deceased's place of work because he was in a hurry and he forgot.  
The accused did not call any witness.
16. Both sides duly filed submissions. On the side of the defence, it was submitted that the prosecution are duty bound to prove death of the deceased, proof that the accused committed the unlawful act which caused death of the deceased and that he had malice a forethought.  
That it is not in dispute the fact of death of the deceased.
17. On the second issue that accused committed the unlawful act, it was submitted that none of the prosecution witnesses was an eye witness and that prosecution case is based on circumstantial evidence. Counsel relied on *Sawe v R*, (2003) KLR 364, wherein the court of Appeal held:  

“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, circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and it never shifts to the accused.”
18. That those who killed the accused person are well captured in the statement of the accused. That there is no proof that accused killed deceased and he cannot be liable only because he witnessed the incident. (*R v Charles Mwaura & another* (2016) eKLR).



19. It was further submitted that accused was similarly not an accessory after the fact, as there is no evidence he did anything in assisting the culprits.
20. On proof of malice aforethought, counsel relied on the case of *Nzuki v R* (1993) KLR, 171, in which the court of Appeal spell out the ingredients of malice aforethought as:-
  - i. An intention to cause death.
  - ii. An intention to cause grievous bodily harm
  - iii. Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
21. That the prosecution failed to prove this element against the accused. The court was urged to acquit the deceased.
22. The prosecution, on the other hand, submitted that the first element of cause of death was proved. And that the circumstances of the case showed it was accused who killed the accused. The case of *Sawe v R* (2003) KLR 364 was relied on.
23. On the 3<sup>rd</sup> issue of proof of malice aforethought, counsel submitted that same was proved. Counsel relied on *Daniel Muthee v R*, (2007) in which the court noted;

“Where the Appellant set upon the deceased and cut her with a panga several times and proceeded to cut Allan allow 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 in terms of Section 206 (b) of the *Penal Code*.”
24. The court was urged to find that it is the accused who murdered the deceased and convict him accordingly.
25. The accused herein faces a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Section 203 of the *Penal Code* defines the offence of murder 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 murder.
26. The above provision clearly declares the ingredients of the offence of murder which the prosecution must prove in order to obtain a conviction for the offence. The ingredients of the offence are:-
  - i. Proof of the fact of death of the deceased.
  - ii. Proof that the deceased’s death was due to an unlawful act or omission on the part of the accused.
  - iii. Proof that the said act or omission was committed with malice aforethought.
  - iv. Identification of the accused as the perpetrator of the offence.
27. Regarding the first ingredient of the offence ie the fact of death of the deceased, the prosecution produced several witnesses in including PW1, PW2, PW3, Pw4, PW5, PW6, PW9, all of whom confirmed that the deceased indeed died. The evidence of PW10, Dr. Daniel Wanjovu Juma, the Doctor who produced post mortem report of the deceased body was conclusive in this regard. This witness confirmed that the deceased died and that the cause of death was heamorhagic shock due to



- massive hemorrhage secondary to multiple cut wounds. He duly produced the post mortem report as exhibit (Exh-1). The defence has also conceded the fact of death of the deceased. In the circumstances, this court is convinced that this element of the charge was sufficiently proved by the prosecution.
28. On the second ingredient that the deceased's death was as a result of an unlawful act of the accused, this court considers the manner in which the deceased was killed. The deceased was cut severally with sharp objects on the head, face, hand and neck among other body parts. The attack was vicious leading to skull fractures and fractures of other bones. He was also strangled. The body was dragged to a bush where it was recovered. There is absolutely no evidence on record to suggest why the deceased had to be killed and in this cruel manner. I accordingly find that the killing of the deceased was unlawful.
29. On the element of malice aforethought, it is important to consider Section 206 of the *Penal Code*. The same defines 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:-
- i. 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,
  - ii. Knowledge that the act or omission causing death will probably cause the death 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 harm is caused or not, or by a wish that it may not be caused.
  - iii. An intent to commit a felony.
  - iv. 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.
30. The Court of Appeal in the case of *Nzuki v R*, (1993) KLR 171 that the defence has referred this court to summarize what malice aforethought would entail. That the act must have been committed with the following intentions:-
- a. An intention to cause death.
  - b. An intention to cause grievous harm.
  - c. Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
31. The facts and the nature of death the deceased suffered have already been captured herein above by the evidence of the various witnesses and confirmed by the evidence of PW10 by way of the post mortem form produced. The deceased was viciously attacked using sharp objects. The sharp objects were aimed at the deceased's head, neck and hands amongst other parts of the body. He was also strangled and marks on indicative of the same were discernible and visible. The nature of the injuries and the body parts targeted by the perpetrators can only point to one fact. That there was a clear intention to kill the deceased. I so find. The prosecution clearly therefore proved beyond any doubt that in killing the deceased, the perpetrator(s) had malice aforethought. And the case of *Daniel Muthee v R* (*supra*) to which this court was referred confirms this position.
32. Lastly, on the issue of identification of the accused, as the perpetrator of this heinous crime, it is a fact, a fact agreed on by both the prosecution that there was no eye witness to this act. The case of the



prosecution against the accused is therefore based on circumstantial evidence. Several authorities were relied on by the parties to help the court to determine whether or not it was the accused who murdered the deceased. Amongst these were:-

33.

a. *Abmed Abolfathi Mobamed & another v R*, (2018) eKLR, that;

“However, it is a truism that the guilt of an accused person can be proved by both direct and circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or fact that has been proved. Such evidence can form a strong basis for proving guilt of an accused person just or direct evidence.”

b. *Sawe v R* (2003) KLR 364, that,

“.....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.....”

The Sawe case (above) was extensively relied on by both sides.

34. It is therefore important for this court to keenly consider the circumstances of this case so as to determine if it was the accused who murdered the deceased. And the prosecution availed several witnesses whose evidence are material in this respect.
35. It was the evidence of PW1, Jared Omondi Odala, that the accused was a tenant at a rental house for which he was caretaker from 21/12/2021 to 12/5/2022. This is the same house from which blood of the deceased was traced. It is the same house the accused confirms the deceased had visited him in and was in when he was attacked. The accused moved out of the house the following day after the attack and death of the deceased. And in moving out, apparently the accused gave neither a notice nor any reason for moving out to the landlord or caretaker. The body of the deceased was later recovered in a thicket barely 100 m away from this house.
36. PW3, Linnet Adhiambo Ochieng, an Mpesa attendant, gave evidence that she knew both deceased and the accused as friends as they both used to visit her business whenever the deceased wanted to deposit money in his Mpesa account in his phone. Her evidence was further that the accused had approached her on 12/5/2022 at about 9.20 am asking her to assist him with the deceased identity card number from her records that he could use to switch on the deceased phone which he had inadvertently switched off. Accused then had deceased's itel phone. It is worth noting that this was early in the morning following attack and death of the deceased in the night. This witness declined the accused' request and duly informed PW2, the employer of the deceased. While giving the evidence in court, the accused did not challenge the evidence of this witness at all.
37. PW4 and PW6 confirmed that when the accused led them to the house he had just vacated, blood was found and samples taken for examination turned out to match the DNA of the deceased. PW6 continued that a bag of clothes belonging to the deceased was also recovered from the house, and that the accused had the deceased's two phones, 1 Itel and 1 Techno. And that accused even recorded a confession, (though the confession was never produced in court). Again, the accused did not challenge the evidence of this witness during cross examination.



38. The blood samples taken from the house of accused, on examination, matched the DNA profile of the deceased according to PW7 and the analyst reports produced as exhibits Exh. 2 (a) (b).
39. And then there is the evidence of PW9, Thomas Ogola, that on 12/5/2022, at about 1.00 pm, the same night the deceased was killed, the accused appeared at his place of work (he is a watchman) while riding the deceased's motor cycle, and claimed that deceased was behind putting on a jacket. Out of suspicion, the witness went and checked the house of the deceased, but did not find the deceased.
40. In his defence, accused testified that deceased was called outside by Jemmo and Jose who beat him to death. With respect I find the defence of the accused unconvincing and unbelievable in many ways. Whereas, the accused stated that once deceased was called out, he came out to check but did not find the accused, Jemmo and Jose, in the same defence, he goes on to state how he saw Jemmo cut the deceased with a sharp object as Jose also hit him, and that he even asked the two why they were killing the deceased. He also stated that the two took deceased money and two phones. He however gave no explanation as to how he came in possession of the same phone of the deceased recovered from him. Accused states further that Jemmo entered the house and had the wall smeared with deceased's blood which was on his hands. In saying this, the accused fails to say what Jemmo came to do in the house, if at all. It is also unbelievable that Jemmo would go to accused's house in that manner without neither speaking nor saying anything to the other. It is further unbelievable that the two would kill the deceased in this manner and in his presence without the accused intervening or calling for help. Not even making a report of the incident to the police station. His action of vacating the house the following day is clearly suspect and must have been motivated by an attempt to cover up on his deed.
41. The accused testimony that the police demanded Kshs 50,000/= from him and that Jemmo managed to pay and was released was clearly afterthought. This is because the alleged officer, PW6, gave evidence in court and at no time did the accused raise this issue with the witness.
42. And whereas the accused on cross examination testified that he was tortured to write his statement with the police, it is surprising that in the submissions of the defence, the accused sought to rely on the same statement he recorded with the police as being a true statement of what took place. This clearly would not be testimony of an honest and candid man.
43. In the same cross examination, the accused gives a number of self-incriminating evidence. He states that he took the motor cycle of the deceased and that re-retained the deceased's phone.
44. Taking into account the above circumstances, I am convinced that the same point to the accused, and no one else as the person who murdered the deceased. The defence of the accused lacks in any merit and I dismiss it.
45. In total therefore, I am convinced that the prosecution managed to prove all the ingredients of the charge and in the process managed to prove this case against the accused beyond any reasonable doubt as required by the law. I accordingly convict the accused with the offence of murder contrary to Section 204 of the [Penal Code](#) as charged.

**DATED, SIGNED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**D. O. OGEMBO**

**JUDGE**

**13/6/2024**

Court

Judgment read out in court in presence of the accused, Mr. Ooro for the accused and Ms. Kerubo for State.



**D. O. OGEMBO**

**JUDGE**

**13/6/2024**

Ms. Kerubo

We do not have any previous records of the accused.

Mr. Ooro

I ask for a date for mitigation.

Court

Matter fixed for mitigation and sentence. Mention on 18/6/2024.

**D. O. OGEMBO**

**JUDGE**

**13/6/2024**

