



**Republic v Ogotu (Criminal Case 39 of 2020)
[2024] KEHC 14480 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 39 OF 2020
HI ONG'UDI, J
NOVEMBER 20, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ELVIS OTIENO OGUTU ACCUSED

JUDGMENT

1. Elvis Otieno Ogotu the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the penal code on two counts. The particulars being that:

Count 1: The accused on the 28th day of November, 2020 at Kivumbini area in Nakuru East sub-county within Nakuru county jointly with others not before court murdered Joseph Macharia

Count 2: The Accused on the 28th day of November, 2020 at Kivumbini area in Nakuru East sub county within Nakuru county jointly with others not before court, murdered Solomon Mathenge Muthoni.
2. The accused denied both counts of murder and the case proceeded to full hearing with the prosecution calling a total of eight (8) witnesses. PW1 - Amar Hashiru a boda boda rider testified that on 28th November, 2020 at 6 pm he gave his motorbike to the accused to transport a customer, as he went to see his brother. Upon his return at the stage he found many people there and a cyclist came and reported to them that the accused was being beaten at Kivumbini. He went to the Bondeni police station with the stage chairman called Babu and reported the incident.
3. They took the police to the scene and later found the customer whom the accused had carried there. The customer informed them that the police had taken the accused to the provincial general hospital. They found him there bleeding from the head, and was being treated. He learnt from the police that the accused had been involved with the murder. His motorbike KMSS 160D was later found in a ditch near Kivumbini area.



4. In cross examination he said the accused did not have a motor-bike so he would be given one by the group. He did not know who had beaten the accused.
5. PW6 - Dr. Titus Ngulungu together with Dr. Karman conducted the post mortem in respect of Solomon Mathenge, on 3rd December, 2020. They found the deceased to have had two stab wounds on his neck measuring 3cms. There was blood in the chest cavity - 750mls. The wound had cut the artery that supplies blood to the brain. The cause of death was massive blood loss as a result of vascular injury due to sharp blade trauma to the root of the neck. The post mortem report was produced as EXB P1. He said the wound was caused by a sharp object which could have been a knife.
6. He further examined the body of Joseph Macharia. It had a stab wound below the 2nd rib and an injury on the lung on the right side. The main vein from the head was cut, and there was massive bleeding from the chest. The cause of death was serious bleeding. He produced the post-mortem report as EXB2. He said the wounds were caused by a sharp object.
7. PW3 - Michael Miguna Macharia an uncle to the deceased and Silas Nyaramba Wairimu (PW5) witnessed the post mortem.
8. PW7 - Peter Oduor stated that he operates a boda boda business and is a carpenter. On 28th November, 2020 at 3pm it was drizzling and he went home Kivumbini village to get an umbrella. The rains increased and he heard people screaming. After the rains subsided he saw five (5) motorbike riders armed with pangas, knives and bottles, and they cut his motorbike. He went where people were screaming and he saw one dead and one injured persons. He rushed to pick his motorbike which was already cut. He then went to the police station to report. He did not identify the people on the motorbikes. He denied knowing the accused person, nor those who murdered the deceased persons.
9. PW8 - No. 63488, P. C John Mutinda testified that on 28th November 2020 at around 2pm while on duty at Bondeni police station they were notified of an incident at Kivumbini. They were taken to the scene where they found two dead bodies, which they took to the mortuary in a police vehicle. They were also informed of a person who had been beaten and badly injured by members of the public. They rescued him and took him to hospital. The accused is the person they rescued and he was said to have ferried the culprits to the scene on his motorbike KMFF 160D whose owner was PW1. The culprits were said to be on a revenge mission. He added that the witnesses are so scared and can't testify against the culprits.
10. In cross examination he said no weapons were recovered. That the accused was not armed but he ferried the culprits. PW1 confirmed to them that the accused would borrow his motorbike. Further that PW7 identified the accused as one of those seen ferrying the culprits. To him the accused was an accomplice since the people he carried were armed.
11. In his sworn defence the accused stated that he lived in Bondeni Plot 18 Nakuru and used to do boda boda (motorbike) operations. On 28th November, 2020 at 4pm he was at the stage of St. John Bondeni when he got a customer whom he took to Shabab Nakuru and she paid for the ride. On his way back, he passed through Flamingo and bought Mogokaa and groundnuts and went back to the stage. It started raining as he waited for passengers while eating his stuff.
12. The rain reduced and he got two (2) female customers (market women) whom he did not know and he took them to Kaloleni Nakuru. After dropping them some five (5) young men armed with pangas appeared. One took his motorbike whose keys were in the lock and he went back to the others. He followed to ask for the keys and was cut on the left side of the head. He was then hit on the head with a piece of wood. By then his money had been taken. By then he was bleeding a lot from the head and



- even lost consciousness. He found himself at the PGH Nakuru. He said the motorbike he had was KMFF 160D Make Aujuri and blue in colour.
13. He stated that he had met his employer (PW1) at the stage and he gave him Ksh 300/= though PW1 did not see the customers. He was arrested while in hospital and placed in cells at Bondeni police station from where he recorded a statement. He denied knowing PW7 nor carrying any armed customers using a red motorbike. He denied knowledge of the Confam Gang though he had heard about them.
 14. In cross examination he denied being a member of the Confam Gang. He said the youngmen beat him. That it was while at the police station that he heard of the killings in Kivumbini. He further denied knowing PW7. He said he had on that day carried several customers whom he did not know. He however denied carrying any armed people.
 15. Counsel for the prosecution opted not to file any submissions.
 16. In her submissions dated 18th April, 2024 M/s Cheruto for the accused argued on two issues. On whether the prosecution had proved its case beyond reasonable doubt, counsel referred to sections 203 and 204 of the Penal Code and outlined the elements of murder to be:
 - i. Malice aforethought
 - ii. Death of a person
 - iii. Death caused by an unlawful act or omission. Reference was also made to the case of Anthony Ndegwa Ngari V Republic [2014] eKLR which outlined the same elements.
 17. Counsel referred to the evidence of PW2 and PW3 who identified the deceased persons' bodies and PW6 who corroborated the testimony of PW2 and PW3 and produced the post-mortem reports of the deceased persons. She thus submitted that the death of the deceased was not in dispute.
 18. On whether the accused committed an unlawful act/omission which caused the death of the deceased persons counsel submitted that none of the prosecution witnesses linked the accused person to any acts that led to the death of the deceased. That the investigating officer said he acted on the words of Peter Oduor and arrested the accused because he ferried the perpetrators that caused the death of the deceased. Counsel submitted that Peter Oduor stated that he was not at the scene when the killings occurred. That he said he attended court because of the destruction of his motor bike.
 19. Counsel submitted that from the testimony of the doctor and investigating officer the deceased died of stab wounds caused by stab wounds. However, no weapon was produced in court to link the accused to the murder. That the accused in his defence denied being at the scene at the time of the murder. On whether the accused had malice aforethought counsel referred to section 206 of the penal code which provides:
 - 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 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 as facilitate the flight or escape from custody of a person who has committed or attempted to commit a felony



20. Relying on the above provision and the cases of Bonaya Tutu Ipu and another V Republic [2015] eKLR and Chesakit V Uganda, Cri App No. 95 of 2004, counsel submitted that malice aforethought against the accused, has not been proved, by the prosecution. Reference was also made to the case of DPP V WOOLMINGTON, (1935) UKHL1. She thus urged the court to acquit the accused under section 215 of the Criminal Procedure Code.

Analysis and determination

21. I have carefully considered the charge, the evidence on record plus the submissions by the defence. The main issue for determination is whether the prosecution has proved the charge of murder against the accused person. Section 203 of the penal code defines murder as follows:

“Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder”

Section 204 of the penal code provides for the sentence for murder. It states as follows:

“Any person convicted of murder shall be sentenced to death”.

22. From the above definition a charge of murder may only be proved if the following ingredients are established by the prosecution:
- i. Death of the deceased
 - ii. Killing of the deceased by the accused (actus reus)
 - iii. Intention to kill (mens rea)

Death of the deceased persons

23. PW3 and PW5 witnessed the post mortem of the 1st and 2nd deceased persons respectively. PW2 also confirmed the death of her son (deceased in the 2nd count). Besides that, Dr. Titus Ngulungu (PW6) carried out the post-mortem upon identification by PW3 and PW5 respectively. He produced the post mortem reports as P. EXB 1 and 2 respectively. He found the cause of death in the case of both accused persons to be massive haemorrhage plus sharp force trauma. There is therefore no dispute in respect of the fact of death.

Whether the accused killed the deceased (actus reus)

24. From the evidence placed before this court the prosecution relied on circumstantial evidence to blame the accused for the death of the deceased persons. There is no witness who saw the deceased persons being killed. What then is circumstantial evidence, and what weight should be attached to it to justify a conviction? I will consider a few cases which dealt with such evidence.
25. The Court of Appeal in Sawe V Republic [2003] KLR 364 held thus:
1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.
 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.



3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.
 7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.
26. Further in the case of *Nzivo V Republic* [2005] 1 KLR 699 the same court held as follows:
5. In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.
27. Additionally, in *Ndurya V Republic* [2008] KLR 135 the Court of Appeal held thus:
1. Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.
28. In the present case the only witnesses who gave evidence related to the scene were PW1, PW7 and PW8. PW1 is a motorbike owner, who owned Motorbike registration No. KMSS 160D blue in colour. He testified that on the 28th November, 2020 at around 6pm he had given his motorbike to the accused for purposes of ferrying a customer. He did not tell court where the accused was taking the customer. He later received information that the accused was being beaten at Kivumbini. He reported the matter at Bondeni police station and went to the scene. He did not tell the court who alleged that the accused was one of the killers.
29. The next witness is PW8 a police officer. He confirmed that the office at Bondeni police station received information in respect of a person who was being beaten by members of the public at Kivumbini. This was on 28th November, 2020. They rushed to the scene and rescued the victim whom they took to hospital. His evidence was that it had been indicated that the accused had ferried the culprits to the scene. He did not avail any of the persons who gave him this information. Peter Oduori whom he claimed was one of the informers testified as PW7.
30. In his evidence PW7 told the court this at Page 13 of the proceedings:
- “I didn't identify the persons who were on the 5 motorbikes”
- At Page 14 in cross examination he said:
- “I didn't know who killed them. They were already dead. I didn't get to know who cut my bike. They were in rastas. I don't know the accused. I didn't see him at the crowd”.
31. The evidence of PW7 does not therefore confirm what PW8 (police) told the court about the accused. PW8 did not avail any witness who saw the accused ferrying the goons to the scene.



32. In his sworn defence the accused explained what transpired on 28th November, 2020. It was his evidence that he was attacked by a group of five (5) young people who were armed with pangas. This happened after he had dropped some two (2) customers, at Kaloleni Nakuru. They injured him and he found himself at the hospital. This evidence by the accused was not rebutted by the evidence by the prosecution witnesses.
33. PW8 relied on what he was allegedly told by people who never testified. Even for PW7 who testified, his evidence does not support the claims by PW8. Had the police carried out proper investigations the culprits would have been traced. Going by the definitions and expectations of circumstantial evidence stated above I am not persuaded at all that the prosecution has satisfied the test for such evidence to be relied on to sustain a conviction.
34. The evidence by PW8 confirmed that the accused was not arrested with any weapons. He did not even explain to the court from where the accused was rescued and where the incident took place. How far apart were the two scenes? None of those who beat up the accused were interrogated and/or arrested.
35. The accused was merely arrested and charged based on suspicion. As has been stated in *Sawe V Republic* (supra) suspicion however strong cannot provide the basis of inferring guilt.
36. After doing the above analysis, I have come to the conclusion that the prosecution has failed to prove its case against the accused to the required standard.
37. For my part I find him not guilty and acquit him under section 322(1) of the Criminal Procedure Code.
38. He shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 20TH DAY OF NOVEMBER, 2024 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

