



**State v Otieno (Criminal Case E008 of 2023)  
[2024] KEHC 14793 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14793 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E008 OF 2023  
RE ABURILI, J  
NOVEMBER 20, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**COLLINS OTIENO OTIENO ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person Collins Otieno Otieno is charged with the of the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 18<sup>th</sup> day of January 2021 at Kanyagwal location, Nyando sub county within Kisumu County, the accused murdered one Everlyne Akoth Otieno.
2. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial. The prosecution called a total of ten (10) witnesses in support of its case which is summarised herein below.

**The Prosecution’s Case**

3. PW1 Bonface Otieno Nyandya the Chief of Kanyagwal Location Nyando Sub-county testified that on the 18<sup>th</sup> January 2021 between 12am and 1am he was in his house sleeping when he heard a knock on the door and on asking who it was, he got a reply from the accused saying that he was the one, Collins Otieno Otieno. PW1 testified opened the door and the accused informed him that he had a domestic dispute with his wife, the deceased, and that he ended up cutting her left hand and so he wanted PW1 to help him escort the wife to hospital.
4. PW1 Accompanied the accused person to his house where they found the deceased lying outside the house on the ground in a pool of blood. He also testified that he found three other people present at



- the scene, two of whom he knew as Pascal Ariga and Arthur Ariga who retold the same story that the accused had told him.
5. PW1 testified that he mobilized the people at the scene and went and took his motorcycle on which the deceased and the accused were carried as they proceeded to Ahero Hospital as Pascal carried the other people who were at the scene on his motorcycle. It was his testimony that on arrival at the Annex Hospital at Ahero, the accused got off the motor cycle to take the victim from the motorcycle at which point he, PW1, heard the victim taking a deep breath which turned out to be her last.
  6. PW1 testified that he called the OCS who arrived with other police officers and they arrested the accused after which they all proceeded to the scene of the incident at the accused's home. It was his testimony that at the scene, they found a pool of blood and that the accused was asked to lead them into the house where they recovered a blood stained panga which the accused admitted was his. PW1 further testified that they also recovered a T-shirt and trouser.
  7. PW1 stated that he had known the accused person since he was born, over 18 years ago. PW1 reiterated his testimony in cross-examination.
  8. PW2 John Oluoch, the deceased's uncle testified that on the 26<sup>th</sup> January 2021, he was at the mortuary where he identified the deceased's body to the doctor for a post-mortem. In cross-examination, he testified that he attended the post-mortem as he was the eldest surviving person in the family and whom the family had requested to do so.
  9. PW3 Arthur Origa testified that on the 18<sup>th</sup> January 2021 at around 11pm he was in his house when he heard the sound of a panga slapping someone followed by the sound of a child crying emanating from the accused's house.
  10. It was his testimony that he proceeded to the accused's house where he found the accused, his wife and a child with both the accused and his wife each holding the child by one arm and each pulling the child to their direction. PW3 testified that he inquired as to what was the problem and the accused informed him that he did not want his wife to leave with the child. He testified that he informed them to give him the child but the accused took the child and slapped his wife with the panga on her upper arm to which the wife reacted by folding her hands as the accused pulled the panga which cut his wife.
  11. PW3 testified that he took the panga from the accused and took it into the accused's house before telling the accused to go and get a motor bike from the Chief and escort the wife to hospital. It was his testimony that the accused returned with the chief but as the chief was afraid of riding the motor bike, he woke up his brother, Maurice Origa, who took the accused's wife to hospital however the wife died on her way to hospital.
  12. PW3 identified the panga that the accused had used to cut the deceased and went on to state that he knew the accused who was his neighbor. He further testified that the accused was dressed in a blue jean and a blue white stripped t-shirt. He reiterated his testimony in cross-examination and further stated that he witnessed the accused slapping the deceased with a panga.
  13. PW4 Eric Omondi Abongo testified that on the night of 18<sup>th</sup> January 2021 he was in his house when he heard a dog barking so he got out and heard screams but returned to his house. It was his testimony that after 10 minutes, Maurice Juma Odeyo knocked his door and told him that he had been sent by the Chief to ask him to help ride his motorcycle to take the accused's wife to hospital as the accused had cut his wife.



14. PW4 testified that he went to the accused's house where he found that the accused's wife had already been taken to hospital so he and David followed them to Ahero Annex where they found that the accused's wife had already passed on.
15. It was his testimony that the Chief called the police who came and removed the body to the mortuary at Ahero after which the police went to the scene with the accused who removed a panga from the house and gave it to the police. PW4 testified that he knew the accused as he was a fisherman and further as he was a neighbour.
16. PW5 David Otieno Muga testified that on the 19<sup>th</sup> January 2021, he was asleep in his house at night when the chief woke him up saying he had a sick person whom he should take to hospital. He testified that he went with the chief to where the person was injured at a certain homestead where he found a lady lying down. PW5 testified that he knew that homestead as Mzee Origa's home but did not know its owner.
17. It was his testimony that it was the home of Arthur Origa and that when he inquired as to why she was lying down, he was told that she had fought with her husband who had injured her. He testified that he saw her with a cut on the left hand. PW5 testified that he was assisted by the Chief and another person to place the injured on to his motorcycle and together they left for the hospital. It was his case that at the home he found Arthur Origa and also saw the person who was said to have cut the lady. PW5 testified that he carried the Chief and another person while another motorcyclist carried the injured and her husband. He further testified that he had never known the lady's assailant before and thus he cannot identify him as he only saw him that night.
18. PW6 Dickson Mchana, a Consultant Pathologist based in Kakamega and covering Western and Nyanza regions testified that he carried out an autopsy on the body of Everlyne Akoth Otieno at Ahero Sub-County Hospital mortuary which body was identified by John Oluoch Omuga and Calvince Otieno Obongo on 26<sup>th</sup> January 2021.
19. Dr. Mchana testified that the body was draped in a maroon sheet, mild obesity, of a female adult, preserved in formalin, 8 days from date of death, severely pale. He further testified that there were 3 incised cut wounds, first across the left elbow, second at the back of left forearm and third on the back of left arm, widespread bruises and grazes involving both upper limbs and entire back.
20. Dr. Mchana further testified that internally, there was severance of blood vessels of left arm and that the stomach had food with no alcohol. It was his testimony that he found the cause of death was due to external blood loss due to sharp force trauma as a result of assault. He testified that he removed a nail and gave to the Investigating officer for further forensic analysis at Government Chemist. It was his testimony that he signed the Postmortem on 26<sup>th</sup> January 2021 which he produced as P. Exhibit 1.
21. In cross-examination Dr. Mchana testified that when one does not have enough blood, the kidneys become congested. He testified that there was excessive blood loss due to severed blood vessels and that though he could not recall how many people were present during the autopsy, the body was positively identified.
22. PW7 Maurice Odhiambo Origa testified that he did not know the deceased but that he knew the deceased who was his neighbour. He testified that he recalled on the 18<sup>th</sup> January 2021 he was asleep at 1am when he heard people talking so he peeped out of his front window when he saw the Area Chief Boniface Otieno and Arthur Origa, his brother. He testified that he then got out of the house and went to where the two were where he found other people gathered and on checking found a lady bleeding from her right hand and she was crying.



23. PW7 testified that they took her to hospital with Chief and that 2 nurses came to attend to her then she breathed her last. He testified that the police at Nyango were called and they came and went to arrest the deceased's husband. PW7 further testified that the deceased was taken to the morgue at Ahero District Mortuary as the accused was taken to cells. He testified that he was present when the police recovered the murder weapon.
24. In cross-examination PW7 denied lying that he saw the panga had blood on it. He reiterated that the accused was the one who retrieved the panga from his place and gave it to the police. He testified that he did not know the deceased prior to that date.
25. PW8 No. 75661 PC James Muriuki attached to DCI Nyando testified that on the 18<sup>th</sup> January 2021 he was in his house when he received a call from Corporal Ibere of a murder incident at Kanyagwal as reported by the area Chief Boniface Otieno. It was his testimony that he went to the report office and met the OCS and they proceeded to the scene where they met many people including the area Chief, Boniface Otieno and a suspect Collins Otieno. He further testified that the Chief said that the suspect had cut his wife Everlyne Akoth Otieno.
26. PC Muriuki testified that they handcuffed the accused and took him to his house and recovered a long panga, blue trouser jeans and white stripped T-shirt. PC Muriuki produced the panga as P. Exhibit 2, the Blue jeans as P. Exhibit 3 and stripped blue/white T-shirt as P. Exhibit 4. He further testified that the person whom they rearrested was the accused person.
27. PW10 George Lawrence Oguda, a Deputy Government Chemist testified that he received an exhibit memo from Nyando CID with the listed exhibits/items to determine evidential material, on 27<sup>th</sup> January 2021 from PC James Muriuki of DCI Nyando with five exhibits;
  1. A panga with a black rubber handle in khaki envelope marked 'A'.
  2. Finger nails from Everlyne Otieno (deceased) in a small plastic container 'B'.
  3. A white T-shirt with blue and blue T-shirt 'C'.
  4. Dark Blue Jeans trouser 'D'.
  5. Blood sample from Collins Otieno 'E' in a container.
28. It was his testimony that he examined the exhibits and arrived at the findings that the panga 'A', T-shirt 'C' and trouser 'D' were positive for blood of human origin and that subsequently generated DNA profiles from exhibits.
29. PW10 concluded that the blood stains on the panga 'A', T-shirt 'C' and trouser 'D' matched DNA profile of Everlyne Otieno (Deceased). He proceeded to produce the Report which he signed on 23<sup>rd</sup> March 2021 as P. Exhibit 5 and the memo as P. Exhibit 6.
30. In cross-examination PW10 testified that he did not collect the samples but rather the samples were brought by PC Muriuki and that he could not tell if the samples came from the deceased or the accused. He testified that the blood stain on the panga and found the DNA profile of the deceased on the panga.

### **The Defense Case**

31. The accused person gave a sworn testimony in which he stated that on the 18<sup>th</sup> January 2021 the deceased, his wife, was on the road crying and told him that she was returning from work at night when she was attacked by unknown people and injured.



32. The accused testified that he took his vest and covered her as she was bleeding after which he went to the thief to tell him what had happened and to seek his help to take her to hospital. The accused denied fighting with his wife. He testified that on the particular date he went home at 11am and on reaching the gate heard someone crying. It was his testimony that he asked him who he was but the person never answered but instead continued crying. He testified that he called out to his wife but she never responded.
33. The accused testified that those who killed his wife were robbers who wanted to snatch money and other items and that they were not arrested. He further testified that he and his wife lived peacefully without any disagreement.

### **Analysis and Determination**

34. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel. The accused faces a charge of murder contrary to section 203 of the Penal Code. That section defines murder as:

“ Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”
35. The prosecution has to adduce evidence to establish that the accused caused the deaths of the deceased children by an unlawful act which led to their death. The prosecution must prove that the accused action was motivated by malice.
36. The fact of death is not in doubt and was confirmed vide the testimonies of all the prosecution witnesses. PW1 and PW7 both testified that they helped the accused take his wife to hospital but that the deceased passed on as they got to the hospital. PW2, the deceased's uncle testified that he witnessed an autopsy on the body of the deceased Everlyne Akoth Otieno. PW6, Dr. Mchana carried out the post-mortem on the body of Everlyne Akoth Otieno as identified by her relatives and prepared the post-mortem report which was produced as PEx.1. According to Dr. Mchana, the cause of death was found to be external blood loss secondary sharp force trauma following assault.
37. As to whether the death of Everlyne Akoth Otieno was caused by an unlawful act or omission, Article 26 (1) of *the Constitution* guarantees every person the right to life. The postmortem report revealed that the deceased suffered injuries involving 3 incised cut wounds, first across the left elbow, second at the back of left forearm and third on the back of left arm, widespread bruises and grazes involving both upper limbs and entire back and that internally, there was severance of blood vessels of left arm and that the stomach had food with no alcohol. All these injuries in my view, if caused by an individual, amount to an unlawful act as no-one has the right to deprive another of their life. I am not persuaded that such injuries could have been self-inflicted or that they were as a result of a third party defending themselves from her attack on them. I am thus persuaded beyond reasonable doubt that the deceased person died out of an unlawful act.
38. As to whether it was the accused who unlawfully caused the death of Everlyne Akoth Otieno, PW1 the area chief testified that the accused came to seek his help to take his wife, who is the deceased to hospital after their disagreement which ended with the accused cutting the deceased on the left arm. This evidence was corroborated by PW3, Arthur Ariga who testified that he witnessed the accused cutting the deceased on the left arm over their struggle for a child, and this is after PW3 had initially heard a slap of a panga which made him go to the home of the accused only for him to encounter the scuffle taking place.



39. The nature of injuries as seen by both PW1 and PW3 were consistent with those observed by PW6, Dr. Mchana who carried out the postmortem on the body of the deceased. PW1 and PW8 also testified that when the accused led them back to his home, they recovered a panga which had blood stains and which blood stains were confirmed by PW10, the Government Analyst, to match the deceased's DNA.
40. In his defence, the accused denied committing the offence and stated that his wife, the deceased, was attacked by robbers who killed her and snatched her stuff. The accused sought to lay blame of his wife's death on unknown person or group of persons as the persons who killed his wife. Assuming his defence is plausible, and the robbers never attacked the couple from their house, how did the panga which was found in the house of the accused find itself with the deceased's blood and DNA? Did PW1 and PW3 have any grudge with the accused as to frame him with the heinous offence of unlawful killing of his wife? The accused was under no duty to testify to exonerate himself from blame. However, assessing the prosecution evidence as against the defence offered, I am persuaded that the evidence by prosecution witnesses PW1, PW3, PW8 and PW10 was reliable and cogent and corroborated each other and so was the rest of the evidence by the prosecution witnesses that it displaced the defence by the accused person.
41. I am persuaded that the prosecution has proved beyond reasonable doubt that it was the accused person herein who unlawfully killed the deceased, using a panga which was recovered and produced as an exhibit.
42. Finally, as to whether the accused had malice aforethought when he unlawfully killed the deceased, The essential ingredient for the offence of murder is malice aforethought. The circumstances which constitute malice aforethought are described under Section 206 of the Penal Code 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.”
43. What can be deduced from section 206 is that, malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the locus classicus case of Republic v Tubere S/O Ochen [1945] 12 EACA 63, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.



44. In the instant case, evidence adduced by the prosecution witnesses show that the aim of the deceased's attacker was clearly to cause grievous harm. Dr. Mchana noted that the deceased had 3 incised cut wounds meaning that she was cut on 3 separate occasions. PW3 also testified that prior to stepping outside of his house he had heard someone being slapped by a panga and that he subsequently he witnessed the accused cutting the deceased. It is clear that the accused set out to cause the deceased grievous harm. Accordingly, I find and hold that malice aforethought was proved beyond reasonable doubt.
45. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt.
46. Accordingly, I find the accused person Collins Otieno Otieno GUILTY of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly. Sentence to follow after records and mitigation.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

