



**Republic v Osiako (Criminal Case E010 of 2021)  
[2024] KEHC 9067 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE E010 OF 2021**

**JN KAMAU, J  
JULY 25, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GEOFFREY EDWARD OSIAKO ALIAS ASWANI ..... RESPONDENT**

**JUDGMENT**

1. The Accused person herein was charged with 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 Charge were that:-  
  
“On the 11<sup>th</sup> day of October 2021 in Mwitindi village, Ebusakami Sub-Location, within Luanda with others before court murdered Fanuel Tony Nambute.”
2. The Prosecution’s case was heard on diverse dates between 7<sup>th</sup> March 2022 and 13<sup>th</sup> July 2023 when it closed its case.
3. Musyoka J took the evidence of Dixon Mchana (hereinafter referred to as “PW 1”), Stephen Nambute Mbiya (hereinafter referred to as “PW 2”), David Nambute (hereinafter referred to as “PW 3”), Livingstone Kungu Ayuko (hereinafter referred to as “PW 4”), Ericka Virek (hereinafter referred to as “PW 5”), Sarah Opati Okore (hereinafter referred to as “PW 6”) and Nelson Obando Okore (hereinafter referred to as “PW 7”).
4. This court became seized of this matter on 7<sup>th</sup> March 2023 on which day the Accused persons and the State indicated that they wished to proceed with the matter from where it had reached. It took the evidence of No 237821 Inspector Margret Muthui (hereinafter referred to as “PW 8”), No 104602 Inspector Joyce Wawira (hereinafter referred to as “PW 9”), the Accused person, Henry Zadock Osiako (hereinafter referred to as “DW 2”) and Wycliffe Mbeya (hereinafter referred to as “DW 3”).



5. On 28<sup>th</sup> September 2023, it found that the Prosecution had established a prima facie case against the Accused person and thereby put him on his defence. The defence case was heard on 7<sup>th</sup> February 2024.
6. The Prosecution's Written Submissions were dated and filed on 20<sup>th</sup> February 2024 while those of the Accused person were dated and filed on 14<sup>th</sup> February 2024. The Judgment herein was based on the said Written Submissions which the parties relied upon in their entirety.

### **Legal Analysis**

7. The issues that were put before this court for consideration were as follows:-
  - a. Whether or not Fanuel Tony Nambute (hereinafter referred to as the "deceased") died?
  - b. If so, was his death caused by an unlawful action(s) and/or omissions?
  - c. If so, who caused the unlawful action(s) and/or omissions?
  - d. Was there malice aforethought in the causation of the deceased's death?
8. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

#### **I. Proof of death of the deceased**

9. PW 1 who was the Pathologist conducted the post-mortem examination on the deceased. The examination could only have been conducted if the deceased was dead.
10. As both the Prosecution and Defence witnesses alluded to the deceased's death, it was not necessary to seek further proof. This court therefore found and held that the deceased's death was proved without an iota of doubt.

#### **II. Proof of cause of the deceased's death**

11. The cause of the deceased's death was a pertinent issue. PW 1 tendered a Postmortem Report dated 15<sup>th</sup> October 2021 in respect of the deceased herein as an exhibit in this matter. After conducting the postmortem examination, he formed an opinion that the deceased died of a head injury due to assault.
12. It was therefore clear from his evidence that the deceased's death was not as a result of natural causes. Rather, it was due to having been assaulted. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.

#### **III. Identification of perpetrator(s) of deceased's death**

13. The Accused person adduced sworn evidence. He denied having been with the deceased on the material date of 11<sup>th</sup> October 2021. He testified that on the night of 10<sup>th</sup> October 2021, at around 12.00am, he was sleeping in his house when his wife woke him up saying there were noises outside. He stated that the noises were coming from DW 2's house. DW 2 was his brother. When he went to see what was happening, DW 2 informed him that there was someone in his cowshed. He went to DW 2's house where he found other people. They then went and reported the matter to DW 3 who was Nyumba Kumi elder who informed them that he would deal with the matter in the morning. He said that he then went back to sleep.



14. He denied having killed the deceased or having known PW 6, PW 7 and one Henry Okaka or having been seen in PW 4's compound. He also denied knowing Mukhuyu Junction. His evidence was corroborated by that of DW 2 and DW 3.
15. He cited Section 206 of the Penal Code and asked this court to ascertain if the Prosecution had proved any ingredients on malice aforethought as the only witness who stated that he saw him in his homestead was PW 4. He asserted that PW 4 did not state the clothes he was wearing and that he never informed the deceased's family that he saw him.
16. He placed reliance on the case of *Joseph Kimani Njau vs Republic [2014]* eKLR where it was held that before an act could be a murder (sic), it had to be aimed at someone and had to be committed with the intention of causing death, grievous bodily harm and the same was done deliberately and without lawful excuse with the intention to expose a potential victim to that grievous bodily harm.
17. It was his case that the deceased had passed by several homes and had on one occasion been escorted to Mukhuyu Junction which was closer to his home, thus, there were no evidence to show that he was the one who inflicted the injuries on the deceased. He was emphatic that the Prosecution had failed to prove its case to warrant his conviction.
18. On the other hand, the Prosecution submitted that both DW 2 and DW 3 testified in their cross-examination that they could not give an account of the whereabouts of the Accused person before and after they met at DW 2's house. It pointed out that the Accused person did not call his wife as a witness to corroborate his evidence as he stated that at the material time he was sleeping in his house before she woke him up and went to DW 2's home.
19. In the *Black's Law Dictionary, 10<sup>th</sup> Edition*, alibi is defined as:-

“A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time”.
20. The principle had long been accepted that an accused person who wished to rely on a defence of alibi had to raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi as was held in the case of *Republic vs Sukha Singh S/O Wazir Singh & Others [1939]* 6 EACA 145.
21. It was also trite law that once an accused person raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of *Victor Mwendwa Mulinge vs Republic [2014]* eKLR.
22. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) that provides that:-

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”
23. Notably, PW 4 testified that on the night of 11<sup>th</sup> October 2021 he was sleeping when he heard footsteps outside his house. He stated that he picked a torch and went to his children's room which was next to where he had placed his timber as he suspected that thieves had come to steal it. He said that when he shone his torch from his house, he saw someone he knew as Aswani run away after he realised he had seen him.



24. He went near the fence which was three (3) metres away to check what was going on and after he shone the torch, he saw someone with blood on his face. He raised an alarm. His wife and neighbour came so that they could assist the person. They recognised the person as Tony, who was their neighbour. He informed Tony's father, PW 2 and Tony's brother, PW 3 of the incident. He said that PW 2 came to the scene at about 6.00 pm. They took the deceased to hospital. In the evening, PW 4 was informed that Tony had died. His evidence was corroborated by that of his wife, PW 5.
25. PW 2 went to the scene of the incident with his two (2) sons, namely, PW 3 and one Paul Ndanyi Nyambute. PW 3 said that he got to the scene at around 5.30 am. It was PW 2's and PW 3's testimony that they found the deceased with injuries on the head, his legs had been broken and was bleeding on the part of his head. He could not walk or talk and that they took him to Olympus Medical Centre at Yala where he later passed on. PW 3 averred that the deceased told him that it was Geoffrey who had injured him. In his cross-examination, he was categorical that Geoffrey and Aswani referred to the same person.
26. PW 6 testified that the deceased went to her home at around 11.00am on the material night of 10<sup>th</sup> October 2021. She instructed her children, PW 7, Kelvin Obado and Henry Okaka to escort him to Mukhungu Junction so that he could get to his home. Her evidence was corroborated by that of PW 7. She stated that although the deceased was drunk, he was in good health. PW 7 stated that they did not meet anyone on the way while escorting the deceased to Mukhungu Junction.
27. PW 9, the investigating officer, testified that in the course of her investigations, PW 8 carried out an identification parade. PW 8 stated that PW 4 was able to identify the Accused person by touching him and that the Accused person was satisfied with how the identification parade was carried out. She produced the identification parade forms as evidence in court.
28. It was evident that PW 4 saw him running away from the scene of crime on the material date using a torch. Using the light from the torch, PW 4 and PW 5 were also able to see the deceased bleeding at their fence. The source of light from the torch was sufficient for PW 4 to have recognised the Accused person as he was standing one (1) metre from his window from where he shone the torch.
29. In an identification parade that was carried out by PW 8, PW 4 positively identified the Accused person. The Accused person was satisfied with how the parade was conducted and in fact signed the necessary forms.
30. This court was persuaded to find and hold that PW 4's evidence placed the Accused person squarely at the scene of crime. He positively identified him as having been the person who was near his fence on that material date and where the deceased was lying bleeding. Identification was by way of recognition. This could not have been a case of mistaken identity. In fact, PW 3 testified that the deceased informed him at the hospital that the person who injured him was Geoffrey who this court noted was also called Aswani.
31. The Accused person did not demonstrate that there was any motive for PW 3 and PW 4 to have framed him as the person who unlawfully caused the deceased's death on that material date. The fact that the deceased was found at the fence with injuries and the Accused person fled from the scene pointed to the Accused person to having been contributed to the deceased's death.
32. As was correctly submitted by the Prosecution, there was no direct evidence. It was circumstantial in nature. However, having weighed against the evidence that was adduced by the Prosecution witnesses against that of the Accused person herein, this court did not find his alibi evidence and the evidence of his witnesses to have been watertight enough to have weakened the inference of guilt on his part.



33. It was this court's finding that his defence of alibi was an afterthought and had to fail. It was apparent that DW 2 and DW 3 were out to protect him. Their evidence did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 8.

#### **IV. Malice Aforethought**

34. Having found and held that the Accused person's defence of alibi was not sustainable as he was positively identified as the perpetrator of the deceased's death, the next pertinent question that arose was whether or not he had malice aforethought in causing his death.

35. This court had due regard to the case of *Morris Aluoch vs Republic [1997]* eKLR which cited the case of *Rex vs Tubere s/o Ochen [1945]* 12 EACA 63 where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted.

36. PW 2 and PW 3 testified that when they got at the scene of crime, they found the deceased with cuts on his head. He also had injuries on the chest, abdomen, knees and stomach. His legs were weak and broken and he could not talk and/or walk. Clearly, the deceased must have suffered greatly from the injuries that his assailants meted upon him. The injuries were so severe that they could only have been intended to kill him.

37. The seriousness of the injuries the deceased sustained was confirmed by PW 1. Upon conducting the post mortem examination, he observed that the deceased's nails, fingers and tongue had turned bluish, there were minor bruises on his upper limbs and lower limbs, he had stitched lacerations on the forehead behind the hairline, a stab on the forearm, a huge clot under the skin on his head, bleeding above and below the brain and moderate swelling of the brain.

38. The extensive injuries all over the deceased's body and the fact that he did not die immediately were evident that he suffered greatly before he died. In addition, the fact that the deceased was found dead in PW 4's fence suggested that the Accused person had no regard to his life and did not care if he died.

39. This court was thus persuaded to find and hold that there were no variances of gaps in the Prosecution's case as the Accused person had asserted. The injuries that the deceased suffered at his hands were not only unlawful but they could not be said to have been bereft of malice aforethought on his part.

40. This court was satisfied that the Prosecution had demonstrated the ingredients of malice aforethought as had been set out in Section 203 of the Penal Code being:-

- a. Proof of the deceased's death'
- b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
- c. Proof of malice aforethought in the unlawful actions and/or omissions.

41. Accordingly, having analysed the evidence that was adduced by both Prosecution and the Accused person and their respective Written Submissions, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein by the Accused person herein among other persons who were not before this court.

#### **Disposition**

42. For the foregoing reasons, the upshot of this court's decision was that the Accused person herein be and is hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of



the *Penal Code* Cap 63 (Laws of Kenya) under Section 215 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

43. It is so ordered.

**DATED and DELIVERED at VIHIGA this 25<sup>th</sup> day of July 2024**

**J. KAMAU**

**JUDGE**

