



Republic v Opiyo (Criminal Case 3 of 2020) [2023] KEHC 19848 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 3 OF 2020**

LM NJUGUNA, J

JULY 5, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

FREDRICK OUMA OPIYO ACCUSED

JUDGMENT

1. Fredrick Ouma Opiyo the accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the night of 09.01.2020 at an unknown place within Embu Municipality of Embu County murdered Brian Gitonga Wanja. The case proceeded for trial wherein the prosecution called 9 witnesses in support of its case while the defence had only the accused person.
2. PW 1, Purity Wanja Marigu testified that on 09.01.2020 at around 7.00p.m the accused person visited them at their house. That he served him supper and afterwards, before leaving for work, asked the accused to leave her house since they were not in good terms and they had parted ways, he reluctantly moved out with her. On getting back to the house between 12 and 1 am, she found her son missing. It was her evidence that she screamed and sought for help from the neighbours who came to help in searching for the deceased but they did not find him. She stated that she took a bodaboda to the accused's house and upon entering the house, saw the accused push something behind the bed. That she left and reported the matter to Embu Police Station. It was the testimony of the witness that she received a call from a certain lady who told her that a body of a child had been spotted near River Rупingazi; on arrival, she found that indeed it was the body of her son. On 03.02.2020 she identified the body to the doctor for post mortem. Further, she stated that she suspected the accused because, when they were friends and, he kept telling her to take the child to his father because the accused was not the father of the deceased. She also recalled an instance when the accused threatened to kill her son and she reported the matter to the police station.



3. PW 2 Esther Wanjiku Njeru, stated that on 09.01.2020, she left her place of work at around 9.00p.m. and on reaching near Kaimu Dispensary, she met the accused person in the company of the deceased but she didn't talk to them. The following day she heard that the deceased had died. She noted that the deceased was in school uniform and the accused was dressed in a purple T-Shirt with white stripes. It was her evidence that, she knew the accused as the father to the deceased. She identified the accused in the dock.
4. PW 3, Kevin Kariuki Mbogo stated that he knew the accused herein. That he (PW3) used to stay with Brian at their grandmother's place at Muthatari and when he could visit Brian at their Dallas house after they moved from Muthatari. That the accused could come to Dallas twice a week. He recalled an occasion when he was at Dallas, the accused person visited and his aunt told him not to open for him. He stated that on the fateful day that the deceased went missing, the witness was not staying at Dallas.
5. PW 4, Wanjiru Kevin Murimi, testified that he knew the accused person whom he used to meet at Gibson Club. That on 09.01.2020 at around 9.00p.m, he was looking for miraa at Dallas when he saw the accused with the deceased. He stated that the accused was holding the hand of the deceased and it was like he was forcing him to walk; that the deceased wore a blue short and a blue T-Shirt. He later learnt from Wimwaro Radio Station that the deceased was missing and the description that was given matched the child he saw that night. It was at that point that he decided to look for the mother to the deceased who told him to accompany her to the police station to report. Later, she met the mother who informed her that the boy's body was found dumped in a river.
6. PW 5, No. 235636 PC. Kinyua Mutege, stated that on 10.01.2020, he was called by his boss, Insp. Abraham Gordon who was the investigating officer in this case. That he asked him to help with the investigations of the matter and wherein he recorded the statement from the deceased's mother who mentioned the accused as a suspect. It was her evidence that they later arrested the accused at the Huduma Center in Embu. Further, that on 24.01.2020 the deceased's mother reported that the body of the deceased was lying at Kerugoya District Hospital Mortuary and therefore, the investigating officer, PC Kiptarus and PC Sabina together with the mother of the deceased went to the mortuary. It was her evidence that they did not take the clothes since they were still on the deceased's body.
7. PW 6, Amos Mbogo Mugo stated on 03.02.2020 he identified the body of the deceased to the doctor for postmortem. He didn't know the accused person before the incident.
8. PW 7, Dr. Ndirangu Karomo testified that on 03.02.2020 he examined the body of the deceased in the presence of PC Philip Kinyua, Purity Wanja and Mbogo Mugo. He further stated that on observation, the eyes were absent in both sockets and there were no ligature marks; on the internal appearance, there were multiple hematoma below the skin of the skull with a fractured skull bone along the suture lines. There was bleeding on the surface of the skull; multiple cervical spine injuries with hyper extension and hyper flexion at the neck. It was his opinion that the cause of death was severe head injury following assault with a blunt object. On cross exam he noted that the deceased died before he was put in water.
9. PW 8, 64340 Cpl Juda Muthuri stated that on 18.01.2020 while on duty, he received information from Insp. Catherine Nyaga that she received a report from the Chief of Marinduko Location, Mr. Joseph Kariuki that there was a body found floating on River Rupingazi at a village called Rogoi. That together with PC Michael Karuvya, Douglas Nzale they proceeded to the scene where they retrieved the body and took it to Kerugoya County Hospital mortuary to await identification, postmortem and investigations. On 23.01.2020 one Purity Wanja from Embu came with an OB 11/10/1/2020 of a missing child. He recorded a statement to that effect, he also stated that he didn't know the accused person.



10. PW 9, 235848 Inspector Regina Syombua stated that she was the current investigating officer in this case which had earlier been investigated by two investigating officers. She stated that the file was handed over to her by Insp. Kimathi who was transferred to Machakos who was also handed over the file by Insp. Abraham who was the first investigating officer. It was her evidence that, previously, the accused person was arrested and charged with the offence of child stealing before a report was made by the mother of the deceased that she had been given information about a floating body that had been retrieved from River Kapingazi and taken to Kerugoya Hospital Mortuary. The police from Embu in the company of the mother visited the mortuary for identification of the body which turned out positive. On a later date in February 2020, a postmortem was conducted and the doctor gave his report. At that time, the charge was amended from child stealing to murder. She described the relationship between the accused and the deceased as that of a father and a son and that he was in a relationship with the mother and further, they were living together. It was also established that the accused wanted to marry the mother to the deceased, but the deceased was a stumbling block. Additionally, she produced a Mental assessment report which was previously conducted on 13.02.2022 at Embu level 5 hospital where the doctor concluded that the accused person herein had no mental illness and that he was fit to stand trial.
11. After the close of the prosecution's case, the accused herein was placed on his defence upon the court finding that the prosecution had established a prima face case against him.
12. DW 1 Fredrick Ouma Opiyo, testified that he was working as a mechanic at Stamara garage in Majengo in Embu County. He further stated that that the deceased's mother was his girlfriend. He recalled that on 09.01.2020 at around 6.00p.m. he received a call from Purity Wanja who wanted to see him. He stated that he had known her for 2 months. He went to her place at 6:30p.m. where he stayed until 8:30p.m. and got to his house at about 9.00p.m. That PW1 had called him to ask him if she could go to his place, but she didn't. The witness stated that he slept only to be awoken by a knock on the door at 5.00a.m. when he found PW1 and a bodaboda rider on his door. That at about 8.00a.m, he left the garage to buy some spares and while he was around Huduma Center Embu, whereupon he received a call from PW1 inquiring his whereabouts. It was his case that while walking towards the garage, PW1 arrived on a bodaboda and informed him that she had not seen her son and immediately the police arrested him. It was the testimony of the accused that he didn't know what happened to the deceased and he didn't know why he was charged. On cross exam, the witness testified that he didn't know Esther Wanjiku neither did he know Kevin Kariuki. It was also not true that he had made a marriage proposal to Purity.
13. After the close of the defence case, directions were given for both parties to file their submissions and wherein all the parties complied with the order.
14. In its submission, the prosecution reiterated the evidence given by PW2 and PW4 who stated that they saw the accused person with the deceased around the same time. They singled out the testimony of PW4 where he noted that the accused was forcing the deceased to go with him but the deceased was hesitant. Further, it was also noted that apart from the circumstantial evidence, the doctrine of the last seen applied. The prosecution relied on the Court of Appeal case of *David Munyui Chiragu & Samuel Mungai Nganga v R* (2021) KECA 342 eKLR where it was found that there is a presumption in law where the last seen person with the deceased is fully held responsible for the death of the deceased and the responsibility to rebut the presumption lies with an accused person. The prosecution also quoted the Nigerian case of *Stephene Haruna v the Attorney General of the Federation* where the doctrine was buttressed. It was argued that the presumption was equally anchored on section 111(1) and section 119 of the *Evidence Act*. It was submitted that the accused person totally failed to discharge the burden and elected to raise an alibi which did not dislodge the prosecution's case.



15. The Defence on the other hand submitted that the prosecution relied on circumstantial evidence and that no person came out to confirm or state that the accused person was caught killing the deceased or was in any way caught with any murder weapon that may have been used in the process. Further, the defence argued that the prosecution did not prove its case beyond any reasonable doubt as is required by the law. Reliance was placed on the Court of Appeal case of *Musili Tulo v R* CA No. 30 of 2013 which laid tests to be applied in considering circumstantial evidence placed before court to support conviction in such circumstances. And on the case of *Abanga alias Onyango v R* CA No. 32 of 1990, in which the court set the 3 tests which must be satisfied before circumstantial evidence is relied upon and submitted that the prosecution herein did not meet the said tests.
16. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The degree/standard of prove is always that of “beyond any reasonable doubts” [See was *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373].
17. In the instant case, the accused person is facing a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. Murder is defined as
- “when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
- The elements of murder and which the prosecution ought to prove are;
- a. the death of the deceased occurred
 - b. the death was caused by unlawful acts;
 - c. that the accused committed the unlawful act which caused the death of the deceased; and
 - d. that the accused had malice aforethought.
- (See *Anthony Ndegwa Ngari v Republic* [2014] eKLR).
18. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
19. As to whether the death of the deceased occurred, it is not in doubt that the deceased herein died. Dr. Ndirangu Karomo who conducted post mortem on the body of the deceased formed the opinion that the cause of death was as a result of severe head injury due to a blunt object. As such death was proven.
20. As to whether the death was caused by unlawful acts, under article 26 of the *Constitution* of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. [See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63]. The post mortem report by Dr. Ndirangu Karomo stated that the cause of death was as a result of severe head injury due to a blunt object. As such the death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
21. As to whether the accused person committed the unlawful act which caused the death of the deceased, I have perused the prosecution’s evidence as presented before the court. From the evidence on record, no witness saw the accused herein kill the deceased. In essence, the prosecution’s case was based on circumstantial evidence.



22. In *Abamad Abolfathi Mohammed and another v Republic* [2018] eKLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

23. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

24. In the case herein, the prosecution submitted that the accused was the last person who was seen with the deceased and therefore, it was incumbent upon him to explain the circumstances under which the deceased herein met his death.

25. The investigating officer on the other hand stated that no one witnessed when the deceased was killed save for the fact that the accused was allegedly the last person to be seen with the deceased. She testified that from her investigations, the relationship between the accused and the deceased was that of a father and a son and that the accused was in a relationship with PW1. It was also established that the accused wanted to marry the mother to the deceased, but the deceased was a stumbling block. PW 4 testified that he knew the accused person and that on 09.01.2020 at around 9.00p.m, while he was looking for miraa at Dallas, he saw the accused with the deceased. He stated that the accused was holding the hand of the deceased and it was like he was forcing him to walk; that the deceased wore a blue short and a blue T-Shirt. He later learnt from Wimwaro Radio Station that the deceased was missing and



the description that was given matched the child he saw that night. In the same breath, PW2 also testified that on 09.01.2020, as she left her place of work at around 9.00p.m. and on reaching near Kaimu Dispensary, she met the accused person in the company of the deceased though she didn't talk to them. That the following day, she heard that the deceased had died. She noted that the deceased was in school uniform and the accused was dressed in a purple T-Shirt with white stripes. It was her further evidence that, she knew the accused as the father to the deceased.

26. From the above testimonies, it is clear that it was the accused person herein who was last seen with the deceased before he was found dumped in the river.
27. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide a reasonable explanation as to what happened. The prosecution having tendered evidence that the accused was the person who was last seen with the deceased before he died, the accused person herein had a duty to give an explanation of how the deceased met his death.
28. In the Nigerian case of *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:

“The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

29. Similarly, in the Indian case of *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the court held that:

“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

30. The accused herein was thus required to offer an explanation on how the deceased met her death. Sections 111(1) and 119 of the *Evidence Act* provides as follows:

“ 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:



Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

31. In the circumstances of this case, it is my considered view that the accused person’s defence failed to offer any explanation as to how the deceased might have met his death. His defense, in my mind, amounted to a mere denial.

32. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused herein who unlawfully caused the deceased’s death. I find him guilty and convict him accordingly.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

..... for the Accused

..... for the State

