



**Republic v Ogechi & another (Criminal Case 18 of 2021)
[2023] KEHC 23719 (KLR) (21 September 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 18 OF 2021
REA OUGO, J
SEPTEMBER 21, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH MOGAKA OGECHI 1ST ACCUSED

CAYUS MAGENA OGECHI 2ND ACCUSED

JUDGMENT

1. Joseph Mogaka Ogechi (1st Accused) and Cayus Magena Ogechi (2nd Accused) are charged with the offence of murder contrary to section 203 and 204 of the Penal Code. The particulars of the offence are that; on the 23rd June 2021 in Karundu village in Raganga Sub- location Kitutu Central, Sub County within Kisii County the 1st and 2nd accused jointly with others not before the court murdered Chrisantus Ogechi Otwori.
2. The accused persons denied the charge and the prosecution called nine (9) witnesses to prove their case.

Prosecution Case

3. Mary Colleta Ogechi (Pw1) testified that, the deceased is her father and the accused persons her brothers. She stays with her parents in their home . They are a family of six children. The accused persons stay with them in the same homestead. On the 23rd of June 2021 she was at home. She accompanied her mother to go pick tea. They left her father in their homestead, preparing to go weed his Napier grass. She did not see the accused persons that morning as they had not woken up. Cayus's wife joined them at the shamba at 9.00am. After picking tea she left her mother at the tea centre and returned home. At that time Joseph was in the shamba with his wife. On reaching home she found the well open. This was unusual. At their home they were not sharing anything. Each household had their own rope to draw water from the well. She found the basin they use to wash clothes outside. Inside it



she found her father's trouser and his shirt was put on the line. She also found the house open and the jembe her father had was in the outer room. She called her father 3 times and there was no response. He could not be reached. This was unusual. She got unsettled. She decided to go to the well. She found the stick that is usually at the top of the well broken. She became suspicious as her father never used to draw water from the well or wash his own clothes nor was the well left open. She decided to go to her uncle's place. Her uncle Fidelis Oregu and his wife Anna accompanied her back home. They could not see anything inside the well. Her uncle asked to go check if her father was in the shamba. He was not there. She returned home and her uncle suggested that they get the person who digs wells so to find out if her father was inside the well. Ouru (Pw5) a well digger arrived at 11.00am. He entered the well and found her father inside the well. They called the assistant chief Simeon Okeyo. They also called the police who came with a rescue team. The body was removed. His head was facing downwards and his legs were facing up. He had an injury on the forehead. The body was taken to Kisii referral hospital. The accused persons and their wives returned home. She looked around and found a place a freshly dug hole. She also found 2 buttons of a shirt. The place looked like there had been a struggle. Pw1 testified further that in 2020 the accused persons and the deceased had a dispute over a portion of land he sold. That they were not on good terms with the deceased and that the accused persons had threatened to kill their father, after they took the portion of Emonga by force. That at one time their father found that he did not have his title deeds and on going to the lands office he found that the accused persons had written a letter stating that their parents died long ago and that they wanted to do succession. Pw1 identified a statutory declaration form sworn by the accused persons dated 5th November 2020. That due to the disputes they had at their home they were not on good terms with the accused persons.

4. Concepter Nyabangi Ogechi (Pw2) testified that, the accused persons are her sons and the deceased is her husband. They all stay in the same homestead. On the 23rd June 2021 she woke up and left to go pick tea with Pw1. She did not see Cayus that morning. She saw Joseph and his wife at the shamba. Cayus wife went to the shamba where they were picking tea. Pw1 went back home when she went to have the tea leaves weighed. On reaching home Pw1 called her to go back home. She did so. She found many people in her homestead. Whilst there her husband's body was pulled out of their borehole. The deceased had injuries on his forehead. She had no disagreement with the deceased. The children and the deceased did not agree, they had a land dispute. She noticed buttons at her kitchen door and it looked like there had been a struggle at the said place. She saw the accused persons after the body was removed, standing at a distance. Pw2 identified the following items; a grey trouser Pext 8(a) belonging to Joseph Mogaka, a black jacket belonging to Cayus Pext 8 (g), a grey jacket Pext 8(b) belonging to Mogaka, sports shoes belonging to Mogaka, cream trousers 8 (e) belonging to Cayus and a shirt 8(f) belonging to Cayus.
5. Simon Ogango Omabayu (Pw3) testified that; he is the assistant chief of Raganga Sub-location. He knows the deceased and the accused persons. They are the sons of the deceased. Pw1 is the daughter of the deceased. They all stay in one homestead. In 2018 he handed a dispute after the deceased sold a portion of his land to pay a debt. The accused persons wanted their share of the money that was paid to the deceased. In June 2021 the chief called him and told him something had happened at Karundu village. He went to the home of the deceased and found the him inside the borehole. Police were called and the body was removed. The body had injuries on the head. The accused persons were present all along.
6. Fidelius Orero Odwori (Pw4) testified as follows; the deceased is his older brother, Pw2 is his wife and Pw1 is the daughter, the 2 accused persons are his sons. All stay in the same homestead. On the 23/6/2021 whilst at his homestead he was told by Pw1 that she had come back from the shamba and found their borehole open. That this was unusual and that she could not find the father. He accompanied Pw1 back to their home and he called Ouru who entered the borehole and found the



- deceased inside. The accused persons were not inside the home at that time. He later on attended the post mortem. He knew of one dispute which the family had but it ended well in 2018. He did not know of any other dispute.
7. Mark Obesi Ogari alias Ouru (Pw5) testified that, he digs boreholes. He knows the deceased's family. On the 23/6/21 at 10.30am Fidelis called him to go to the home of the deceased. He was requested to enter the borehole. He did so and found the body of the deceased inside the said borehole. He informed Fidelis.
 8. Doctor Naomi Ariaga (Pw6) testified that she conducted a post mortem on the body of the deceased Christanus Ogechi Otworu on the 25/6/2021. He was a male African of about 70 years old. She noted that the deceased had abrasions on the right hand of 3x2cm, right index finger 3x2cm, right thumb 3x2cm, abrasions on left elbow 2x2cm, left hand 4x3cm, abrasions on the left knee 9x4cm, abrasions on left knee 5x4cms. Fracture of right ribs from number 1 to 11, fracture of the left rib from number 4 to 9, contusion of the right lower lobe of the lung. He had blood in the chest cavity. There was no congestion in the lungs, no water in the lungs. The heart and major vessels were normal. The digestive system had a laceration of the right lobe of the liver measuring 7by 4cms. In the genito urinary system he had a hematoma in the right kidney and on the head a laceration of the frontal scalp 9 x 4cms. He had a left front scalp measuring 1x1cm. He had a left fracture on the left mandible bone he had no missing teeth. The brain had a commuted fracture right frontal to right panetal to occipital measuring 22cms. He had a global subglial subarachnoid hemorrhage. There was no fracture in the spinal code. After examining the body, she concluded that the cause of death was multiple injuries to the head, chest and abdominal injuries due to blunt force trauma. Sample were taken of the nails, nail bed and hairs by Doctor Leah Obosy. During cross examination Pw6 told court that the hand abrasions on the right and left are signs of defending oneself. That the injuries were more on the head. There was no water in the lungs and no signs that he fell down.
 9. Polycap Lutta Kweyu (Pw7) a government analyst testified that on the 13/7/2021 he received the following items; a grey tracksuit trouser with red black stripes in multi-colored marked "A1", a hooded black jumper with a label branded "Mountain West" marked "A2", a pair of muddy grey sports shoes No. 44 marked " A3", a metallic bar marked "A4", a cream trouser marked "B1", a short-sleeved shirt with black/brown prints marked "B2", a black hooded long sleeve jacket marked "B3" and a soil sample marked "C". Nail cuttings and hair samples of Chrisantus Ogechi (deceased) indicated as the deceased marked "D1 & D2". On the 3/8/21 he also received blood samples of Joseph Mogaka Ogechi and Cayus Magena Ogechi marked as " E1 & E2".
 10. Pw7 was requested to carry out DNA profiling and indicate any genetic relationship. He carried out the analysis and came up with the following report. The metal bar " A4" the trouser item " B1" and the jacket item "B3" were slightly stained with the blood of a human being. The trouser item "A1" the jumper "A2" and the soil item "C" were moderately stained with blood of a human being. The dark stains on the shirt item "B2" and the shoes items "A3" tested negative for presence of human blood. He proceeded to generate DNA profiles and came up with the following; the DNA profiles generated from blood stained on the trouser item "A1" from jumper item "A2" , the metal bar item " A4" trouser item "B1", jacket item "B3" and the soil item "C" all matched the DNA profile generated from the reference sample of Chrisantus Ogechi the deceased, i.e., the blood on the items belonged to the deceased. The stains on the pair of shoes item "A3" and the shirt item "B2" did not generate a DNA profiles. He produced his report as exhibit 9.
 11. No. 240070 Inspector John Ngeno (Pw8) an officer based at DCI Kisii attached to scenes of crime investigations testified as follows; on the 17/3/21 at around 10.30am he was requested by P.C Ibunga and Corporal (Cpl) Nyangua of DCI Kitutu Central to accompany them to a scene of crimes at



Nyamagunda village in Nyatieko. It was a scene of murder. At the scene he was requested to take photographs of the scene. Photo No. 1 was a general view of the borehole and the deceased's main house and kitchen. Photo no. 2 A & 2B shows the general view and close-up view of the basins and clothes allegedly being washed by the deceased. Photo no. 3 shows the general view and close-up view of the borehole. Photo no. 4 is a close-up view of the borehole after it had been opened. Photo no. 5a,5b and 5c show a general and close-up view of the deceased's body as it was being taken out of the borehole. Photos no. 6 were 4 photographs of the general and close-up view of the deceased's body after being retrieved from the borehole and the different bruises on the body. He prepared and produced a certificate and photos as exhibits, Pext. Nos, 3 and 3a to 3m.

12. No. 71112 Cpl. Kennedy Nyagwa (Pw9), an officer attached to DCI Kitutu Central Sub- County performing general duties testified as follows; on the 23/6/2021 at about 1300hours he was called by the DCI and instructed to proceed to Ranganga sub-location where there was a case of drowning in a borehole. He visited the scene with the scenes of crime personnel. He found a big crowd in the compound. He secured the scene. He saw an open borehole and some clothes in basin. They retrieved the body from the borehole and the scenes of crime officer processed the scene. He also made a physical examination of deceased's body. He noted he had a head injury and he was bleeding. They took the body to KTRH for preservation. Thereafter he recorded statements from witnesses. He learnt that the 2 accused persons had a long-standing dispute with their father concerning a parcel of land L.R. West Kitutu/Bugiserio/1587. He arrested the 2 accused persons to help with the investigations. The post mortem was done on the 25/6/2021. The doctor confirmed the deceased died of broken ribs, chest injuries and head injuries. The deceased had no water in his lungs which meant the deceased was thrown into the borehole. This made him change his pattern of investigations.
13. Pw9 testified further that on the 27/6/21 he visited the scenes of crime as it was clear to them that they were dealing with a murder case. They looked for the murder weapon. They feared going with the 2 accused persons as the area was volatile. They were accompanied by the wives of the accused persons to the scene. At the 1st accused's house, they found a heap of soil (Pext 8 (h)they scooped it to be analyzed by the government analyst. They picked sport shoes grey in color (Pext 8 (c) and a track trouser grey in color with black and red stripes (Pext 8 (a) and a jumper (Pext.8(b). They also recovered a metal bar (Pext d) which they thought was the murder weapon. They prepared an inventory of the said items. From the 2nd accused's house, they recovered a black jacket (Pext 8 (g), a khaki trouser (Pext 8 (e) and a mixed color shirt (Pext 8 (f). They wrote the said items in an inventory, Pext 10(a) & 10 (b). The inventories were signed by the wives of the accused persons Norah Bocheri Mogaka and Julian Mwola. On the 29/6/2021 he requested the doctor to get samples from the deceased to help in comparison during the DNA analysis. The doctor removed hair from the pelvic and nails. He sent all the said samples to the government analyst thereafter. He also got learn that the 2 accused persons had made a statutory declaration on the 5/11/2020 that their father was dead and also that their father had made a report at Kisii Central vide OB No. 38/3/12/2020 complaining that his life was in danger.

Defence Case

14. The 1st accused Joseph Mogaka Ogechi (Dw1) gave a sworn statement. This is his defense. On the 23/6/2021 he went to the shamba with his wife at 6.00am. They worked till 11.30am. On the way home they met a small group of people who stopped him and told him that they had heard that their father had fallen in the well. They went quickly. His wife had gone ahead like 10 minutes. On reaching the gate he found Pw1 his sister. She started calling loudly “ come and help come and help”. He asked her what was going on and she told him that their father had fallen in the well and that she had called the expert to come and remove him from the well. He went to the well and found the item they draw water with inside the well, a bucket with half water and a basin with his clothes, his shoes, soap plastic



chair and his shirt which had been washed and was dripping with water. The person to remove the body arrived just at the time he arrived in the home. He could not see inside the well. He asked his mother what happened and she told him to ask Pw1 who was home at that time. The person to remove the body was looking for a rope then. He went to him with a key. He asked him to call the police as the father's head was split inside the well. Pw1 started shouting that she had gotten a chance to remain in the compound. Pw1 spoke badly about him and the deceased. She was blaming him because of the case he had with the deceased over her 2nd marriage. Pw1 was claiming the lower part of the shamba. She was revenging against him over the shamba. That Pw1 had a dispute where she was married and they did the case but did not resolve it. Pw1 & Pw2 kept throwing words at the deceased during the said case. He told Pw1 he was mourning. The assistant chief and the chief held the hand of Pw1 as she spoke and took her behind the house. She came out again and said she will collude with the chief, assistant chief and police to ensure that she remained in the boma. By then the police had not arrived. The police arrived with the county recuse team. The deceased was removed from the well. He was bleeding a lot from the face. They carried him to Kisii Referral Hospital and the body was placed in the mortuary. He went to the police station to write his statement. The officer told him to remain at the station as Pw1 was crying in a manner no one could understand. He was thereafter placed in the cells. All this time Cayus was at his place of work in town. By the time Pw1 got home Cayus was not there. He called Cayus and told him of the incident. They are six siblings and he is the eldest son. He had no bad relationship with the father. His father and him stayed in town. His father had divided the shamba and given them their portions. They all lived in one compound. They have lived well. On the dispute over the shamba, their issues began when Pw1 left her 2nd marriage. Pw1 made his children leave sleeping in their mother's house. Pw1 also started plucking tea with the mother. Pw1 would pluck tea and transport using the boundary/ fence. His sister and the workers had a dispute over that. His father took action and called the chief plus his uncle and they went to the shamba and his father fixed the fence himself. His sister was not satisfied. She wanted five more lines of tea. Their father refused and she added five lines. They resolved the dispute that way. That their father sold a shamba he was not given a portion. He knows that the money was used to pay debts. His father authorized him to ensure the bank debt was paid. His father trusted him and entrusted him with the assignment. The said transaction did not cause any dispute with the father but there was a dispute between his father mother and the sister. The mother and sister kept asking him where he took the money. He kept telling her to go get married. On the caution he went to the station with his father and brother and they did a statement and left. They were not charged. They resolved the matter at the police station and it ended there. That his family is not at their home. They were chased the next day. Noone is inside his boma. Pw1 & Pw2 are in his boma now. That he saw the keys produced in court. That on the date of the incident Pw1 & Pw2 entered his boma at 7.00am. Pw1 had a duster in the form of a blanket used to clean the house and it had blood. Pw2 told his wife that she wanted to perform a clan rite. She asked for a jembe. His wife told her that it was in the store. Pw1 entered the store and gave it to Pw2. They took the duster with the blood and placed it outside the house and forced his wife to jump over it inside and out and they threatened her. Pw1 took the duster and told his wife to lick the duster. His wife refused. She entered the store and they took a chuma which they used to beat and poke his wife with. Pw1 took the blood in her finger and licked it and pushed her inside the bathroom. They opened for her and showed her money from the wardrobe. They removed the money after entering the house. They chased his wife and she is currently in their home and she is mentally disturbed. He is suffering because of the stand over the boma. His mother used to threaten them with the father that she had a brother working with the government and that she would make sure she chased them from the boma. 184

15. Cayus Magena Ogechi (Dw2) the 2nd accused stated as follows in his defense; on the 23/6/2021 he woke up at 6.40am and went to his place of work in Kisii town at Nyabera Masosa. He worked till 11.30am when Joseph called him and told him that their father had fallen in the well. He left work



borrowed a bike and went home. he arrived in their home at 12.00pm. He found many people. He went to the well and found the items Pw1 uses to draw water. The stick was broken and there were clothes some were still wet. His father's body was still in the well. He was bleeding on the face. His father was placed aside and people were examining him. Pw1 & Pw2 were there. He asked Pw2 what happened. She told him that she was at the tea centre and that it was Pw1 who called her. Pw1 was crying saying she had a chance to stay in the boma and that she would teach them the experience of staying in the boma. The body was removed and taken to Kisii Referral. The investigating officer (I/O) asked them to go and write statements. He went with his brother and after writing the statement the I/O told them that since people were crying they could be placed in the cells because of what their sister had said. Pw1 is the one who was in the boma when the body was found. His relationship with Mzee was good, he brought him up and even taught him the trade. On the caution, his father called him and his brother and they went to the police station. Their father wrote a statement. They did not. The shamba has been subdivided. It was done by Mzee. There was no fight. Pw1 started plucking tea and interfered with their boundaries, there was a dispute but it was resolved. Pw1 demanded the money from the sale of the shamba to pay debts. He was charged because of the grudge Pw1 & Pw2 had with their father. His family is not at home. Pw1 & Pw2 chased them when they were arrested. Pw1 & Pw2 are staying in the boma now.

16. Dennis Onyiego (Dw3) testified that he knows the accused persons. On the 23/6/2021 he reported to work at 8.00am and found his boss Cayus at work. They worked till 11.00am when he received a call and he went out and talked to his caller. On returning he told them that he had to go home to confirm what he had heard on the phone. Cayus left between 10.00am and 11.00am. He told them he was going home. time passed. They called him between 2.00pm and 3.00pm and he told them that he had found his father had died and was in a well. That on 22nd Cayus was at work but he did not report to work on the 24th.
17. Ronald Omwenga (Dw4) testified that; he knows the accused persons. The father of the accused persons and his father are brothers. He is their cousin. He has known them since childhood. He has not noted any fights at home. The 1st accused is like a mentor to him. They live together. He has never been called over a dispute in their family. There is a time his father was called over a dispute they had and it was resolved. The dispute was over a shamba. It was in 2020 Pw1 Colleta his cousin wanted a portion of the shamba. His father told him that it was discussed and she was given a portion of the shamba. He has not heard of any dispute thereafter. That on the 23/6/2021 he attended a wedding. His father and his wife informed him that his uncle had died. He does not know of any criminal records of the accused persons. They have lived well.
18. At the close of the defence case the prosecution chose to rely on the evidence on record. Mr. Bonuke filed written submissions. A summary of the defense submissions is as follows; there was no direct evidence adduced that the accused persons murdered the deceased. That the prosecution has not placed the accused persons on the scene of crime and that the evidence adduced was circumstantial. The I/O went to the alleged scene of crime four (4) days later which shows incompetence as the scene could have been tampered with, that fake evidence could have been planted. That the alleged murder weapon was used to poke the wife of the 1st accused, after they went to his house with a blanket that had blood, this discredits the DNA tests carried out, if it was the same metal bar frequently used by the deceased. That Pw1 & Pw2 were persons of interest in the case, being persons who were causing havoc as stated by the accused persons. Reliance was made on the case of Sawe vs. Republic (2003) KLR 364 and Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR) on what a court must observe if it were to convict an accused on circumstantial evidence only. That the accused persons denied committing the murder and that the burden of proof does not shift to them. That the land issues within the family were resolved in 2018 which controverts the evidence of Pw1 and Pw2. That suspicion cannot suffice



to infer guilt on an accused person (See Joan Chebichii Sawe vs. Republic Criminal Appeal No. 2 of 2002). On whether the accused persons had malice aforethought, reference was made to section 206 of the Penal Code and Republic vs. Tumbe S/O Ochen [1945] 12 EACA 63. It was submitted that there was no direct evidence to support the ingredients of section 206 of the Penal Code. There was no eye witnesses and that the prosecution seem to have charged the accused persons on the testimonies of Pw1 and Pw2 who said that they had land issue with the deceased. That the accused persons on the material day were running their normal day to day activities and on discovery of the body they were present. They did not resist arrest. That the prosecution failed to prove their case beyond reasonable doubt.

Analysis And Determination

19. For the prosecution to prove a charge of murder, the following must be proved; the death of the deceased, that the death was due to an unlawful act or omission of the accused person or persons and that the accused person/s had malice aforethought (See Antony Ndegwa Ngari vs Republic [2014] eKLR).
20. The death of the deceased has been proved. Pw1, Pw2, Pw3 , Pw4, Pw5, Pw7, Pw8 and Pw9 saw the body of the deceased. Pw6 did a post mortem on the body of the death and formed the opinion that the cause of death was multiple injuries to the head, chest and abdominal injuries due to blunt force trauma.
21. The next issue is whether the accused persons caused the unlawful death of the deceased. As correctly submitted there is no direct evidence that was adduced that the accused persons murdered the deceased. The prosecution case is based on circumstantial evidence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, 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.

In Abanga alias Onyango v R Cr. App. No 32 of 1990, the Court of Appeal set out the conditions be applied when considering circumstantial evidence 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; 9iii) 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.”

22. None of the witnesses saw the accused persons murder the deceased. Pw1 and Pw3 testified that they left the deceased home when they left to pick tea. They did not see the accused persons at the time they left the home. They saw the 1st accused and his wife working in their part of the shamba the same day at 9.am. The evidence that links the accused persons is that of the items recovered from their houses. According to Pw9 the items were recovered 4 days later. This because they had not thought it was a murder case, but after post mortem they went back to the scene and searched the houses of the 1st and 2 accused person. They could not go with the accused persons as the situation was volatile. They



found sports shoes 'A3', a track suit grey in color with red and black strips 'A2' and a jumper written MH Western plus a metallic bar 'A4' from the 1st accused's house. From the 2nd accused's house, they found a black jacket 'B3' a khaki trouser 'B1' and mixed colored shirt 'B2'. Each inventory was signed by the spouse of each accused person. They found a heap of soil in front of the 1st accused's house. The government analyst report indicates that the metallic bar, the trouser 'B1' and the jacket 'B3' were all lightly stained with human blood of human origin. The tracksuit 'A1' the jumper 'A2' and the soil 'C' were moderately stained with blood of human origin. The analyst's opinion after carrying out the tests as per the request was that the DNA profiles from the blood stains on the trouser 'A1', the jumper 'A2' metallic bar 'A4', the trouser 'B1' the jacket 'B3' and the soil all matched the DNA profile generated from the reference sample of Christianus Ogechi the deceased.

23. Sections 111(1) of the [Evidence Act](#) provides as follows:

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“ 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.”

24. The 1st accused in his defense stated that his mother Pw2 and sister Pw1 went to his house and performed some rituals with human blood in the presence of his wife and that they even had a blanket which had some blood which was smeared on the metallic. He claimed that his wife is now insane because of what Pw1 and Pw2 made her do. It is not the duty of the accused persons to prove their innocence, however they had a duty to explain how the blood got to their clothes which were found and taken from their houses. They do not deny that the clothes are theirs or that they were found in their houses by Pw9 and his team. The 1st accused did not call his wife to state what happened. He claimed she had gone insane, but did not produce her in court for the court to establish what he had stated or a medical report to prove that she was not mentally fit to testify. His evidence on what is alleged to have been done by Pw1 and Pw2 is hearsay evidence. Further Pw1 and Pw2 were never asked about the alleged activities during cross examination. I am therefore not persuaded that it is Pw1 and Pw2 who took blood to the house of the 1st accused and 2nd accused and planted it on their said items' clothes and metallic bar. This evidence was an afterthought on the part of the 1st accused. The deceased had injuries on his head caused by a blunt object. I find that the metallic bar recovered from the 1st accused's house which had his blood was the weapon used to hit the deceased causing the serious injuries he sustained and he died. There was also evidence from the doctor Pw6 that the deceased had wounds on his hands which showed that he was defending himself. There was no water in his lungs and therefore it was not a case of drowning. The 1st accused person's defense was an afterthought. He also mentioned that Pw1



and Pw2 had threatened to fix them. I do note that they were not in good terms. I observed the Pw1 and Pw2 as they testified, in my view they truthful and I did not notice any malice as they testified. They were honest and hurt by what had happened. They each withstood thorough cross-examination and their evidence on the land dispute between the deceased and his two sons was corroborated by Pw3, Pw4 and Dw4 the defense witness. From the evidence adduced the land dispute started in 2018 and was still ongoing in 2020.

25. The 2nd accused stated that he was at his place of work. He raised a defense of alibi. Pw1 stated that he was in the home the previous day but did not see him as they left to go pick tea. His witness Dw3 saw him at 8am when he reported to work. He was not with the accused between 6am and 8am before he reported. His evidence did not assist the 2nd accused for he could not tell where the 2nd accused was before he reported to work. I am not persuaded that Pw1 and Pw2 were out to fix the accused person. The conduct of Pw1 narrated by the 2nd accused is an afterthought. Nothing about her conduct was mentioned during cross-examination.
26. The accused persons have not denied that the items recovered were their clothes. They were in the home on the material day. The evidence points to them as the persons who had the opportunity to cause grievous harm to the deceased and thereafter threw his body inside a well inside their homestead. From the evidence adduced there is strong circumstantial evidence which points to the 1st and 2nd accused as the persons who caused the unlawful death of the deceased. I am not persuaded as submitted that this was a case of suspicion. The evidence irresistibly points to the 1st and 2nd accused persons as the persons who caused the death of the deceased. I am satisfied that the prosecution has proved beyond reasonable doubt that the 1st and 2nd accused persons caused the unlawful death of the deceased.
27. The final issue for determination of whether there was malice aforethought on the part of the accused persons. Section 206 of the Penal Code defines malice aforethought as follows:

“206. 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.”

28. The Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR, the Court of Appeal held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;



- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

29. Pw6 performed the post mortem on the body of the deceased Christanus Ogechi. She noted that the deceased had abrasions on the right hand ,right index finger , right thumb , abrasions on left elbow , left hand, abrasions on the left knee, abrasions on left knee. Fracture of right ribs from number 1 to 11, fracture of the left rib from number 4 to 9, contusion of the right lower lobe of the lung. He had blood in the chest cavity. There was no congestion in the lungs, no water in the lungs. The digestive system had a laceration of the right lobe of the liver. In the genito urinary system he had a hematoma in the right kidney and on the head a laceration of the frontal scalp 9 x 4cms. He had a left front scalp measuring 1x1cm. He had a left fracture on the left mandible bone but he had no missing teeth. The brain had a commuted fracture right frontal to right panetal to occipital measuring 22cms. He had a global subglial subarachnoid hemorrhage. After examining the body, Pw6 concluded that the cause of death was multiple injuries to the head, chest and abdominal injuries due to blunt force trauma. The injuries sustained by the deceased were grievous and were inflicted to him to cause his death. He had severe head injuries. I am persuaded that prosecution has proved malice aforethought beyond reasonable on the part of each accused person.
30. In conclusion I find that the prosecution has proved the charge of murder beyond reasonable doubt. I find Joseph Mogaka Ogechi and Cayus Magena Ogechi guilty and convict each accused person of the offence of murder of Christanus Ogechi the deceased as charged.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023.

R. E.OUGO

JUDGE

In the presence of:

1st Accused Joseph Mogaka Ogechi- Present

2nd Accused Cayus Magena Ogechi- Present

Mr. Ayodo -State Counsel ODDP

Orwasa/Okwaro - C/A

