



**State v Omondi (Criminal Case E003 of 2022)
[2023] KEHC 3026 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E003 OF 2022
RE ABURILI, J
MARCH 22, 2023**

BETWEEN

STATE PROSECUTION

AND

KELLY BRIAN OMONDI ACCUSED

JUDGMENT

1. The accused person herein Kelly Brian Omondi is 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 offence are that on the night of January 15 2022 at Mahaya Sub-Location, West Asembo Location within Rarieda Sub-county of Siaya County, jointly with others not before court, the accused person murdered one Nicholas Omondi Ojuodhi ICHOLAS OMONDI OJUODHI. The accused pleaded not guilty to the charge against him and the matter proceeded to trial.
2. The prosecution called eight (8) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

3. Vivian Achieng Otieno, a minor aged 17 years and a Form four leaver from Tiga village, Mahaya Sublocation in Rarieda was taken through voire dire examination and found to understand the nature of an oath so she was allowed to testify on oath as PW1. She recalled in detail that on the 14/1/2022 at around 6.30 pm, she was at home having returned from school and going about her chores when Nicholas, the deceased, called her and asked her if she could accompany him to the funeral of one Beckham in their neighborhood but she told him that she was busy. She testified that Nicholas told her that they could go at night and so at about 9.00 pm, she called him but he told her that he was showering and that he would come for her. It was her testimony that she finished her chores and slept and at about 11pm, she found missed calls and a message from Nicholas to the effect that he was at her gate and had come for her so she called him. PW1 testified that she got out and went to where



- Nicholas was at her gate and found him on a motor cycle. She testified that they stood there for a few minutes then they left for Beckham's funeral. She further testified that they took about 20 minutes to the funeral.
4. PW1 testified that after about 5 minutes, Nicholas told her that he wanted to take the motorcycle to its owner, Sam so they left together. She testified that the place was still within Mahaya and about 3 minutes ride from the funeral place. She testified that they went to Sa's place but they did not find Sam. That they met two boys whom Nicholas gave the motorcycle to take to Sam and he also instructed them to go to his house and pick his motorcycle and bring it to where Nicholas was.
 5. It was PW1's testimony that the two boys went and took some time to return and when Nicholas called them, they informed him that they were on their way. She testified that her and Nicholas then started walking to the funeral place and Enroute, they met Sam who told them that he was going to sleep and that he told them that he had already been given his motorcycle. PW1 testified that as they bypassed Sam, they saw a group of people ahead of them. She testified that it was about 1.00 am at night but there was light from the market place, an electric security light and also another behind the school.
 6. PW1 testified that Nicholas told her that he could not go where the crowd was so they started using the alternative route. She testified that the group then scattered and started surrounding them with one person who was behind them lighting a torch. She testified that she looked behind and saw him holding a rungu which he used to hit Nicholas from behind and Nicholas fell on his face. PW1 testified that the four men started chasing her into shrubs and beat her up and demanded for her phone. She testified that she had a red Itel phone which she gave them. It was her testimony that she asked them whom they were and why they were beating them and one of them slapped her with a panga on her head. PW1 testified that the assailants led her towards Mahaya Primary School in the field then told her to go away and not to return to that place.
 7. PW1 testified that she walked to her home and arrived at 6.00 am. She testified that she could walk and sit in the shrubs until she reached because she was in pain. It was her testimony that her parents were not aware that she had gone out to the funeral. She testified that at 7.00 am, she asked her sister for a phone so that she could call Sam which she did and asked him where Nicholas was but he told her that he did not know so she told him to go and check on Nicholas. It was her testimony that Sam went and later called her informing her that Nicholas had been taken to Lwak Hospital because he was badly injured after an assault.
 8. PW1 stated that she stayed until the following morning when the bodaboda people went to her home and asked her to say what happened to Nicholas, then they took her to Wangarot Police Station where she recorded her statement on what happened to Nicholas then she returned home. It was her testimony that the bodaboda riders went to her home at 2pm in the company of Kelly whom they also took to Wangarot Police Station to explain what happened to Nicholas. PW1 testified that she then learnt from them that Nicholas had died. It was her testimony that she knew Kelly because he was the one who hit Nicholas with a rungu and as he was with the four people who were following them with Nicholas. She testified that she had known him for over one month and used to meet him on her way from school and so they became friends.
 9. PW1 testified that on that material night, Kelly was not masked and he had no cap on him unlike his other 3 friends who were masked and had caps on their heads. She testified that she saw Kelly hit Nicholas. It was her testimony that she recorded her statement concerning the attack on Nicholas and herself and told the police that Kelly was her boyfriend and that prior to that night, they were not in talking terms. PW1 admitted that Kelly was her boyfriend. It was her testimony that when the people attacked them from behind, she was about 5 metres from them. She testified that there was light where



- they were and that after hitting Nicholas, Kelly told her to walk ahead as they led her towards the field. She reiterated that there was light so Kelly tried to hide his face using his hand by placing it across his eyes so that she may not see him but she had seen him and saw him as they walked in the field where there was electric light. 9Court observed the witness demonstrate how the accused placed his hand across his face). She testified that she was with Kelly and his group as they walked with her for about 30 minutes. PW1 testified that prior to that day, they had parted ways with Kelly and that the incident took place in January 2022.
10. PW1 testified that she was not aware of any feud between Nicholas and Kelly. She testified that Kelly had demanded that she return to him the phone (IteI) because it was his as he had given it to her after he had damaged her phone. She testified that he demanded that she return it to him after they disagreed. She testified that the phone (IteI) that was taken from her that night belonged to Kelly and that she had not seen it since that night. It was her testimony that Nicholas was her boyfriend. She identified the accused in court.
 11. In cross-examination, PW1 stated that she recorded her statement at Wangarot Police Station and signed it. She stated that she never told the police the problem she had with the accused over the phone. She testified that she recorded a further statement. She further stated that she told the police that the person who hit Nicholas was Kelly Odera. She stated that she only knew his one name Kelly but when she went to the police the second time, he introduced himself as Kelly Brian Omondi and that is when she knew his other names as Brian Omondi. PW1 stated that she had been in a love affair with the accused. She further stated that her first statement was recorded on 16/1/2022 and a further statement on 24/1/2022 whereas the incident took place on 15/1/2022.
 12. She stated that she recorded her statement after the bodaboda people went to her home and took her to Wangarot Police Station. She stated that when she was recording her statement, the bodaboda riders were outside the police station and that the riders never forced her to go to the police station but only urged her to go and tell the police what had happened. She testified that she never reported to the police on her own accord because she did not know how seriously injured Nicholas was after being hit.
 13. PW1 stated that the deceased had a wife whom she knew about one week before the incident. She stated that she continued her love affair with him even after learning that he had a wife. She testified that the incident occurred near ACK Church, about 5 metres walk to Mahaya centre. She stated that there were security lights at that place and that there were lights from the Market area.
 14. She stated that the attackers left her at Mahaya field. She further stated that the funeral she and Nicholas were to attend was at some distance from where the assailants left her. She further stated that she was taken through the field then she entered the shrubs and that the assailants warned her not to return to the field so she went by people's homesteads as she walked to her home. She stated that she never met anyone on the way.
 15. PW1 stated that it was around 1am and that she never saw lights in the home where she passed as she passed by the path not inside the homestead. She further stated that she never heard any dog bark. It was her testimony in cross-examination that at Mahaya Market, there were people. She stated that she never asked anyone for help as she was scared of meeting the same attackers. She further testified that the assailants beat her as she ran and that she did not have the strength to scream. She also stated that at the funeral place, there was disco noise so no one could have heard her despite her not calling out for help. She testified that she did not know William but heard the accused say William was his friend. She stated that from where they were attacked to her home is about 40 minutes walking distance.
 16. The witness stated that she saw 4 people all dressed in long trousers, one in jeans and black sweater, the other with a black jacket and blue jeans., the third with a rugged blue jeans and a dark jacket. She



testified that the 4 were armed with pangas, knives and rungas and were exchanging and that the third person was standing on the sideways. PW1 stated that she did not give these descriptions to the police as they only asked her if she knew the 3 people who were with Kelly and she informed them that she did not. She testified that she knew the accused herein and saw him and that he went to her and told her in Kiswahili: “toka hapa uende ama tukuuwe.”

17. PW1 further stated in cross-examination that she was facing the accused one on one and saw him as the person of Kelly. She stated that after they led her past the field, she faced the accused herein for a minute as he was forcing her to go away or they kill her. She reiterated that she was very close to the accused as he was commanding her. PW1 further stated that she never told her parents what happened because she had not sought their permission to go to the funeral.
18. She testified that when she was hit, she got a swelling on her head and was to go to hospital but never went. She stated that she only revealed to her sister what had transpired. She further stated that she would have reported to the police but the bodaboda riders went to their home the following morning. When questioned by court as to how many times she recorded her statement with the police, PW1 stated that she did it twice.
19. PW2 Lucas Otieno Ojuodh, the deceased’s brother testified that on the 14/1/2022, they had lost a cousin Richard Beckham Oluoch, so they went and removed his body from Lwak Mortuary and reached his home at 8.30 pm. He testified that they assisted the family in receiving visitors. It was his testimony that Nicholas told him that he was tired and wanted to go and rest at his house for a while. He testified that from their home to the funeral was separated by a fence.
20. PW2 testified that at about midnight, he heard his phone ring and on picking it up, it was Nicholas who was groaning and not responding. He testified that he disconnected and thought it was a network issue then called him back. PW2 testified that Nicholas picked the phone and groaned so he started walking towards Nicholas’ house. It was his testimony that he saw torchlight on the way and went near and that is when he saw Nicholas with injuries on the head which was swollen and his left eye also swollen. He testified that his nose had blood. He testified that he checked Nicholas’ phone which had writings which could not make any sense then rushed and got a motor cycle, placed him on it and assisted by Rodon, they took Nicholas to Lwak Hospital where he was treated before returning him to his house to rest. It was his testimony that his mother also accompanied them.
21. PW2 testified that at 6am, he went and knocked on the door of Nicholas’ house and his wife opened the door and when PW2 asked her how Nicholas had slept, she told him that he had not slept well and that he had vomited blood and stopped groaning. He testified that he entered the house saw the left eye of Nicholas was very swollen. He testified that he got a motor cycle and accompanied by Nicholas’s wife, his mother Alice and PW2’s sister Mary Anyango on two motor cycles, they took Nicholas to Bondo District Hospital where they were referred to Siaya Hospital for a CT scan. PW2 testified that they proceeded to Siaya Hospital, raised Kshs. 6500 for a CT scan and Nicholas was admitted in Hospital although his condition never improved despite treatment.
22. PW2 testified that Nicholas was to be referred to Kisumu for further treatment and as they were clearing the bills at Siaya Hospital before transfer to Kisumu, Nicholas’ wife informed him of the bad state of his Nicholas and that when he went to check on him, he found him dead. He testified that it was on a Sunday on 16/1/2022 and Beckham had been buried on 15/1/2022. He testified that he did not attend that burial because his brother was injured badly. He further testified that he did not know who injured Nicholas.
23. PW2 testified that Molly, Nicholas’ wife was at Beckham’s funeral and that after Nicholas left the funeral place saying he was going to rest, he never returned there again until he, PW2, found him



- injured. He testified that Nicholas called him using his phone. PW2 stated that he knew Vivian Achieng whom he schooled with but did not know if she was Nicholas' lover. He testified that he did not know Brian Kelly. He further stated that his brother never spoke to him when he found him injured.
24. In cross-examination, PW2 stated that although he knew Vivian Achieng, he did not know her home. He stated that from the funeral place where Beckham had died to Mahaya Market was a walking distance of about 10 minutes and that it was a one way. He further testified that from the Market at Mahaya, one could use another route without necessarily using the playground. He testified that there were many people at the funeral place. He stated that there were two routes from Mahaya Market to the funeral; one through the primary school and the other through the playground.
 25. He testified that prior to his brother Nicholas calling him, he heard nothing. He stated that he never spoke to Vivian on that day. He further stated that his brother had told him earlier that he wanted to rest because he was tired and had some headache. He further stated that he did not know if Nicholas took any medication.
 26. In re-examination, PW2 stated that between Beckham's home and Mahaya Market, there was a field and that he had been up the end of that field before. He stated that there was a route that could lead one out. He reiterated that he had never been to Vivian's home and did not know her home.
 27. PW3 Maurice Ogogo Aboo, the deceased's uncle testified that on the 19/1/2022, he was at Siaya Mortuary where he identified the body of Nicholas Omondi to the doctor who performed the post mortem. He testified that he was accompanied by his sister in law Alice, the step mother of the deceased. He testified that he was shown the results of the postmortem and that the doctor told them that the deceased's head was hit and there was blood clot in the brain. He testified that he did not know who hit Nicholas. He testified that he had known Nicholas Omondi for over 20 years and that Nicholas lived with PW3's elder brother in their home.
 28. PW4 No. 226739 Police Constable Benson Ochieng stationed at Aram Police station and attached to Wangarot Police Post testified that on the 16/1/2022 at 10.30 am, he was in the report office at Wangarot police post when a group of bodaboda riders went with one suspect and a lady. He testified that the group were men in the company of a mother and her daughter and said that they wanted the record a statement. He testified that he recorded the statement from the lady who said that her boyfriend had been assaulted the previous day then he released them to go back and later in the evening between 6 pm and 7pm, a certain mother went to the Police Station asking the police officers to o help rescue her son who was being assaulted.
 29. PW4 testified that suddenly a group of people entered the police post with a young man who had been assaulted and with blood all over his body. He testified that more bodaboda riders arrived at the police station. He testified that they called Inspector Njiru from Aram Police Station and took the injured young man and 2 others including a girl and a boy suspected of having participated in assaulting the victim. PW4 testified that Brian was brought by the bodaboda riders. He testified that he could not identify him because his face was bloodied such that he could not recognize him.
 30. PW4 testified that the Bodaboda riders were outside while Brian was in the police Report Office. He further testified that he recorded one statement from a lady and in the evening who said her brother had been knifed and was in the company of a lady.
 31. In cross-examination, PW4 stated that initially, 2 ladies carried by bodaboda riders, a lady and her mother went to the police post. He stated that there were more than 10 riders who were not armed and on different motor bikes. He stated that the riders wanted the girl to record her statement concerning one of them who was assaulted at night in her company. He further stated that the mother told them



- that the riders went to her home and scared them but that they also assured them that they were not to hurt them but wanted her daughter to go and record a statement concerning an assault, which had taken place the previous night at about 9 pm.
32. PW4 stated that the bodaboda party went to the station the following day at 10 am. He stated that he did not ask Vivian why she did not voluntarily go to report the occurrence. It was his testimony that the second group of riders had over 50 riders, with a boy full of blood on his face though they were not armed. He testified that they appeared to have rescued the boy from another group which was assaulting him and wanting to kill him. He stated that he did not see the 2 groups being armed.
 33. PW4 stated that the 3rd group went to the police post with another boy who was not injured. He testified that they did not place Vivian into custody. He stated that he recorded her statement and left her to go with her mother after being advised by his boss. He further stated that he handed Vivian to Aram Police Station on advice from his boss after she was recalled. He further stated that the bodaboda riders told them that Vivian was a chief suspect so they handed her over to Aram Police Station for her safety. He admitted that the riders had mounted pressure on them and that the assaulted suspect was at their Report Office.
 34. In re-examination, PW4 stated that he received the 2 assault reports, the first about the man who was in the company of Vivian. He testified that Vivian was brought with her mother. It was his testimony that in the second report, the reportees were alone. He testified that the first reportee said that they were being intimidated/scared by the bodaboda riders but she was told that they were not to harm them while the second reportee did not say that they were intimidated.
 35. PW5 Gladys Akinyi Ochwodhi, the deceased's sister testified that in January 2022 she was in her home in West Asembo, Siaya. She testified that on the 15/1/2022 at about 1am whilst at a funeral of her cousin, Richard Beckham, a certain person called 'Daddy' went to where she was and told her to check and see her brother Nicholas. PW5 testified that she saw her brother swollen all over the head and tried to speak to him but he could not speak and only pointed at the gate. She testified that she asked him for his phone which he gave her.
 36. PW5 testified that her mother and herself tried talking to Nicholas in vain so they took him to Lwak Hospital where he was given first aid. She testified that they were referred to Bondo Hospital but it was late so they took him home until morning then took him to Bondo but they were referred to Siaya Hospital where they were advised to raise money for a CT Scan which they did and a CT Scan was done. It was her testimony that they left him at the hospital with his wife at 3.03 pm.
 37. PW5 testified that the following day at 8 am, she was at Siaya Hospital where they were informed that the deceased needed specialized treatment at Kisumu or Eldoret. She testified that they later received information that he had died. She testified that her brother did not talk from the time they took him to hospital.
 38. In cross-examination, PW5 testified that at Lwak, his brother was treated but discharged and they went home. He testified that the incident occurred on the night of 15th -16th January 2022. She testified that they took him to Bondo Hospital at 7.00 am where they were advised to take him to Siaya Hospital where they reached at 10.00 am but no treatment was given to him because the family had no money. She testified that they left him after the CT scan was done at 6pm then she called his wife at 9.00pm who told her that he was in the ward. She testified that on the 17/1/2022 at 1 pm, they received a call that they needed to take him to Kisumu or Eldoret because his condition was bad. It was her testimony that he died at 5 pm.



39. In re-examination, PW5 testified that Nicholas was taken to the funeral after midnight on 15th and they took him to Siaya the following morning at 10 am on 16th January 2022.
40. PW6 No. 238892 Inspector Tum Manassas testified that on the 16/1/2022 at 5 pm, they were called by the OCS to prepare a team and reinforce officers at Wangarot Police Post to rescue some suspects who were being lynched by members of the public.
41. He testified that they rescued three suspects who were injured namely; Kelly Brian, Collins Omondi and Vivian Atieno. It was his testimony that 2 suspects were seriously injured so they escorted them to Madiany Sub County Hospital where they were treated and discharged before escorting them to Aram Police Station for further police action. He identified Kelly Brian, the accused, as one of those whom he rescued.
42. In cross-examination, PW6 stated that all the 3 suspects were injured but 2 were seriously injured namely: Kelly Brian and Collins Omondi. He stated that Vivian was slightly injured. It was his testimony that the members of the public treated Vivian as one of the suspects.
43. PW7 No. 96927 Police Constable Jason Mogaka, the investigating officer testified that on the 17/1/2022, he received instructions from his DCIO Rarieda Sub County Mr. James Ouma instructing him to take over investigations into a murder reported at Wangarot Police Post of Nicholas Omondi Ochwodhi (Ojuodhi). He testified that 3 suspects had been arrested and were in custody. It was his testimony that they went to Bondo Law Courts and obtained an order to hold the suspects pending investigations. He further testified that the 3 suspects were Kelly Brian Omondi, Collins Omondi Odhiambo and Vivian Achieng Otieno.
44. It was his testimony that after securing an order from court, he caused statements to be recorded from various witnesses. He testified that he gathered that Vivian was the deceased's girlfriend and that the deceased had picked her to go to the funeral when they were accosted on their way to the funeral. He testified that Vivian identified Kelly Brian Omondi as the other assailants were said to be masked and wore marvins so she did not identify them.
45. PW7 testified that on the 19/1/2022, a postmortem was conducted on the body of the deceased after being identified by the family members, which Postmortem Report showed the cause of death as severe head blunt trauma. He testified that on the 18/1/2022, he escorted the 3 suspects for mental assessment and the doctor found all the 3 suspects fit to plead to the charge.
46. It was his testimony that Vivian was later treated as a key witness to this case. He further testified that as there was no witness linking Collins to the case from the statements recorded, he was released. PW7 identified Kelly Brian Omondi in court and stated that he did not know him before that date.
47. In cross-examination, PW7 reiterated that Vivian was a suspect initially. He further stated that there were other suspects who were not in court.
48. PW8 Dr. Juma Gabriel Wekesa a medical Officer at Siaya County Referral Hospital testified that on 19th January, 2022 he carried out an autopsy on the body of the deceased Nicholas Omondi Ojuodhi at 11.00am. That the deceased was a male adult African aged 26 years old. The injuries noted on the body were a cracked skull on the left parietal area with epidural haematoma. In the nervous system, there was a left parietal subdural haematoma. All other systems were normal. He concluded that the cause of death was severe blunt head trauma. he issued death Certificate No. 0171139 and signed the postmortem report which he produced as PEX 1.



49. In cross examination by the defence counsel, Dr. Juma reiterated his testimony in chief and stated that the skull is internal not external and that the injury noted was considered a high force injury causing crack on the skull and bleeding in the brain hence the chances of survival depended on how fast the injured received treatment. He stated that he could not authoritatively say that the cause of death was a delay in the patient receiving medication although he could not rule out the fact that such delay contributes. He denied the suggestion that the injuries noted could have been self-inflicted because of the amount of force applied but that an accident can cause such injury.

The Defence Case

50. The accused testified as DW1 and stated that he never knew the deceased nor was he related to him. It was his testimony that on the 15/1/2022, he received a call from his father who wanted him to go and pick him up at Bondo. He testified that he went on his motorcycle and returned home at 6 pm before proceeding to Kamindo to pick his mother. He testified that he arrived back home at 7pm when they ate dinner. It was his testimony that he was with his brother John Kennedy and that they were watching football replays. He testified that his brother left him as he went to sleep at 10pm and he remained behind watching a movie till midnight when he went to sleep.
51. The accused testified that on the 16/1/2022 at 4 pm, he went to wash his motorcycle at the quarry and then took it for service after which he joined some friends at the quarry as his motorcycle was drying. He testified that at about 5pm while at the quarry, a group of more than ten people arrived saying they wanted sand but suddenly turned on him and lifted him saying they were looking for him. It was his testimony that they assaulted him and forced him to give the keys to the motorcycle before proceeding to PW1's home where they found PW1 but when she saw the group hooting and shouting, she got scared and he started running before eventually returning.
52. The accused testified that the group asked PW1 what happened to Nick and she told them that DW1 is the one who assaulted Nick. He testified that the people beat him up saying they should take him away and kill him before taking him to PW1's gate where they beat him for 20 minutes then took him to the police post. He testified that he lost consciousness and found himself at Madiany Hospital. The accused testified that PW1 was his ex-girlfriend and she could have had a grudge against him. He further testified that the boda boda people beat her and forced her to say it was him who beat the deceased. It was his testimony that on the 15/1/2022 he slept with his brother John Kennedy and never left the house until morning.
53. In cross-examination, the accused stated that he had parted with Vivian for about 2 weeks and that he did not know that she had another boyfriend. He further stated that the deceased did not come from his area and that he did not know his home. The accused testified that his brother John Kennedy left him at 10 pm watching football until midnight when he went to sleep.
54. DW2 K'odera John Kennedy testified that on the 15/1/2022, at around 9 pm, they had dinner as a family then they started watching sports replays. It was his testimony that after dinner, he and the accused continued watching sports then at around 9.45 pm, he went to sleep because he was to go to school the following day. He testified that he left the accused watching movies and that he could not tell the time that the accused joined him in the house where they slept together. He further testified that before the accused joined him, he heard his mother speaking to the accused. He testified that he woke up at 4.45 pm and found Brian sleeping. It was his testimony that the accused never left him in the house otherwise he would have heard him leave.



55. In cross-examination, DW2 stated that the accused joined him between 9.45pm and that he assumed that the accused was watching television. He testified that he heard the accused speak to their mother when he was leaving but had no clock so he could not tell the time.

Analysis & Determination

56. I have considered the evidence by the prosecution witnesses and the defence. The only issue for determination is whether the prosecution has proved the charge of murder against the accused person herein beyond reasonable doubt. To sustain a conviction on a charge of murder under Section 203 of the Penal Code, the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:
- a. The fact and the cause of death of the deceased.
 - b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - “actus reus”.
 - c. That the said unlawful act of omission or commission was committed with malice aforethought - “mens rea”.
57. The burden of proving all the aforementioned ingredients of the offence of murder beyond reasonable doubt falls on the prosecution in throughout the trial and in all criminal cases save in a few statutory defences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour See *Miller v Minister of Pensions* [1947] All. E.R 372. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness in the defence raised by the accused person.
58. The fact of death of the deceased was proved through the testimony of all prosecution witnesses. The postmortem report alluded to by PW7 cited the cause of death as severe blunt trauma to the head. Accordingly, this first ingredient of the offence was duly proved by the prosecution beyond reasonable doubt.
59. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* [2016] eKLR citing the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 where it was held that:
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”
60. The deceased in this case was found to have died from severe blunt trauma to the head. The doctor who performed an autopsy on the body ruled out self-inflicted injury and there was no evidence that the death could have been accidental. PW1 in her firm detailed testimony was to the effect that she was in the company of the deceased when they were attacked by four people wielding weapons including *rungus* and that one of the attackers hit the deceased on the head upon which the deceased fell on his face then the attackers chased her from the scene. No defence of self-defence was raised by the accused person who maintained his innocence. It is thus clear that the deceased’s death was unlawfully caused.



61. As to whether it was the accused person who unlawfully killed the deceased, PW1 testified that she saw the accused hit the deceased on the head after which the deceased fell down face forward. The accused was well known to PW1 with whom they had been in a relationship with and further, PW1 was emphatic that there was adequate light at the scene that aided PW1 in her recognition of the accused. PW1 further testified that the accused was the only one out of the assailants whose face was not covered and that he led her away telling her to go or they kill her.
62. In his defense, the accused stated that on the material night he went to sleep at midnight after watching movies. On his part, DW2 the accused's brother K'odera John Kennedy initially testified that he left the accused watching movies at around 9.45pm but in cross-examination, DW2 stated that the accused joined him between 9.45pm and that he assumed that the accused was watching television. DW2 further stated that he heard the accused speak to their mum when he was leaving but had no clock so he could not tell the time.
63. I find it curious that DW2 who was called to substantiate the accused's testimony only remembers time when it is convenient to him such as when he went to sleep and when he woke up at 4.45am and saw the accused sleeping but as regards the time that he heard the accused talk to his mother, DW2 states that he had no clock and thus could not tell the time.
64. The testimony by the prosecution witnesses particularly PW1 was firm and pointed to the accused as the one who committed the unlawful act that led to the deceased's death. The nature of injuries sustained by the deceased match PW1's narration of the accused's attack on the deceased. I find the defence proffered by the accused not to be credible at all. It is unbelievable The accused defense is an afterthought and amounts to a mere denial.
65. It is not lost to this court that in his counsel's submissions on no case to answer, the accused raised the defence of negligence on the part of the relatives of the deceased alleging that they failed to take him to hospital for medical attention leading to his demise and this court dismissed that kind of allegation which was not supported by any evidence on record as the deceased's relatives did all that they could within their means upon learning of the assault, to take him for medical attention.
66. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused person herein Kelly Brian Omondi who unlawfully caused the deceased's death by hitting him on the head with a rungu.
67. As to whether the accused had malice aforethought when he unlawfully killed the deceased, malice aforethought is defined 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 of any person who has committed or attempted to commit a felony.”

68. In *Republic v Stephen Sila Wambua Matheka* [2017] eKLR it was held that:

“The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic 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. In the *Ogelo v Republic* [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of *Ernest Bwire Abanga Onyango v Republic* [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.”

69. The deceased died as a result of the injuries sustained following an assault with a blunt object on the head. The assailant who hit him on the head until the skull cracked leading to bleeding in the brain, no doubt, knew that the head was delicate part of the body to be hit with such force and that the result would ultimately be death. I find that the accused person had the necessary malice aforethought to unlawfully kill the deceased.

70. In the result, I find and hold that the prosecution has proved the charge of murder against the accused person herein Kelly Brian Omondi beyond reasonable doubt and contrary to section 203. I find the accused person herein Kelly Brian Omondi guilty of the Information for murder of the deceased Nicholas Omondi Ojuodhi and I convict him accordingly.

71. Sentence shall be meted out after records and mitigation.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF MARCH, 2023

R.E. ABURILI

JUDGE

