



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Olando (Criminal Case 46 of 2013)
[2023] KEHC 2299 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 46 OF 2013
PJO OTIENO, J
MARCH 24, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MUSA OLANDO ACCUSED

JUDGMENT

1. This is one of those matters that all and the prosecution in particular ought to apologize to the accused for undue delay. They owe such an apology because the defence case was closed on the July 8, 2019, but on account of submissions, it has taken over three years only for the prosecution to announce to court that it relies wholly on the evidence on record.
2. The accused person, Musa Olando faces the charge of murder contrary to section 203 as read with section 204 of the *Penal Code* whose particulars are that on the August 29, 2013 at Masingo estate, Kakamega municipality in Kakamega central district within Kakamega county, he unlawfully murdered Itunda Moi.
3. Towards the discharge of its burden of proof under section 107(1) of the *Evidence Act*, the prosecution tendered evidence from seven (7) witnesses and when called to defend himself against the *prima facie* case put forth by the prosecution, the accused elected to give a sworn statement as the sole witness for the defence.

The Evidence

4. PW1, Gladys Alimila Andrea, mother to the deceased testified that on August 29, 2012 she got into her hotel at 5am and after conducting morning prayers she received a call from one of her customers who worked as a watchman in Kakamega town informing her that a young man by the name Moi had been killed. She asked him to confirm if the young man had a bald head and when that was confirmed, she rushed to the scene and saw a lot of blood spilt on the ground but the body was not there. She also



- saw a trouser, a shoe and a cap which she identified as belonging to her son. She thereafter went to the Kakamega County General Hospital where she identified the body of her son and later attended the post mortem examination.
5. On cross examination she stated that she was not at the scene and did not know what time her son was killed.
 6. PW2, Cleigh Adolwa Haruna testified that on August 29, 2013 he lived in Masingo area where he ran a movie shop. On the said date, he was at the shop when at about 7:30 pm a friend by the name Jackson entered the shop and offered to buy him tea from an adjacent hotel to which he agreed. Before he could finish taking his tea, he heard noises at his movie shop and when he went there he found the accused person very angry and harassing his clients. He decided to switch off the machines and asked the customers to leave. Five of them remained asking for a refund but he asked them to come the following day. One of the five was the deceased who was angry and was questioning why the accused had caused the closure of the shop. The accused then took a long knife and stabbed the deceased on the chest. The deceased fell to the ground bleeding and he ran to call the landlord and thereafter reported the incident with the police. He stated that he knew the accused very well and that they used to drink together.
 7. On cross examination he stated that the incident happened at 7:30 pm outside the video shop after he had closed the shop, and that there was electric light. He stated that it was the accused who started the scuffle and when he was overpowered he took out the knife, stabbed the deceased and ran away with the knife. He reiterated that at the scene there was electric light including a security light at the veranda.
 8. PW3, Jackson Baraka Lihanda, testified that on August 29, 2013 at around 7pm he went to Masingo area at Ras's, PW2's movie shop. When he got there, together with PW2 they went to an adjacent hotel to eat and while eating they heard noises at PW2's shop. They left for the shop at about 7:30pm, and the deceased started complaining why one person was disturbing others and PW2 decided to close the shop. Some people left and others remained and a quarrel ensued with the deceased complaining about the accused. He then saw the accused hit the deceased on the chest with what he thought was a fist and when the deceased fell to the ground, blood was oozing from his chest. He stated that he knew the accused and he could clearly see him attacking the deceased as there was an electric light in the place.
 9. On cross examination he confirmed having been just about two meters from the accused and the deceased, was able to see him well, having known him for about 3-4 years, and refuted claims that the deceased started the fight.
 10. PW4, Ernest Owotse Juma, father to the accused person, testified that on August 30, 2013 at about 10am he was running his business in town when a friend of the accused informed him that the accused had murdered a friend of his. He then rushed home and found the accused there who informed him that he had committed an offence. He then went and reported at Shikoti AP camp and returned home with two Aps who arrested the accused and took him to Kakamega central police station. On cross examination, he admitted having not been present at scene of the incident and did not witness it happen.
 11. PW5, No 226783 APC Stephen Owuor gave evidence that on August 30, 2013 he was attached at Shikoti AP Post when PW4 reported that his son had murdered someone in Kakamega town and the public was planning to lynch him. Together with another officer they went to the home of PW4, arrested the accused and presented him to the CID for further investigations.
 12. PW6, Dr Dixon Mchana a consultant pathologist at the Kakamega County General Hospital testified that he conducted a post mortem on the body of the deceased and produced an autopsy report dated September 3, 2013 in that regard. He stated that externally, the deceased had a single stab wound below



the 2nd rib close to the breast bone and the wound was 1.5 x 1 cm long. Internally, the offending object penetrated through the muscles of the chest and divided the main artery into two and there was a small amount of blood on the right part of the chest with the food pipe also being cut into two. He formed the opinion that the deceased died due to external bleeding secondary to a penetrating chest injury (stab wound).

13. PW7, No 93569 Wangari Mithigi attached at the DCIO office Kakamega, testified that on August 29, 2013 she was on a night patrol when she was informed by DCIO Wambugu of a murder incident at Masingo area. She went to the scene and found Kakamega OCS CI Daniel and the crime scene personnel. On interrogating those present, she was informed that there was a misunderstanding between the deceased and the accused and that she invited members of the public to record their statements. On August 30, 2012 the accused was brought to the station in the company of two AP officers and taken to the DCIO office for interrogation. During her investigations, she was informed the whereabouts of the clothes the accused wore at the time of the incident and she proceeded to the accused person's home where she recovered a navy blue jacket, a maroon striped t-shirt, a black cap and black jeans which she produced as exhibits. She stated that she was not able to recover the murder weapon since the accused had indicated that he had thrown it into Masingo river.
14. On cross examination she stated that there were no security lights at the place but the incident did not occur in darkness. He admitted having made an inventory of the items recovered from the accused's house which inventory was however not produced as an exhibit.
15. On re-examination she clarified that there was a security light outside the video shop and that the owner of the video shop only switched off the lights inside the video shop and not the security lights.
16. That witness was the last by the prosecution after which the case was closed and the court adjudged that a *prima facie* case had been established against the accused person and he was thus placed on his defence.
17. For the defence only one witness, the appellant herein, testified on oath to the effect that on August 29, 2013 he was at his home in Shikangania and that he was not at Masingo village where the deceased is said to have been killed. He further stated that on August 30, 2013 he was arrested while at home cleaning his compound. He denied knowing PW2 and PW3.

Issues, Analysis And Determination

18. Having presented to court the charge against the accused on the he offence of murder, the prosecution acquired the duty and obligation to prove, beyond reasonable doubt that, the accused had, of malice aforethought causes death of the deceased by an unlawful act or omission.
19. Therefore, for the prosecution to sustain a conviction, all the ingredients contain in section 203 of the *Penal Code* ought to be proved beyond reasonable doubt. That said, the issues that arise for determination by this court are as follows; -
 - a. whether Itunda Moi is the deceased?
 - b. did the accused person kill the deceased out of unlawful acts or omission?
 - c. whether the accused was actuated with malice afore thought in causing the death of the deceased?



Whether Itunda Moi is the Deceased

20. It was the testimony of PW1, mother to the deceased, that she went to the Kakamega County General Hospital where she identified the body of the deceased to PW6, a consultant pathologist at Kakamega County Hospital, who also testified that Itunda Moi is deceased and that he conducted an autopsy on his body and produced a post mortem report dated September 3, 2013 in that regard. In addition, PW2 and three all knew the deceased well and told the court how he was stabbed and fell down and died in their presence. The court determines that the evidence on record leaves no reasonable doubt that the person who was identified by PW2 and 3 to have been stabbed by the accused and known as Itunda Moi and whose body was identified by PW1 was indeed the deceased. The first issue is thus answered in the affirmative.

whether the accused person's unlawful acts led to the death of the deceased?

21. The killing of the deceased occurred at about 7:30pm at a movie shop belonging to PW2. According to PW2 and PW3, the eye witnesses to the killing of the deceased, the happenings leading to the death began with a scuffle between the deceased and the accused person with the deceased questioning why the accused had caused the pre mature closure of the movie shop. PW2 stated that he closed the shop by turning off the machines. It was not clear if the lights at the movie shop remained on though it was the testimony of PW7, who was not at the scene, that the lights were off. Nonetheless, it was the testimony of PW2, PW3 and PW7 on re-examination that there were security lights outside the movie shop enabling PW2 and PW3 to witness the commotion clearly. PW2 stated that he saw the accused pull out a long knife and stab the deceased on the chest. PW3 witnessed the accused hit the deceased on the chest with what he thought was a fist and when the deceased fell to the ground he saw blood ooze from his chest. The testimonies of PW2 and PW3 the only eye witnesses to the killing of the deceased coincide and resonate with that of PW6, the consultant pathologist, who testified that in examining the body of the deceased, he noted that he had a stab wound on his chest, which was the cause of his death.
22. The accused person denied being present at the scene and insisted that on August 29, 2013 he was at home in Shikangania and that he was not at Masingo village where the deceased is said to have been killed. PW2 and PW3 placed the accused at the scene of crime and to rebut this allegation the accused ought to have at least summoned witnesses to confirm his whereabouts at the time of the incident. I find his testimony untruthful and incapable of displacing the otherwise cogent evidence by the prosecution. I find the accused to have been seen give the fatal blow to the deceased.
23. The right to life is protected and guaranteed under article 26 of the *Constitution* of Kenya, 2010 and any action that tends to take the life of another is unlawful. It was and remains unlawful to assault any person in the manner and severity demonstrated by evidence in this matter. Here no attempt was made to justify the actions of the accused leading to the death. It is therefore the finding and holding by the court that the acts of the accused were not only justifiable but wholly unlawful.

Whether the accused was actuated with malice afore thought in causing the death of the deceased

24. The principle of malice aforethought was reiterated by the court of appeal in *Nzuki v Republic* [1993] KLR 171 when the court observed that:
- “ Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the rest of which is always subjective to the actual accused:
- i. The intention to cause death.



- ii. The intention to cause grievous harm.
 - iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences, to ensue or not. In none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman v DPP* [1975] AC 55)."
25. To determine whether or not the killing of the deceased was premeditated by the accused person, this court looks at the events leading up to the murder and how the murder took place.
25. It was the testimony of PW2 and PW3 that they heard noises at the movie shop and decided to go there where they found the accused shouting at the movie shop. PW2 then closed the machines at the movie shop and the deceased questioned why the accused was leading to the premature closure of the movie shop. The accused person appeared irate at the time and he took a knife and stabbed the deceased on the chest.
26. Malice aforethought is deduced from circumstances surrounding the killing, including the mode of killing, the weapon used and the part of the body assaulted and injured. This was the holding of the Supreme Court of Uganda in the case of *Nanyuiyo Harriet & another v Uganda* Cr Appeal No 24 of 2002 where it was held as follows: -
- “In a case of homicide the intention and/or knowledge of the accused person at the time of committing the offence, is rarely proved by direct evidence more often than not the court finds it necessary to deduce the intention or knowledge from the circumstances surrounding the killing, including the mode of killing, the weapon used and the part of the body assaulted and injured.”
27. The deceased was attacked on the chest by the accused using a knife whose use is known to have lethal effects. I thus find that the accused could have had no other intention other than the intention to kill the deceased, or at the very least occasion him grievous harm. That sufficiently and beyond reasonable doubt established the malice aforethought.
28. The upshot and conclusion is that the accused is found guilty of the offence of murder as charged and is convicted accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF MARCH 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Prosecution/State

Mr. Ondieki for the Accused

Court Assistant: Polycap

