



**Republic v Oyombera (Criminal Case 5 of 2018)
[2023] KEHC 18312 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18312 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 5 OF 2018
WM MUSYOKA, J
JUNE 2, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SAMUEL OMUKUBA OYOMBERA ACCUSED

JUDGMENT

1. 4 witnesses testified in this matter. None of them witnessed the assault on the deceased. PW1, Athnas Nyikuli Andeche, a brother of the deceased, was notified by a wife of the deceased, that the deceased had been injured, and was implored to take him to hospital, which he did. At the hospital the deceased told him that he was attacked by the accused. PW2, Margaret Shisia Nyikuli, was his widow. She was at home at the material time, in the kitchen, while the deceased was in another house. She heard him scream that the accused was killing him. She could not get out of the kitchen, as the door to it had been locked from the outside. PW3, Edwin Makotsi Andeche, was a brother of the deceased, he was told of the incident by one of the wives of the deceased. When he went to the home of the deceased, he found that he had been taken to hospital, and he followed him there. The deceased told him, at the hospital, that it was the accused who had attacked him. PW4, No 1XXXX95 Police Constable Mathew Gitau, was the investigating officer.
2. I put the accused on his defence. He denied killing the deceased. He said that on the material day, he heard screams from the home of the deceased, which was 100 metres from his. He did not get out of his house. He was arrested the next day.
3. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
4. On whether the deceased died, I have the evidence of PW1, PW2 and PW3. They all attested to the fact that the deceased died in hospital. The pathologist did not testify, but the post-mortem report and



a P3 Form were produced by consent. The cause of death was said to be thromboembolism due to multiple fractures with severe head injury. The P3 Form documented the injuries as deep cut wounds on the head and face and compound fractures of both arms. The cause of death was linked to the accused, based on a dying declaration made to PW1, PW2 and PW3. The accused denied killing the deceased. The dying declaration was made by the deceased shortly after he was admitted in hospital, and was conveyed to 3 witnesses. I find it curious that the accused, a next-door neighbour of the deceased, whose house was just 100 metres away, did not get out of his house to answer the distress call from the deceased, despite hearing the screams and the general commotion from the home of the deceased. I am satisfied that there is evidence, beyond reasonable doubt, that the injury that caused the death, was inflicted by the accused.

5. The remaining issue for determination is whether the act by the accused was with malice aforethought.
6. Malice aforethought is defined in section 206 of the [Penal Code](#). Section 206(b) states:

“Malice aforethought

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.”

7. Under section 206, malice aforethought is to be inferred where there is an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from lawful custody of a person, and, in the process, a death is caused.
8. The very grave injuries that the deceased sustained on his head, face and hands could only have been caused by a person who had an intention to kill him or to cause him grievous harm, both of which are elements of malice aforethought.
9. In view of everything stated above, I do hereby, find the accused herein, Samuel Omukuba Oyombera, guilty of the offence of the murder of Harrison Nyikuli Andeche, contrary to section 203 of the [Penal Code](#), as read with section 204 thereof, and I convict him accordingly, under section 322 of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya. For the purpose of sentencing, I hereby direct the Kakamega County Director of Probation and Aftercare Services to assess the antecedents of the accused person, and to get the views of the family of the deceased, and the community, and to file a report thereon within 30 days.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
2ND DAY OF JUNE 2023**



WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Otsyeno, Advocate for the accused person.

