



**State v Otieno (Criminal Case E010 of 2023)
[2024] KEHC 9978 (KLR) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E010 OF 2023
RE ABURILI, J
AUGUST 7, 2024**

BETWEEN

STATE PROSECUTION

AND

MARGARET ACHIENG OTIENO ACCUSED

JUDGMENT

Introduction

1. The accused person is 23 years old. She is Margaret Achieng Otieno, charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63 Laws of Kenya.
2. The particulars of the offence are that on the night of 7th May 2023 at Kisumu Kanyakwar in Kisumu Central District within Kisumu County the accused murdered Regan Otiende Otieno.
3. The accused person pleaded not guilty to the charge against her and the case proceeded to full trial.
4. The prosecution called a total of seven (7) witnesses in support of its case which is summarised herein below. Placed on her defence, the accused person gave sworn testimony which is also summarised in this judgment.

The Prosecution's Case

5. PW1 Vincent Owino Otieno, a builder from Obunga area testified that the accused was his niece and that he used to live with her since her mother died in 2016. It was his testimony that the accused used to disappear from home and that in May, 2023, she disappeared after which he reported the incident to the police and looked for her until he saw her in Kasarani washing utensils.
6. PW1 testified that he inquired from the accused as to where she had been as her son, Reagan, whom she had left in his custody, had been disturbing him. He testified that she told him that she was to return



- the following day on the 6th May 2023 on which date the accused asked to leave with her son Reagan and to be accompanied by his two children Befine Achieng and Miriam Atieno. He testified that they left on the same day and that his two children returned without Regan.
7. PW1 testified that on the 7th May 2023 after returning from church, he received a call from a certain young man who told him that they had arrested a girl who had thrown her son in water in Kasarani and that the girl identified him as her uncle. He testified that he went to the scene and found a dead child in water while the accused had been arrested by the area Chief. He testified that the body was removed to the mortuary and they later buried the body. In cross-examination, PW1 testified that he did not see the accused throw her child in the water.
 8. PW2 Wilfred Otieno, the accused's other uncle testified that he identified the child's body to the doctor who performed an autopsy on the 11th May 2023. In cross-examination, he testified that his brother PW1 called him and informed him of the death of the child and that he went to the mortuary where he identified the deceased's body to the doctor for post-mortem purposes.
 9. PW3 Evans Gor Ong'wech, an employee of an NGO OLPS as a Programme Officer and the Chairman of Community Policing Kanyakwar area testified that on the 7th May 2023 he was called by a village elder Fredrick Ochuka and informed that a child had been thrown near the quarry which had been dug. He testified that he got onto a motorcycle and went to the scene where he found people gathered and where a lady called Roselynda informed him that she had seen a girl walking near the quarry with a child and she suspected that the girl may have thrown the child in the quarry. It was his testimony that Roselinda informed him that she could identify the girl if she saw her.
 10. PW3 testified that he called the Murram OCS and informed him during which time a certain lady, whom he knew, came towards where they were, crying and upon inquiry the lady stated that her child had died in water. It was his testimony that Roselinda identified the girl as the one she had seen walk with the child. PW3 testified that the accused subsequently informed him that she had thrown the child in the water because the child was disturbing her and that the father of the child had refused to marry her. He testified that they took her to the police station and the police went to the scene and removed the body to the mortuary.
 11. In cross-examination, PW3 testified that Fredrick Ochuka informed him that he had seen a child's body in water. He testified that the child was around three years old. And that other that Roselinda, there were many other people at the scene. He testified that he knew the accused's uncle. It was his testimony that prior to that date, he did not see the accused with any child nor had he seen her throw or drown the deceased but that he believed her word that she is the one who threw the child in the water.
 12. PW4 Cornel Ochieng Rakwayo from Obunga testified that on the 7th May 2023 at around 4.30pm he received a call from 'Japolo' a boda boda rider who informed him that across the railway line where there is a disused quarry, a body of a child had been seen floating lying face down in the quarry. He testified that he left his house immediately for the scene and confirmed that a 3-year-old child was floating in the water in the quarry, face down and in a white vest after which he informed Mr. Soita, an Inspector Police at Obunga Police Station and the Area Assistant Chief, Mr. Maurice Ojwang.
 13. PW4 testified that while still at the scene, a lady who is his in-law, Roselinda Achayo Owino or 'Mama Akinyi' and who lived 300m across that quarry came and informed him that on her way from church she had met a young lady who informed her that she had seen a woman throw a child in a quarry and that the said lady was in a hurry, looked worried and was muddy in her feet so she did not get much from her. It was his testimony that on inquiry, Roselinda stated that she could identify the lady.



14. PW4 testified that while they were still talking, he saw a young lady, who looked troubled being held by two women on her sides, which lady was identified by Roselinda by saying “that is the lady I was telling you about.’ He testified that Achieng started wailing in Dholuo ‘Ooh nyathina’ – ooh my child despite not even seeing the child. It was his testimony that he knew Achieng very well so he called her out to come and to calm down and further inquired as to how she knew that that was her child and to tell him what had happened.
15. PW4 testified that the young girl opened up and told him that she was married to Kevin Otiende the father of the child and Kevin was no longer interested in her and had taken another wife whereas her current boyfriend ‘Odosh’ – Odongo did not want the child and that is why she had to do it. It was his testimony that he asked her how she did it and she said that she strangled the child first before throwing him in the quarry. It was his testimony that he felt she was not safe so they rushed her to Obunga Police Station.
16. PW4 testified that on the 6th May 2023 he had met the accused at Opija Base in Kasarani area with the said child as she held the hand of the child as they walked. PW4 identified the accused in court and testified that the clothes she wore in court were the ones she had on the date of the incident, a T-Shirt with a lion and a flowery skirt. He testified that he had known the accused for a long time as her mother came from the same neighbourhood as his mother.
17. In cross-examination PW4 testified that he saw Margaret a day to the incident accompanied by a male child walking, that at the quarry he saw the body of a minor facing down and floating in the water at which time he could not recognize the child and that he did not know the child’s parents until Achieng told him that the child was hers. It was his testimony that he first met Roselinda before meeting Achieng and that he reiterated what Roselinda told him. He testified that the accused did not show him a birth certificate for the child but that he knew the child was hers as he had known her and that she had the child.
18. PW5 Dr. Ombok Lucy, a medical officer at JOOTRH testified that she performed an autopsy on 11th May 2023 on Reagan Otiende Otieno at Jaramogi Oginga Odinga Teaching and Referral Hospital - JOOTRH mortuary at 12.50pm. It was her testimony that the body was of a 3-year-old African Male with good nutrition, 85cm in height, well preserved, embalmed.
19. PW5 testified that externally, the body was pale with centro cyanosis, face swollen, swollen eyes, pattern marks on the neck while internally he found increased intracranial pressure with signs of lack of oxygen in the brain. She testified that other systems were essentially normal and that she found the cause of death to be asphyxia due to homicidal strangulation. She testified that she signed the Report which she produced as exhibit P. Exhibit 1.
20. In cross-examination Dr. Ombok testified that asphyxia can also be caused by drowning but the cause of death in this case was asphyxia due to homicidal strangulation. She testified that in this case, the lungs were normal so there was no drowning since in the cases of drowning, they usually find water in the lungs.
21. PW6 Roselinda Acharo Owino testified that on the 7th May 2023 as she returned home from church she met a young lady who was unknown to her and as they approached each other the lady called her ‘Mathe’ then told her that some women are not good and on inquiry why, the lady informed her that she had seen a woman beating up a child and drowning the child in a dam. PW6 testified that the unknown lady had muddy legs and her skirt was wet and that she further told her that the woman who had drowned the child had escaped and that she had been told by some police officers whom she had reported the incident to, to go to Kondele.



22. PW6 testified that she questioned the lady why the latter looked muddy and wet and she told her that she had been washing clothes. PW6 became suspicious of the girl as she proceeded on so she called a Community Leader, Cornel Ochieng, and told him that she had suspected the girl. She further testified that she proceeded on and ahead of her, she saw a crowd gathered at the Murram area where she found a child floating in water lying on his stomach.
23. It was her testimony that shortly they saw a lady coming and being held and as they approached them, the lady started crying and when the lady saw PW6, she said 'Mathe' that woman killed my child. PW6 testified that she asked her how she knew that the woman had killed her child and further Cornel questioned the lady as to whether she was responsible for the death of her child and the lady said that she did not intend to do that and that the lady said that she had looked for Cornel before doing that but she did not find him.
24. PW6 testified that Cornel asked her why she could kill her own child and she said that she had found a man to marry her but he demanded that she takes her child to his father first and so that was the reason for her actions. PW6 identified the accused as the girl she met on the fateful day. In cross-examination PW6 testified that she did not know the accused before 7th May 2023 and that she met her when she was alone. She testified that she did not see her drown her child.
25. PW7 No. 112319 PC Alvin Njue from the DCI Kisumu Central testified that on the 7th May 2023 at 1800 hours he received a call from his in-charge who instructed him to respond to a scene where a lady allegedly killed her child and threw him into a quarry. He testified that they proceeded to the scene and found the body in a quarry and the lady already arrested after which the body was retrieved from the quarry and taken to the morgue.
26. It was his testimony that they brought the lady to Kisumu Central police and sought custodial orders for 7 days, recorded statements of witnesses and attended the postmortem. PW7 testified that they went to the home of the accused and recovered a skirt. He identified the accused person as the girl in court.
27. In cross-examination PW7 testified that the deceased was in the quarry and in waters, that the doctor said the child died due to strangulation and that they did not do finger print examination because it was not necessary. It was his testimony that there were no barriers at the quarry and that there was no possibility of the child walking into the quarry, as the body was inside the quarry. He further testified that none of the witnesses informed them that they saw the accused kill her child but rather that they relied on circumstantial evidence.

Defence Case

28. The accused person gave a sworn testimony. She testified that the deceased was her son. The accused testified that her mother had died and left her after which she got pregnant by Kevin Otiende. She testified that she went to Nairobi and left the child with her uncle Binto and that she was eventually called back home in Kisumu to come to care of her child. It was her testimony that she returned and went to Odongo's, her boyfriend in Kasarani Kisumu.
29. The accused testified that in the morning she saw her uncle who passed by and told her to go collect her child as he was suffering and that she did and found the child living miserably yet she used to send money to her uncle to provide for him. It was her testimony that she took her child and went with him to her boyfriend's house where she made tea and mixed it with paraffin and gave it to the child him to drink but he refused to take it. She testified that she tried to strangle him but the child refused to die, so she took him to the quarry and threw him there in the water.



30. It was the accused's testimony that she met a lady and lied to her that someone had thrown a child in the quarry and further that she pretended that she did not know the person who had thrown the child in the quarry which had water. It was her testimony that she started crying saying her child had died and a lady held her and told her to say the truth as she took her to the quarry where they found the child in the water.
31. The accused testified that she had issues with her uncle Binto who did not want her child. She testified that she killed her child because she did not have the capacity to care for her child. The accused accepted that she made a mistake. She testified that she did not intend to kill her child and that she was suffering since her mother died and left her.
32. In cross-examination the accused testified that the deceased's father was Kevin Odongo and that the deceased was 4 years old. She testified that she worked in Nairobi and that she had the capacity to care for her child. She further testified that she met Fredrick Odongo who could also assist her care for her child.
33. On being asked by the court how she felt killing her own child as admitted, the accused stated that she regretted killing her child as he was still crying when she threw him into the quarry. She further testified that she did not take the child to his father as the father had been arrested in connection with a defilement case; that she took the child to Mama Ngina Children's home but at the gate, he followed her while crying and that is why she went with him and killed him. She testified that the child's spirits haunts her asking her why she killed him.

The Prosecution's Submissions

34. It was submitted on behalf of the state that it was clear that the murder was premeditated as the accused gave the deceased paraffin, strangled him and threw him in a quarry. It was submitted that the accused planned for the murder of the child and should be found guilty of murder as charged.

The Accused's Submissions

35. Mr. Oregio for the accused submitted that mens rea was lacking in the offence; that though the accused admitted killing the deceased, malice aforethought was lacking. He submitted that the accused was desperate in life and was confused, that she was an orphan left to survive in custody of her uncles who did not love her child. It was further submitted that the accused regretted the incident and that she had been in custody and had learnt her lessons.

Analysis and Determination

36. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel. 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 issue for determination is whether all the elements of the charge of murder have been proved by the prosecution, beyond reasonable doubt. There is no doubt as to the deceased's death, the cause of that death and or even as to whether it was the accused who committed the offence.
38. All the prosecution witnesses testified to seeing the deceased's body floating inside the quarry which was filled with water and further Dr. Ombok confirmed that the deceased's cause of death was asphyxia



due to homicidal strangulation. The accused person on her part admitted that she killed the deceased albeit stating that she did not want to do so. Accordingly, proof of death and the cause of that death were established beyond reasonable doubt.

39. As to whether the death of the deceased was unlawfully caused, from the testimony of Dr. Lucy Ombok that the child who was aged about 3 years old was strangled before being thrown into the water as there was no oxygen in the brain but the lungs had no water meaning he could not have died by jumping and drowning himself into the quarry full of water, I am satisfied that the death of the deceased was unlawfully caused.
40. As to whether it was the accused herein who unlawfully caused the death of the child, the accused person had guaranteed rights to remain silent, to adduce and challenge the evidence adduced against her and more importantly, was under no duty to give any self-incriminating evidence. And this Court did ensure that she was reminded of these rights the time of placing her on her defence by reading to her, her guaranteed rights under Article 50(2) (i),(k) and (l) of the Constitution, in the presence of her counsel Mr. Orego
41. The accused then elected to testify on oath and commenced her testimony, guided by her advocate by narrating how the deceased was her child by Kevin Otiende, how her mother died, how she went to Nairobi and left the child in custody of her uncle Binto who later called her to return and care for her child and how she returned and went to Kondele to live with her boyfriend Odongo then her uncle passed and saw her and asked her to go get her child who was suffering, how she went to Obunga at her uncle's place, found her child living miserably yet she used to send money to her uncle for his upkeep, how she took the child, went with him to her boyfriend's place, made tea and mixed it with paraffin and gave him to drink but he refused then she strangled the child but he refused to die then she took him to the quarry which was with water and threw him in there. That she then met a lady on the way and she pretended to have seen someone throw a child into the quarry which had water.
42. The accused continued with her emotional testimony which is already on record and she then stated how she did not want to kill her child because she had no capacity to care for him.
43. Besides the above detailed evidence of how the deceased met his death, even assuming the accused did not testify, as the burden of proof lies on the prosecution throughout the trial to discharge that burden and prove their case beyond reasonable doubt to warrant a conviction, the circumstantial evidence adduced by the witnesses including PW1, PW6, PW4, PW3 and PW5 all irresistibly points to the accused as the person who took the child from PW1 and went with him and the next thing that happened was the child being found dead in the quarry. The cause of death of the child as established by PW5 Dr. Lucy Ombok is consistent with what the accused told the court that she strangled the child before throwing him into the quarry which had water.
44. In the end, I am satisfied beyond reasonable doubt that the accused is the person who unlawfully killed her child and that there was even no compulsion for her to narrate to court how she methodologically killed the child.
45. The other question is whether the accused had malice aforethought when she unlawfully killed the deceased child. The essential ingredient for the offence of murder is malice aforethought, without which, the charge of murder cannot be sustained. 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.”

46. The accused’s advocate submitted that the accused lacked the mens rea to commit the offence due to the tough circumstances of her life and as such, she ought to be convicted of manslaughter and not murder. The accused person also testified that she did not intend to kill her child but that she did so because she did not have the capacity to take care of him.
47. I have considered this argument and I find that it holds no weight. The accused testified how she was methodical in her effort to kill the deceased; that she first tried to poison him with tea mixed with paraffin and after failing, she strangled the child and still, when he refused to die, she eventually threw him in the quarry which had water in it.
48. I am in agreement with the state that the accused person was methodical in her execution of the deceased. Furthermore, it is not lost to this court as was evidenced from the testimonies of PW1,3, 4 and 6 who all testified how the accused initially pretended to have seen a woman drowning a child. This clearly points towards the accused’s state of mind in that she had already made a contingency plan for the murder by shifting the attention of those who would suspect her to be the murder in case she was found around the scene.
49. If the accused was determined enough to keep the child away from harm, she could have tried harder to surrender the child to a children’s home. In my mind, the accused viewed the child as an inconvenience and a hindrance for her to relish life with her new found boyfriend and so, she sought to eliminate him so as to enjoy her life. I find and hold that the accused had the mens rea to commit the murder. In my humble view, not only did the accused intend to cause grievous harm to the child but she indeed was determined to see him dead and she accomplished that mission. Malice aforethought was proved against the accused beyond reasonable doubt.
50. 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.
51. Accordingly, I find the accused person Margaret Achieng Otieno guilty of the offence of murder as charged contrary to section 203 of the [Penal Code](#). I convict her accordingly.
52. Sentence to be pronounced after records and mitigation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

