



**Republic v Omondi (Criminal Case E033 of 2021)
[2023] KEHC 19913 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E033 OF 2021**

**KW KIARIE, J
JULY 12, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHN ODHIAMBO OMONDI ACCUSED

JUDGMENT

1. John Odhiambo Omondi is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the 11th day of July, 2021 at Kigoda Beach, Waware North sub location in Mbita Sub County, of Homa Bay County, murdered Kevin Omollo Odiwuor.
3. The prosecution case was that the accused and the deceased were at the beach. Both were apparently drunk. An altercation occurred between them and the accused stabbed the deceased with a knife he had. The deceased succumbed to the injury.
4. John Odhiambo Omondi, the accused contended that nothing happened between him and the deceased.
5. The issues for determination are:
 - a. Whether the accused was so drunk not to know what transpired;
 - b. Whether it was the accused who fatally stabbed the deceased; and
 - c. Whether the accused committed the offence he is charged with.
6. Section 13 (2) of the *Penal Code* provides:



- (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
 - (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
7. Subsection 2 of the section 13 lays the burden on the accused to prove that the defence of intoxication is available to him. In the case of *Maina vs Republic* [2007] 2 EA 279 (CAK) it was held that:
- If an accused person seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove.
- In addition, section 13 (4) of the *Penal Code* provides that the state of intoxication shall be taken into account in determining whether or not an accused person had the necessary mens rea in committing a crime. That section provides that:
- 4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- In the instant case I will endeavor to find if the evidence on record supports the defence by the accused.
8. Bernard Onyango (PW3) testified that he was at the scene of the incident. His evidence was that when the accused went to collect beach fees, he asked them to give the money to his wife for he was going to sleep. He went away and after a while returned and appeared to be talking to himself. According to him, he appeared drunk.
9. This witness went on to testify that the deceased went to him and asked for some work. When he told him people had already been hired, the deceased went to the accused. He then heard the deceased ask why he was being beaten. The accused told him whether he did not see that people were many.
10. This conversation does not make sense and it would appear that this was a language only understood by fishermen. I conclude so for this witness clarified that when the deceased was asking for money, he meant to be hired to go fishing for pay. The prosecutor ought to have elicited clarification on what the two were saying for to an ordinary man, it does not make sense.
11. The incoherence of the language to an ordinary man notwithstanding, the evidence of Bernard Onyango (PW3) on who stabbed the deceased was clear; it was the accused. He did so and ran away. They gave chase and apprehended him and took him back to the scene where they found the deceased dead.
12. When James Otieno Katete (PW1) went to the scene he found a mob beating the accused next to a dead body.
13. Though there is evidence that the accused appeared drunk, the evidence of Bernard Onyango (PW3) does not draw a picture of a man who did not know what he was doing. The defence of intoxication is not available to him.



14. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In *Black's Law dictionary*, 10th Edition malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the *Penal Code* gives instances when malice aforethought may be proved. It provides:

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.
15. The prosecution has not proved malice aforethought and consequently I acquit the accused of the offence of murder. However, the evidence on record has established beyond reasonable doubt the offence of manslaughter contrary to section 205 of the *Penal Code*. I find the accused guilty of the manslaughter and accordingly convict him.

DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE

