



State v Otieno (Criminal Case E016 of 2023) [2024] KEHC 6838 (KLR) (4 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E016 OF 2023**

RE ABURILI, J

JUNE 4, 2024

BETWEEN

STATE PROSECUTION

AND

JAPHETH OJWANG OTIENO ACCUSED

JUDGMENT

Introduction

1. The accused person Japheth Ojwang Otieno is charged with the of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63 Laws of Kenya. The particulars of the offence are that on the 5th June 2023 at around 10.30hrs in Kibos Market in Kisumu East sub-county within Kisumu County, the accused murdered one Aplhonse Okuku Ongojo Kasera.
2. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial.
3. The prosecution summoned a total of six (6) witnesses in support of its case which is summarised herein below.

The Prosecution’s Case

4. PW1 Dr. Robert Omollo Okuta testified that he carried out the post-mortem on the deceased on the 8th June 2023 at 3pm at Jaramogi Oginga Odinga Teaching and Referral Mortuary. He testified that the deceased is said to have died at 7.00pm on 7th June 2023 at Kibos area. Dr. Okuta testified that the body was of a male African aged 30 years, height of 180cm, naked body and that it was in good general condition with no decomposition or mutilation but rather that it was pale meaning it had lost a lot of blood.
5. Dr. Okuta testified that on the respiratory system, chest, lungs and ribs, there was a chest tube insitu actively draining from the puncture site, that the cardiovascular system was normal while the digestive system had a punctured wound on the spleen from a stab wound caused by a sharp object on the left



hypochondria with severe marked intra peritoneal (abdominal) haematoma. He testified that the other systems were essentially normal.

6. Dr. Okuta testified that he found the cause of death was severe intra peritoneal hemorrhage from a stab wound secondary to a sharp object splenic tear. It was his testimony that he issued a burial permit number 1553102, signed the Postmortem Report on 8th June 2023 at JOOTRH Mortuary. He further testified that no samples were taken for further forensic examination. Dr. Okuta produced the postmortem report as PEx.1. In cross-examination, Dr. Okuta testified that for the object to stab the wound that deep, it had to be long and sharp.
7. PW2 No. 237588 CIP Geoffrey Cheruiyot testified that on the 22nd June 2023, at around 3.30pm, he conducted an identification parade for the accused herein Japheth Ojwang Otieno at Kondele Police station between 3.30-3.45pm. It was his testimony that he asked the suspect if he consented to appear on the parade to which the suspect replied 'yaa'. He further testified that he also asked the suspect if he wanted anybody to be present to which the suspect answered in the affirmative and gave the names of Jared Oliech and Naftali Odero.
8. PW2 testified that the witness was Orwa Ogejo Evans and further that he found 7 members on the parade as per the form. It was his testimony that the accused was asked if he had any objection and he said no. PW2 further testified that the accused stood between No. 2 and No. 3 and he was identified by the witness by touching. It was his testimony that when he inquired from the accused if he was satisfied with the parade, the accused spoke in Kiswahili stating that he was not satisfied because one of them saw him in court wearing Masai Sandals and the mark scar, which complaint PW2 recorded. PW2 testified that the accused signed all required parts and gave his identity card which he personally recorded.
9. PW2 testified that he also signed the form. He identified the suspect in the identification parade as the accused in court. PW2 produced the police identification form as PEx.2.
10. In cross-examination, PW2 testified that the accused had been taken to Winam Law Courts under Miscellaneous Application to allow investigations to be completed. He further testified that the person who identified the accused is the main witness in this case and that the witness touched the suspect and said he saw the suspect by physical looks and a scar on the feet. It was his testimony that the other members of the parade had similar features as the suspect. He testified that he did not know the time when the offence was committed.
11. PW3 No. 240192 IP Dancan Macheso testified that on the 5th June 2023 at about 22.45 hours he was at the police station when he received a call from one Pius saying he wanted to be assisted to take his brother who had been stabbed to the hospital. It was his testimony that together with two other police officers using Isaiah's motor-vehicle they went to the scene a few metres from the bridge at Odemba and found a victim who was identified by Isaiah. He testified that a police officer's motor vehicle arrived and they escorted the victim to Jootrh.
12. PW3 testified that they were accompanied by Evans Orwa who said he was with the victim during the attack. PW3 testified that Evans told him that the chapatti vendor, Japheth Ojwang Otieno, stabbed the victim and that Evans further described how the assailant was dressed and how he appeared. PW3 testified that they went to look for the suspect at Kibos, found him, introduced themselves to him and informed him of the reason for the arrest. It was his testimony that the accused took them to his kiosk where they searched and recovered one knife and utensils that had been washed. It was his testimony that they took the knife which knife he produced as PEx.3.
13. PW3 testified that they took the suspect to Kondele Police station and booked him in for the offence of assault pending further action and informed the family. It was his testimony that on the 7th June 2023



the suspect was taken to Winam Law Courts to get an order to hold the suspect pending investigations. He further testified that on the 8th June 2023 at 8.30am, Prisca Awino, the deceased's mother, went to Kasagam Police station and informed them that the deceased had died while undergoing treatment at Jootrh. It was her testimony that they went to the morgue and confirmed the death and that afterwards they took the suspect back to his kiosk and scene to see if they could recover any other evidence but they got none so they returned the accused person to Kondele Police Station. PW3 identified the accused person as the person they arrested.

14. In cross-examination, PW3 testified that they did not find the accused at the scene of crime and that during the accused's arrest, he was clad in clothes that had been described to them. He testified that he did not see blood stains but that the investigating officer recovered them. He reiterated that the knife was in the accused person's kiosk together with other utensils already washed. He testified that he did not see stains on the knife and that he suspected the knife to have been the murder weapon but that the knife was not subjected to forensic analysis.
15. PW4 Orwa Ogejo Evans testified that he had known the deceased for over 22 years as he was his relative but that he did not know the accused before the incident. It was his testimony that on the 5th June 2023, he left his house at around 9am to sort out his child's school issue of a locker and after sorting it out at about noon, he went to meet the deceased whom they stayed with till about 6pm after which they proceeded to Galins Bar where the deceased played pool as the witness enjoyed taking his beer. He testified that the deceased decided to sleep in Kisumu and not to return to Awasi.
16. It was PW4's testimony that they stayed at the bar until 9.30pm when they decided to go home and as they were negotiating the fare, a boda boda rider called him and asked if he could take them home but the money they had wasn't enough and the deceased suggested that they walk as the place they were going was near yet the riders wanted to take advantage of the night to get more money from them. He testified that, the accused, who was at the chapati making place shouted saying "wachana na hao wajamaa waende, they don't have money, they are wasting your time," to which the deceased responded stating "you don't have money that is why you are here looking for money."
17. PW4 testified that they continued walking towards his house with the deceased on the edge of the road on his right while he walked in the middle of the road as they chatted. He testified that he was a step ahead of the deceased when suddenly he heard the deceased crying, "Aaay amenidunga" ..."aaay he has stabbed me." and that on the witness turning back, he saw the person drawing the knife from Alphonse and coming to stab PW4. He testified that he fell down at the assailant's feet begging the assailant not to stab him. PW4 testified that the assailant carried Akala shoes, with something like an aerial which shoes he identified in court as MFI 4. He further testified that he also saw somethings like burn scars on both the assailant's feet and that the assailant was clad in a red T/shirt, sport type with a black long trouser.
18. It was his testimony that the scene was well lit with security lights as they were just at the centre where there were shops. He testified that he saw the stainless knife which the assailant was holding which was PEx.3 produced in court. It was his testimony that he held the deceased who was bleeding and that despite his efforts to get the motorcycle riders to help, they refused stating that that the injured was bleeding and would die. He testified that he lifted the deceased and walked with him until he reached a petrol station nearby where the deceased collapsed so PW4 called his uncle whom he informed and who told him to call Isaiah who was nearer but Isaiah did not pick his call but later on Isaiah called PW4.
19. PW4 testified that while still at the petrol station, he saw the accused person approaching them in the company of others and holding the same knife that he had used to stab the deceased so, the witness got scared on seeing him holding the same knife so he placed the deceased down and ran towards the bar where he had been with the deceased and told them that Alphonse who had been playing pool had



- been stabbed. He testified that the ladies in the bar started looking for the owner of the bar to help as he returned towards the scene where he met the police and informed them that he was the one with Alphonse. He testified that he showed the police the scene.
20. It was his testimony that he called out to Alphonse who responded after which the police helped him into their vehicle to Russia JOOTRH where he was attended to in emergency and he was taken for a scan. He testified that the owner of the club came with the younger brother and the latter said that he had seen the incident when the accused wanted to stab PW4. PW4 testified that the police then left and after a few minutes, the police came saying they had arrested the assailant and asked PW4 to go to the police station the following day to identify the assailant.
 21. PW4 further testified that the following day, he went to Alphonse's bedside and found that he was stable and that he spoke to the police officers. He testified that the following day at 7.30pm, he went to hospital with relatives to see Alphonse who convulsed and died. He further testified that on the 22nd June 2023 he went to Kasagam police station where he was taken to an office and told to go to a parade where 8 people of the same height and physique were arranged. He testified that he saw the assailant but also requested that the rest of the people on the parade remove their shoes so that he could confirm what he had seen on the assailant's feet which they did and he confirmed the person with burnt feet as the assailant by touching him. He testified that the person he identified at the Police Station and who stabbed Alphonse was the accused in court.
 22. PW4 testified that at the parade, there was another person who had been given the Akala shoes to wear, the ones he saw the accused wearing on the date of the incident, but it was not the accused. He testified that he managed to identify the accused although he did not have on him the said Akala shoes. He reiterated that it was the accused person who stabbed Alphonse and wanted to stab PW4 as well. He stated that he had seen the assailant's feet that had marks like they were burnt. The court observed that the accused person had some burnt marks on both feet which marks were very visible (whitish) even when he is wearing the said Akala open shoes, which were in court as the witness demonstrated how he saw the assailant on the material night.
 23. In cross-examination, PW4 reiterated his testimony in chief and further stated that the akala the man was wearing were not covering the burnt marks. He testified that during the incident, the lights were clearer than the light at the police station where he identified the accused. It was his testimony that he was not intoxicated although he had taken some alcohol and that the deceased never took alcohol.
 24. In re-examination, PW4 testified that he was not intoxicated and that the boda boda men feared helping them because the deceased was bleeding severely and they thought he was already dead.
 25. PW5 No. 73527 Corporal Elly Ouma testified that on the 6th June 2023 at 10am, while he was at the station when CIP Joseph Mutunde minuted a case of a serious assault of one Alphonse Okuku to him. It was his testimony that the accused had been arrested and was already in custody so he removed the accused from the cells, interrogated him and went to JOOTRH to check on the injured admitted in ward 205.
 26. PW5 testified that he interrogated the injured who could not talk with ease as he had a stab wound on the left side of the abdomen and collected from him clothes he had worn at the time of incident; a blue jean with blood stains, PMFI 5, the sweater, PMFI 6, grey with strips, T/shirt brown checked with a cut on the left side. It was his testimony that he returned to the station and recorded in the OB. He further testified that on the 8th June 2023 at 0850 hours while he was at the station, Prisca Awino the deceased's mother and Orwa Agejo came and reported the death of Alphonse Okuku at JOOTRH at 1920 hours on 7th June 2023.



27. PW5 testified that they booked the death report and proceeded to JOOTRH where they found the deceased lying at the mortuary and organized for a postmortem to be done on the 8th June 2023 because the family of the deceased requested to remove the body to Suba. He testified that on the 12th June 2023 he took the accused to Winam Court and got extension of time to hold him in custody so that they complete investigations until 19th June 2023 when he handed over the case to DCI to continue with investigations. It was his testimony that the person who was arrested in connection with the death of the deceased was the accused in court.
28. In cross-examination, PW5 testified that the T/shirt and sweater were the ones worn by the deceased on that day according to PW1. He admitted that he could not see the cut on the sweater. He stated that on the day that he went to Winam Court, PW 1 was not in court. He testified that he investigated serious assault which became a murder case when the victim died.
29. PW6 No. 98994 PC Edwin Musila testified that on 8th June 2023, he was instructed by the DCIO Kisumu East CIP Maurice Kamathi to take over investigations of a case of murder. He testified that he contacted the then investigator who forwarded the file to him and explained the circumstances of the case. He testified that he organized for postmortem to be done on the body of the deceased and then organized for identification parade at Kondele by a Chief Inspector. It was his testimony that he took possession of the Akala shoes which PW1 identified the accused to have been wearing when he committed the offence.
30. PW6 further testified that he also took possession of the clothes the deceased was wearing when he was stabbed. He produced the Akala shoes as PEx.4, the jeans – blue in colour as PEx.5, the grey sweater as PEx.6 and the brown checked T/shirt PEx. 7. He further testified that he also received a metallic knife which was already produced as PEx.3. It was his testimony that the accused person was the person who he took custody of.
31. In cross-examination, PW6 testified that he was the Investigating officer having taken over the file from Corporal Elly. He testified that the accused used to make chapatis, tea and coffee at Kibos market and sold to customers and that he could use the knife to cut chapatis. It was his testimony that the accused was arrested at Kibos on the date of incident past midnight. He further testified that the offence occurred at about 10.30pm and that the accused was arrested from the Kibos area.
32. PW6 further testified that when the knife was recovered, it was very clean and had no blood stains and that was the reason they did not take it for DNA analysis. He testified that neither the accused's or deceased's clothes were recovered and further that the deceased's clothes were not taken for DNA. He further testified that he revisited the scene of crime but did not find anyone. It was his testimony that PW1 told him what he saw and that there were other people at the scene but were not willing to record statements. He testified that he got information from PW1 that the deceased and accused had a verbal confrontation.

The Defence Case

33. Placed on his defence, the accused person gave a sworn testimony that he ran a restaurant where he sold food. It was his testimony that on the 6.5.2023 at around half past midnight he was arrested by plain clothes officers who said he was to record a statement on allegations that there was a person who had been picked from near his workplace.
34. It was his testimony that he had no idea of the person in question and that he was arrested in his house after work. He testified that he never witnessed anything and had not known the person in question and further that he never knew why he was arrested.



35. In cross-examination, the accused stated that he heard the evidence of PW4 and though he had seen him on two previous occasions but that he did not know what PW4 did for a living. He stated that he knew PW4's face as he had seen him in a nearby bar where he used to supply food but not his name. He admitted that had no grudge with PW4 and that PW4 did not tell the court the truth. It was his testimony in cross-examination that he was aware that PW4 identified him on the identification parade. He further stated that PW4 saw him on the same night he was arrested and that he was taken to Jooth and thus PW4 did not identify him on that night.

Analysis and Determination

36. I have carefully considered the evidence adduced in this case for the prosecution and the defence. The accused faces a charge of murder contrary to section 203 of the [Penal Code](#). That section defines murder as follows:

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”

37. The prosecution has to adduce evidence to establish beyond reasonable doubt that there was death, that the death was unlawfully caused by an act or omission and that the accused caused the death of the deceased by an unlawful act or omission. The prosecution must prove that the accused action or omission was motivated by malice aforethought.
38. The deceased's death was confirmed in the testimonies of PW3, PW4 and PW5 all who saw the deceased's body at the morgue and on his deathbed. PW1, Dr. Okuta who carried out the deceased's postmortem and testified that he concluded that the cause of death was severe intra- abdominal haemorrhage from a stab wound (sharp object) with torn spleen.
39. As to whether the deceased's death was caused by an unlawful act or omission. Article 26 (1) of the [Constitution](#) guarantees every person the right to life. The postmortem report revealed that the deceased was pale meaning he had lost a lot of blood, that the digestive system had a punctured wound on the spleen from a stab wound caused by a sharp object on the left hypochondria with severe marked intra peritoneal (abdominal) haematoma. This injury in my view, if caused by an individual, then in my view amounted to an unlawful act as no-one has the right to deprive another of their life. In the circumstances, I am persuaded beyond reasonable doubt that the deceased person, Alphonse Okuku Kasera died out of an unlawful act.
40. As to whether it was the accused who unlawfully caused the deceased persons death, the prosecution's case was built around the testimony of PW4. He was at the scene during the attack on the deceased. He identified the deceased's attacker down to the shoes that the attacker was wearing, the akala shoes with an aerial, and went further even to note the burnt like scars which were on the accused's feet. The area was well illuminated with lights as it was a market centre, according to PW4. This court did confirm that the accused had burnt marks on his feet and the aerial like Akala open shoes described and identified by PW4 were produced in court as exhibits. PW4 further was able to identify the accused in an identification parade.
41. I do note that the accused stated in the Identification Parade that he was not satisfied with the parade as one of the persons therein saw him at court and saw him dressed in the Masai sandals and with the mark on his feet.
42. However, the testimony of PW4 was that during the identification parade, he noted that another member of the parade had put on the Masai sandals that the accused had worn on the night of the



incident and so he asked the police officers present if the parade members could take off their shoes so that he could look for the marks that he had seen on the accused on the night of the attack. PW4 proceeded to identify the accused on the parade as the one who attacked them on the night in question.

43. Having considered the evidence of identification by PW4, and having warned myself of the dangers of relying on evidence on a single identifying witness and at night, I am satisfied that the accused was positively identified as the one who stabbed the deceased, as the incident occurred in a well lit area and the witness, PW4 saw the feet of the assailant as well as the burnt marks on his feet, which marks this court observed were very visible on the upper parts of both feet of the accused. The Court also saw the Akala open shoes which the PW4 described as having been with an aerial..
44. I have considered the defence by the accused person who was arrested in the Kibos area, the area where the incident took place and his insistence that he did not stab anyone. I find the accused person's defence of denial to be just that, a denial. I find no reason to doubt the testimony presented by the prosecution witness PW4.
45. In the circumstances I am satisfied that the prosecution has proved that it was the accused person herein who unlawfully killed the deceased by stabbing him. PW4 identified the stainless knife PEX 3 as having been the one he saw the accused pull from the deceased's body and which he wanted to stab PW4 with, and which PW4 again saw the accused carrying when the accused followed the witness and the deceased while they were at the petrol station. Although the knife had no blood stains and therefore DNA analysis would have been futile, which knife was produced as an exhibit, I find that non recovery of a murder weapon or non-production thereof is not fatal. In this case, as the accused had the opportunity to wash off the blood from the knife which he used to stab the deceased, this court cannot insist that the knife which was recovered should have had blood on it or that the knife should have been subjected to DNA analysis. In any event, PW4 already sufficiently identified the accused and this court believes the testimony of PW4. he was a credible witness whom I did not find any reason to doubt his firm testimony.
46. Finally, as to whether the accused had malice aforethought when he unlawfully killed the deceased, the essential ingredient for the offence of murder is malice aforethought. The circumstances which constitute malice aforethought are described under Section 206 of the *Penal Code* 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.”



47. What can be deduced from section 206 (a-e) is that malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the *locus classicus* case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63, the court held that an inference of 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.
48. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased's attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased which were as follows: the digestive system had a punctured wound on the spleen from a stab wound caused by a sharp object on the left hypochondria with severe marked intra peritoneal (abdominal) haematoma. Malice aforethought was proved beyond reasonable doubt and motive for the attack was immaterial, however, in this case, from the evidence of PW4, the accused person seemed to have felt belittled by the deceased's comment that the accused had no money that is why he was selling food. That in itself could not have provoked a fatal stabbing of a fellow human being. Furthermore, it was the accused who belittled the deceased and PW4 by claiming that they had no money to pay for the ride. The accused knew and had every reason to know that the stabbing of the deceased would cause him fatal injuries.
49. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt.
50. Accordingly, I find the accused person Japheth Ojwang Otieno Guilty of the offence of murder as charged contrary to section 203 of the [Penal Code](#). I convict him accordingly. Sentence shall be pronounced after records, mitigation and victim impact statement.
51. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

