



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Otieno (Criminal Case 9 of 2019)
[2023] KEHC 74 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 74 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 9 OF 2019
FA OCHIENG, J
JANUARY 17, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL ONYANGO OTIENO ACCUSED

JUDGMENT

1. The accused, Samuel Onyango Otieno was charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. Pursuant to the charge sheet, the offence was committed on the night of 8th/February 9, 2019, at an unknown time. The said offence was allegedly committed at Siany Sub-location, South Nyakach Location.
3. During the trial the prosecution called 7 witnesses. Thereafter, when the accused was put to his defence, he gave an unsworn defence. The accused did not call any other witness.
4. PW1, Nancy Akoth Odhiambo, testified that on February 8, 2019 she had some drinks at Jamhuri Bar. Whilst she was at the bar, a lady patron asked for her assistance in getting a place to sleep. The lady approached PW1 after the male friend of the said lady had abandoned her.
5. PW1 agreed to go to her home with the lady patron. After they boarded a boda boda with the said lady, they were joined by a man; in effect, the motorcycle had 3 passengers and the driver. When PW1 reached the place where she was to alight, the male passenger pushed her off, and insisted that he would give the lady patron a place to sleep.
6. On the following morning, PW1 heard about a lady who had been killed and then thrown into River Miriu.



7. During cross-examination, PW1 said that although she did not know the male passenger who had pushed her off the motorcycle on the night of February 8, 2019, she had given the name of that person as “Boi”, when PW1 recorded her statement. When PW1 was asked how she came to know the name of the man who she had not previously known, she said that it was the boda boda driver who gave her the name.
8. PW2, Walter Otieno Ombonyatestified that he operated a boda boda. On the material night, at about 8 pm he ferried PW1 together with “Boi” and another lady, using his motorcycle. When PW1 was about to alight at her destination, she wanted to go with the other lady.
9. It was the testimony of PW2 that “Boi” insisted that it is he who would go with the said lady. “Boi” then pushed away PW1, and he went away with that other lady.
10. PW3, Alice Atieno Odhiambo testified that she worked at Jamhuri Bar, which is located in Sondu. On the material day she reported for duty at the bar, at about 4.45 pm. PW3 saw PW1 at the bar. She also saw another lady within the bar; but the said lady was initially sitting at a table that was separate from that at which PW1 was seated.
11. When that other lady arrived, she was accompanied by a man. But when the said lady was leaving the bar, she was only accompanied by PW1. In other words, she was not in the company of the male companion who she had arrived with.
12. On the next day, at about 3 pm, PW3 received a phone-call from the Area Chief, who informed her that a lady who had had drinks at Jamuhuri Bar on the previous evening, had been killed.
13. The Chief specifically mentioned that the deceased was the lady who had left the bar in the company of PW1.
14. PW3 was able to verify that the deceased was the lady who had been at Jamhuri Bar, because the clothing which the Chief described matched the clothes which the lady was wearing when she had been at the bar.
15. PW4, Shadrack Ochola Kolawas a boda boda rider. He said that on February 9, 2019, he found the accused slashing grass near their gate. PW4 saw the accused at about 7.30 am, whilst he (PW4) was ferrying some customers on his boda boda. According to PW4, the accused greeted him, but as PW4 had some passengers, he did not stop.
16. PW5, Martin Agumba Njara is the husband of the deceased, Elsa Aluoch. He testified that Elsa left home on Friday February 8, 2019, heading to Sondu, where she was going to buy things on wholesale. He pointed out that the deceased used to run a business, hence the need to purchase goods on wholesale. On that day, the deceased did not return home.
17. PW5 thought that the deceased might have gone to visit her mother, who had been sickly. On the next day, PW5 was informed, by his cousin’s wife, that there was a lady who had been killed in Sondu. She told PW5 about that, after PW5 had informed her that his wife had not returned home on the previous day.
18. PW5 phoned the Area Chief, as he had been advised by his cousin’s wife. When he called the Chief, PW5 was advised to visit the Pap Onditi Mortuary, so as to be able to establish whether or not the body of his wife was there. When PW5 visited the mortuary, he found the body of his wife.
19. PW6, Joseph Oliech Ogechaworked as a watchman at a school in Sondu. On the material day, he was at his place of work between 7 pm and 10 pm, when he set-off to go and have supper at his home.



20. Whilst he was on his way, PW6 met the accused, who was a passenger on a boda boda. PW6 said that the boda boda rider was Otieno (PW2). He also said that the 2 men were in the company of one lady.
21. PW6 testified that the accused told the lady to go home with him. He heard the accused telling the lady that she was so drunk that she would be embarrassed on the next day.
22. PW6 noted that the lady was indeed drunk. When she tried to climb onto the back of the accused, the lady fell over backwards. Ultimately, the accused carried away the lady, on his shoulders.
23. PW7, PC Lucas Kamarwas the Investigating Officer. When he was assigned the task of investigating the offence herein, PW7 visited the scene. Upon arrival, he found that the said scene had been secured by other police officers.
24. The body of the deceased lay on the banks of River Sondu-Miriu. When he examined the body, PW7 noted 3 visible injuries. The said injuries were stab wounds; 2 of which were on the back, along the spinal cord, and 1 which was on the chest.
25. PW7 also went to the spot where bloodstains had been seen: that was along the Agai-Dirubi Road, which leads to the house of the accused. According to PW7, the bloodstains were 50 metres away from the house of the accused. At the said spot, where there were bloodstains, there were also remains of clothing which had been burnt.
26. The investigations carried out by PW7 revealed that it was the accused who was last seen with the deceased, when she was alive. PW7 linked the accused to the murder through the witnesses who testified at the trial.
27. It is common ground that there were no eye-witnesses to the murder. All the evidence adduced by the prosecution was circumstantial.
28. In the case of *Abamad Abolfathi Mohamed & another v Republic* [2018] eKLR the Court of Appeal expressed itself thus when commenting on how the prosecution ought to prove the guilt of an accused;

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person, just as direct evidence.”
29. In appreciation of the fact that a conviction founded upon circumstantial evidence is consequent upon hypothesis, it became necessary for the courts to come up with safeguards which strive to protect persons who would otherwise have been acquitted due to the lack of direct evidence.
30. In the case of *Rex v Kipkering Arap Koske & 2 others*, the court held as follows;

“To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be a rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty.”
31. Therefore, in this case, wherein there was no direct evidence, I would have to ask myself whether or not there was any reasonable possibility that the victim was not killed by the accused. If there is any reasonable possibility that it was some person or persons, other than the accused, who killed the victim, the court would have to find the accused “not guilty”.



32. In the case of *Omar Mzungu Chimera v Republic*, Criminal Appeal No 56 of 1998, the court laid down 3 tests which must be satisfied when a case rests entirely upon circumstantial evidence;
- “(i) The circumstances from which an inference of guilt is to be drawn must be cogently and firmly established;
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- ii. The circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”
33. The evidence in this case prove that Elsa Aluoch is dead. The cause of death was haemorrhagic shock from penetrative (stab) wounds due to assault by a sharp object.
34. Apart from the 3 penetrative stab wounds, the body of the deceased had multiple bruises on the facial region. It also had scratch marks on the gluteal region, bilaterally, due to dragging on the ground.
35. It is my understanding that the extent of the injuries were a clear indication that the person who inflicted them, had the intention to cause death or to do grievous harm to the victim.
36. Accordingly, the assailant had malice aforethought, as defined at section 206 of the *Penal Code*.
37. It did not matter that prior to the incident, the victim did not have any differences or disagreements with her assailant. But even if the assailant was indifferent whether or not his actions would cause either death or grievous bodily harm, I find that he must have had knowledge that the victim would either be killed or would sustain grievous bodily harm: and even if that be the case, I find that the assailant had malice aforethought.
38. It was not necessary that the assailant should have known the victim prior to the incident. The intention of the assailant can be discerned from his actions.
39. The only question that remains to be answered is whether or not the accused was the assailant. If there was any reasonable possibility that the victim was killed by a person other than the accused, the court would return a verdict of not guilty.
40. But if the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, the court would return a verdict of guilty.
41. I find that PW2 knew the accused. On the material night, PW2 ferried PW1 and the deceased on his motorcycle. The accused was the third passenger on the said motorcycle.
42. The deceased was drunk, and had requested PW1 to offer her a place to sleep. PW1 agreed to take the deceased to her home. PW3, who operated as an employee at Jamhuri Bar, testified that the deceased left the bar in the company of PW1. PW3 described the clothing worn by the deceased.
43. When PW2 reached the destination at which PW1 was to alight, the accused pushed-off PW1 and he insisted on going away with the deceased.
44. When PW1 walked off towards her home, she left PW2 with the accused and the deceased.
45. PW6 is a watchman at a school located nearby. He left his place of work at about 10 pm, heading home, where he was going to have supper, before returning to work.



46. PW6 saw the accused together with PW2 and a lady. PW2 heard the accused telling the lady that she would go home with him. PW6 saw the accused carry the lady on his shoulders.
47. On the following morning, PW4 saw the accused working outside their home. To my mind, that is a clear indication that the accused did go to their home after PW6 had seen him carrying the deceased on his shoulders.
48. Some 50 metres away from the home of the accused, there were blood stains. Meanwhile, the body was recovered on the banks of the river, about 200 metres away from the home of the accused.
49. As the body had scratch marks, which indicated that the deceased had been dragged on the ground, that shows that she was dumped on the river bank after being killed elsewhere.
50. The accused was the last person to be seen in the company of the deceased when she was still alive. He carried her on the shoulders, having insisted that she would go home with him. On the following morning, the lifeless body of the deceased was recovered.
51. In the circumstances, I find that the inculpatory facts are incompatible with the innocence of the accused. The circumstances in which the deceased met her death are incapable of the explanation upon any other reasonable hypothesis than that of the guilt of the accused.
52. Accordingly, I find that the accused is guilty of the murder of Elsa Aluoch. I therefore, convict him for committing the said offence.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JANUARY, 2023.

FRED A OCHIENG

JUDGE

