



**Republic v Onyimbo (Criminal Case 17 of 2021)
[2023] KEHC 20315 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 17 OF 2021
REA OUGO, J
JUNE 2, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID MAYAKA ONYIMBO ACCUSED

JUDGMENT

1. David Mayaka Onyimbo , the accused, is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are, on May 16, 2021 at Gakero sub-location , Machoge location in Gucha sub-county in Kisii county within Republic of Kenya murdered Joyce Moraa Onyimbo.
2. The accused person pleaded not guilty and the prosecution called five (5) witnesses.
3. Jepita Onyimbo, Pw1, testified that Joyce Moraa Onyimbo is his wife. The accused is his elder brother. On June 6, 21 he attended a post mortem of his wife at Tenewek hospital. He saw the injuries on body of his wife. She had a cut on the right leg at the foot it was dangling. She also had injuries on both sides of the ribs and a cut at the left shoulder and she was hit on the head. That on May 29, 21 he had left Nairobi and on reaching Sotik he got a call that his wife was cut on the leg. He returned and found her at Tabaka. She was admitted for 2 days then her situation got worse. She told him what happened, that the fight happened at his shamba. He went to his brother's place but did not find him. He went to the place where the fight was and he found a jembe (Pext. 2) which he gave the police. They took her to Tenewek from the 18th to the 29th May 2021 when she died.
4. Mutai Nickson Kiplangat a medical officer testified that he did a post mortem on the body of Joyce Moraa Onyimbo on June 6, 21 at Tenewek hospital. On external appearance the body had 1/3 fracture of the tibia fibula, an open fracture measuring 10cm by 5cm not sutured. The bone was exposed. The wound was open and not stitched. On the lateral side there was a wound measuring 5cms by 2cms.



There was also a wound on the lateral upper part measuring 3cms by 1 cms. A fracture of the left finger at the beginning. She was pale as a result of a losing a lot of blood. When he cut through the lungs he found a lot of blood a sign of embolism. She had multiple anterior rib fractures on the left side of the chest at ribs numbers 2,3,4,5,6 & 7. On the right side she had fractures on ribs numbers 2,3,4 & 5. There was accumulation of blood on the left side of the chest and a hematoma in the interior chest. There was swelling in the lungs. On the digestive system she had an enlarged spleen and the liver was friable, when you touched it, it went into pieces . There were eggs in the stomach, a small cut in the small and large intestines. The kidney and urinary system were normal. The bladder was empty. On the head she had brain swelling no clots no bleeding. The spinal cord and nervous system were normal. He formed the opinion that the cause of death was chest injury and pulmonary embolism that is clots of blood in the lung vessels secondary to assault. He produced the post mortem report as Pext No. 1.

5. Grace Kwamboka Masese, Pw3, testified that on May 16, 2021 at 8.30am she left her home to go get a banana from her shamba. On reaching her shamba she heard screams. Someone was screaming, help me help me. On checking she found that the one seeking help was a woman she knew. The woman was Joyce the deceased. She was lying down. Her leg was cut and was dangling, there was blood on the ground. The accused was standing where she was. The accused had a jembe. She too began screaming. She went where Joyce was and found her leg was broken. Joyce did not tell her anything.
6. Moses Okemwa , Pw4, testified that on May 16, 2021 at 7.00am he was looking for grass for his cow. He heard people screaming and he ran to the place. He found David the accused beating Joyce with a hoe. He saw the accused beat Joyce on the head, legs and all over the body. When the accused saw many people he ran away with the hoe. The deceased was taken to hospital and he went to report to the police.
7. John Magara Nyangweso, Pw5, testified that on June 6, 21 he went to Tenewek hospital and attended the post mortem of Joyce Moraa Onyimbo. He identified the body and the post mortem was done. During cross examination he testified that the deceased had an injury in her right leg near the ankle, the leg was cut.
8. No 116970 P C Gilbert Bandari testified that on May 16, 2021 whilst on duty one Moses Okemwa reported to them that Joyce a person well known to him had been seriously assaulted by David Moyaka. He recorded his statement and visited the scene together with his fellow officers. They did not find the deceased at the scene. He learnt she had been taken to Tabaka hospital. He talked Pw1 who gave him the weapon which was used a jembe. After 2 days he got information that the deceased was referred to Tenewek hospital. On May 29, 2021 he was informed that she died. A post mortem was done on June 6, 21. The accused surrendered himself on June 17, 2021 at Ogembo police station and was charged with murder. He learnt that the accused and deceased had a land dispute, each claimed ownership of a parcel of land.
9. The accused elected to give a sworn statement. His defense was as follows; his brother's wife is called Grace Onyimbo. He met her before May 16, 2021. He had gone to her place. She prepared food. She is now deceased. They talked about the sister's shamba. The shamba is at home. The sister had died and had been separated from her husband. They had buried their sister in their home. The sister had children. Their parents had sub divided the shamba amongst them. They were to divide their late sister's shamba amongst the 3 of them, himself Japheth Onyimbo and Noel Onyimbo. They spoke well and he told the deceased that he would plant bananas in the said shamba the next day near the boundary of the portion he was to be given. He went to the shamba the next day. He dug the holes as he was going to plant the bananas. Joyce went there and found him digging the holes. Joyce was cutting grass. They were speaking loudly. She asked him why he was digging the holes. He told her that they had discussed the previous night. She continued to cut the grass and he continued to dig the holes. He left to get seedlings to plant in the said holes from her place. He had hired his younger brother's



shamba. He went to the said shamba and found all the banana seedlings cut down. He did not get any seedlings. He left the place and went to his shamba and dug out 3 banana seedlings. He carried them to the place he had dug the holes. He found Joyce there pouring soil back into the said holes. They began quarrelling. Joyce wanted to beat him with the hoe she was using to return the soil. They struggled as he tried to get the hoe from her. He managed to snatch it and she ran to get a panga. She returned with the panga. He threw the hoe at her and she fell into a hole he had dug. The hole was about 3 to 5 feet deep. When she fell she began screaming and people went to the scene. He left for his home which is not far. Many people came and he left. He returned to his home later and heard she had been taken to hospital. He heard she had died. He returned and went to the police station. She died after 3 weeks. She had a disease in her throat and she was epileptic.

10. Counsel for the accused relied on the evidence on record and so did counsel for the prosecution.

Analysis And Determination

11. I have considered the evidence on record and the law. To prove a charge of murder, the prosecution has to prove three ingredients against an accused person. That the death of the deceased occurred, that the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought (see *Anthony Ndegwa Ngari Vs Republic* [2014] eKLR).
12. The death of the deceased Joyce Moraa Onyimbo is confirmed by the post mortem form Pext.1 which shows that the cause of death was chest injury and pulmonary embolism that is clots of blood in the lung vessels secondary to assault. The post mortem revealed that the deceased had multiple injuries as follows; fracture of the tibia fibula, cut wounds, fracture of the left finger, she was pale due to loss of a lot of blood, clots in the lungs, multiple anterior rib fractures on the left side of the chest at ribs nos. 2,3,4,5,6 &7 and on the right-side fractures on the anterior ribs nos. 2,3,4, &5. Her spleen was enlarged she had cuts in the small and large intestines. Her brain was swollen.
13. On whether the accused caused the death of the deceased. The accused does not deny that he was with the deceased on the material day. He was present at the scene. According to Pw4 he saw the accused beat the deceased all over the body when he arrived at the scene on hearing the deceased scream. Pw3 also heard the deceased scream and went to the scene. She saw the accused holding a jembe (hoe). The deceased had been cut at the leg and she was bleeding. Pw3 and Pw4 gave clear evidence on what they saw on the material day and I believe them. Their evidence clearly links the accused to the injuries the deceased sustained. The accused admitted that he threw the hoe at the deceased when she approached him with a panga and that she fell inside a hole. The injuries sustained by the deceased was due an assault as stated by the doctor. There was no evidence adduced by the defence to show that the hospital was negligent as alleged in their earlier submissions on a case to answer. I find that the injuries inflicted on the deceased on May 16, 2021 caused her death. The prosecution has adduced sufficient evidence that it was the accused person who committed the unlawful act or omission that led to the death of the deceased.
14. The accused's defence seem to imply that he acted in self-defence. He stated that the deceased stated to back fill the holes he had been digging and that on his return she confronted him with a hoe and then went for a panga. In the case of *DPP V MORGAN* [1975]2 ALL ER 347 it was held that: -

“The essential element of self-defence is that the accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds. The ground of self-defence also fails as evidence on record does not bring out that the appellatant faced any kind of danger that made him fear for his life (Emphasis mine).



In my view the accused's defence is an afterthought. Pw4 an eyewitness never saw the deceased fight the accused. What he saw was the accused hit the deceased all over her body. This explains the multiple fractures she sustained plus the injury on her leg. Pw3 found the deceased lying on the ground and the accused standing near the deceased. I am not persuaded by his evidence that he threw the hoe to stop the deceased from getting to him with the panga.

15. The next issue is whether malice thought has been proved. Section 206 of the [Penal Code](#) defines malice aforethought as follows:

206. Malice aforethought shall be deemed to be established by evidence proving anyone 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.”

16. In considering whether the prosecution has established malice aforethought the court may consider the body part injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. This was stated by the Court of Appeal in [Bonaya Tutu Ipu & Another v Republic](#) Mld Ca Criminal Appeal No. 43 & 50 of 2014 [2015] eKLR where it stated as follows:

It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit -vs- Uganda*, Cr. App. No. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex -vs- Tubere S/ o Ochen* (1945) 12 Eaca 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...

17. The deceased hit the deceased with a hoe all over her body she even sustained a cut in her leg that caused her to lose a lot of blood. She was suffered serious injuries, grievous harm which caused her death. In



my view the prosecution has proved malice aforethought. All in all, I find that the accused has proved their case beyond reasonable doubt.

18. Consequently, I find the accused person, David Mayaka Onyimbo guilty of the murder of Joyce Moraa Onyimbo contrary to section 203 of the Penal Code and I convict him accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY JUNE 2023.

R.E. OUGO

JUDGE

