



**Republic v Oyaro (Criminal Case 6 of 2022)
[2023] KEHC 21354 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 6 OF 2022**

**REA OUGO, J
JULY 21, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL ATINA OYARO ACCUSED

JUDGMENT

1. Samuel Atina Oyaro (the Accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that, on the 20th January 2022 at Igare Sub-location in Sameta Sub-County within Kisii County the accused murdered Brian Mogire.
2. The accused pleaded not guilty and the prosecution called eight (8) witnesses to prove their case.
3. Jared Moturi Omwani (Pw1) testified that on the 20.1.2022 he was at Igare. He does boda boda business. He is the chairman of the boda boda riders. At about 7.30pm he went to their stage. On reaching he was found Peter Sosi carrying a person who was bleeding. He was able to see them as there were lights from the shops around there. Before he reached the stage he heard people say that Sammy had killed Brian. He found Sammy the accused at the stage holding a knife. He saw 3 people at the stage whom he recognized. He held the accused put him on the bike and took him to Igare Police station. Robert held the accused at the back of the bike as they went to the police station. He followed to find out what had happened to Brian. He met Sammy's brother Kevin carrying Brian. Brian's leg was dangling on the ground. He stopped them and left to go ahead to start the process of Brian's admission. On arrival at the hospital the doctor told them that Brian had died.
4. Peter Sosi (Pw2) testified that on the 20/1/2022 at 8.00pm he was at Igare at the stage. He rides a boda boda. His bike was being repaired. When he went to check on it he found many people at the garage. He decided to go and check on what the people were looking at. He found Brio injured. Kevo



- and the person who asked him to take Brio to hospital. He took Brio to Nyamache hospital. They were referred to Kisii hospital. Brio was bleeding from the chest. He left them in hospital. Later he was told Brio had died.
5. Vincent Anyika Moi (Pw3) testified that he knows both the accused and deceased, both are residents of Igare. On the 20/1/2022 he was to his place of business at 7.00pm when he met Samuel and Brain quarrelling over 20 bob. There was a bob on at the place where the 2 were. He thought it was their usual talk. Then shortly he saw that Brain had fallen down. People came around including Kevin the accused's brother. Kevin undressed the deceased so that he could get some air. Samuel by then was standing there, he saw Brian bleeding on the left side blood was oozing out. He helped in talking Brian to Nyamache Mission hospital, they were referred to Kisii General where they were told that Brian had died. He does not know what cause Brian to fall. He did not see the accused stab the deceased.
 6. Dominic Mukua Sebe (Pw4) testified that on the 22.1.22 he attended the post mortem of the deceased and identified his body to the doctor. The deceased is his nephew.
 7. Patrick Musili Mwaniki (Pw5) testified that on the 20.1.22 whilst on duty at Igare police post at 8.00pm together with P.C. John Kaiyera they saw a crowd of boda boda people enter their station. They reported that the accused had stabbed Brian Atina Oyaro. They were with the accused. They received Samuel. He received a knife from the boda boda people. When they asked the boda boda people to write statement they left one by one. Whilst attending to the matter another group of people came and told them that Brian had died. The accused was taken to Itumbe police station. They gave the DCIO the knife that had been given to them.
 8. Doctor Naomi Ariaga a pathologist (Pw6) testified that on the 25/1/2022 she did a post mortem on Brian Mogire at Kisii Referral hospital. On general observation the body on the external appearance the body had an abrasion on his right foot measuring about 10cms by 6cms. He had a first degree burn about 1% of the total body surface on his right lower limb. On internal appearance the respiratory system had a stab wound on the left chest wall below the nipple with hematoma on the intercostal muscle. There was a tear on the intercostal muscle and the 3rd intercostal space. There was also a laceration on the pericardium of the heart with hemorrhage. There was a laceration of 2cms in the left ventricle of heart. The other systems were unremarkable. She formed the opinion as a result of the examination that the cause of death was complication of the chest injury from a sharp object forced trauma.
 9. Godwin Khamala Waliama a government analyst(Pw7) testified that he received samples to conduct DNA analysis on the samples he had received. The police exhibit memo was from DCI Sameta and was filed by P.C. Idema Tobias. The request as the per memo form was to do a DNA profiling and comparison amongst 3 exhibits, a penknife with wooden handle marked 'A', blood sample of Samuel Atina Oyaro in a vacutainer tube marked 'B' and blood sample of Brian Mogire in a vacutainer tube marked 'C'. His findings were that the penknife was lightly stained with blood of human origin. The DNA generated from the blood stains on the penknife matched the DNA profile generated by the blood sample of Brian Mogire (deceased).
 10. No. 100982 P. C. Idema Tobias (Pw8) testified that on the 20/1/2022 at 1945 hours he was called by C.IP Matthew Bette and informed to join his colleagues and head for Igare Police post to collect a suspect. They went to Igare and arrested the accused person. They called for reinforcement as there was a crowd pelleting stones at the police station. They were given a pocket knife which they took along with the accused to Itumbe police station. He took over the case as the investigating officer. He went to Igare police post to find out what happened but he was not able to get to the scene to have it processed. Later he attended the post mortem and recorded witness statements. He sent the penknife



and blood samples from the accused and deceased to the government chemist for analysis. The accused was charged in court on the 10.2.22.

11. The accused was put on his defense. He gave an unsworn statement. He testified as follows; he wrote a statement and it is the truth. He adopted it as his evidence in court. He was at the stage on the material day. He does not know where the deceased was stabbed. He was not at the place. The knife is not his. He did not kill anyone. He had a witness called Obanye. The accused stated as follows in his recorded statement; that he recalls that they were playing card with Brian Mogire on 20.1.22 until 7.00pm. They were playing. I had won 1500/- from Brian Mogire. We were playing 200/- every round with every person giving 100/-. Brian was not happy that he had won against him. When we were done playing he followed me saying I return his money. They were talking in Kisii. The deceased was abusing him. The deceased told me to use the money to treat my sickness. He ignored him and went home, a few meters from Digital where they had played for almost one hour. The person who was charging them for playing the cards is called Kalonzo. He was asking us for 20/- after every five rounds of winning. From Digital to my home he was required to pass through the boda boda stage. He went to the boda boda stage and sat on a form for almost 5 minutes. Boda boda people came whilst he was seated. They started beating him slaps asking me what he had done to Brian Mogire. He told them he had not done anything but they were not satisfied then they stole my 100/- which he had won whilst playing with Brian. They took him to Igare police station where he was locked up. He was left with he had put in the front pocket of his trouser. He recalled that there were other card players playing cards at that said place on the material day. He knew them by face and not by names. He does not know the boda boda people who took him to Igare police by name but he would recognize them if he saw them. They were around 15 people who took him to Igare police station. He was removed from Igare police station at night and taken to Itumbe police station where he was to the date he made the statement. He was given the help he needed at the police station.
12. The defense witness was not called.
13. Written submissions were filed at the close of the defense case. The accused submitted as follows; that the witnesses did not give direct evidence linking the accused to the offence but the evidence was largely based on hearsay and indirect. That the chain of custody of the penknife could not be adequately explained by any of the witnesses. That the evidence of Pw1 falls short of credibility having been put in doubt by Pw8 the investigating officer who dismissed his evidence as untrue and questionable. That the DNA evidence forensic does not link the accused with the same offence. That no malice aforethought was proved and that the accused should be acquitted.
14. The prosecution submitted that the prosecution had adduced sufficient evidence to show that the accused was placed at the locus in quo. That there was a multifarious factor to prove that the accused had malice aforethought. That the nature of injuries inflicted on the deceased on his chest is an ingredient enough for malice aforethought as envisaged under section 206 of the Penal Code. That the case against the accused is cogent and he should be convicted accordingly.

Analysis And Determination

15. In order to establish the offence of murder under the provisions of section 203 and 204 of the [Penal Code](#), the prosecution must prove beyond reasonable doubt the following ingredients;
 - a. Proof of the fact and the cause of death of the deceased.
 - b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.



- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by section 206 of the [Penal Code](#).
16. The fact and cause of death has been proved. Pw1 testified that when he reached hospital the deceased was declared dead. Pw6 did a post mortem on the body of the deceased and formed the opinion that the cause of death was complication of the chest injury from a sharp force trauma.
17. The next issue is whether the cause of the deceased's death was a result of the direct consequences of the accused persons' unlawful act or omission. Pw3 testified that when he met the accused and the deceased there was a scuffle between the two over 20/-. The accused is a person well known to him. He thought that this was their usual talk. Shortly thereafter he saw Brian fall down and people came around. Pw2 was one of the said people. He helped them take the deceased to hospital. Pw1 arrived at the scene and found the accused at the scene holding a penknife. Together with Robert they took the accused to the police post and handed him over to the police together with the penknife. Pw1, Pw2 and Pw3 all stated that there was sufficient lighting from the shops around. The deceased fell down with an injury on his chest soon after Pw3 saw him and the accused have a scuffle. The accused had a penknife at the time Pw1 saw him. The pen knife had blood on it. Pw5 received the accused at Igare police post the same night and stored it. The penknife had blood stains from the deceased as per the government analyst report produced by Pw7. The post mortem report indicates that the deceased died as a result of complication of the chest with a sharp forced trauma. All this evidence is direct evidence that shows that the accused stabbed the deceased. Pw1 was adamant that the accused carried the knife as they took him to the police post. Pw8 was not at the police station when Pw1 took him there. I believe Pw1 that he took the accused with one Robert to the police post and left the accused and the knife which he had at the police post. I therefore find that the prosecution adduced sufficient evidence to prove the cause of the deceased's death was a result of the direct consequences of the accused persons' unlawful act.
18. I now turn to consider if the prosecution proved that there was malice aforethought. Section 206 of the [Penal Code](#) provides that malice aforethought includes-
- (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.
19. The accused in his defense does not deny being with the deceased but merely denies that he caused the death of the deceased. The prosecution case was clear and straight forward.
20. The evidence points to the accused person who stabbed the deceased on the chest with a pen knife, I find that malice aforethought was proved.
21. In the end, I find that the prosecution has proved the offence of murder beyond reasonable doubt. I therefore find the accused, Samuel Atina Oyaro, guilty of the murder of Brian Mogire and I convict him accordingly.



DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAM ON THE 21ST DAY OF JULY 2023.

R. E. OUGO

JUDGE

In the presence of;

Samuel Atina Oyaro/ Accused-Present

Mr. Magara -For the Accused

Mr. Ayodo -State Counsel

Orwasa / Wilkister -C/A

