



**State v Ochung (Criminal Case E006 of 2022)
[2024] KEHC 15688 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E006 OF 2022
RE ABURILI, J
DECEMBER 10, 2024**

BETWEEN

STATE PROSECUTION

AND

SYLVESTER AKELLO OCHUNG ACCUSED

JUDGMENT

Introduction

1. The accused person Sylvester Akello Ochung is charged with 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 28th February 2022 at Kadero sub-location, Seme sub county within Kisumu County he murdered one Palmer Kimathi Omondi. The accused person pleaded not guilty to the charge against him and the matter proceeded to trial.
2. The prosecution called a total of ten (10) witnesses in support of its case which is summarised below.

The Prosecution’s Case

3. PW1 Jenipher Akinyi Ochung, the accused person’s mother testified that on 28th February 2022, she was in her homestead at 6.15am when the accused arrived from his residence at his business place. She testified that the accused greeted her and asked her if other people had woken up to which she responded that she did not know.
4. PW1 testified that the accused then proceeded to his house in the home which he had rented out to a certain young man who lived there with a wife and a 2-week baby. PW1 testified that the accused called out to the occupants who opened the door and shortly after, PW1 heard screams coming out of that house and on looking, she saw the accused running away while carrying a baby as he held a jembe while the baby’s mother was chasing after the accused while screaming.



5. PW1 testified that the accused ran towards the road towards his house. PW1 further testified that the baby's mother returned and when PW1 asked her what was happening, the mother of the baby informed PW1 that the accused had gone away with her baby and had threatened to stab her with a knife if she continued following him. It was her testimony that she remained with the lady in her homestead until 9am when they heard screams from a nearby bush.
6. PW1 testified that they proceeded to the bush where they found the baby lying on a cushion with a jembe placed nearby with the baby's stomach cut and the intestines were outside the abdomen. She testified that the Assistant Chief was called and the child was removed from the bushes and taken to Kombewa Hospital and later transferred to Jaramogi Oginga Odinga Teaching and Referral Hospital. he identified the accused in open court as her son.
7. PW2 Richard Otieno Anono testified that on the 28th February 2022, he woke up early in the morning to milk his cows so he untied the cow and took it to where he was to milk it from. It was his testimony that he then went to bring the calf and on his return, he saw the accused taking away the cow and on confronting the accused, the accused pulled out a knife from his overcoat and threatened to stab PW1 but that PW1 ducked when the accused aimed the knife at his face and stabbed him at his left side near the left eye.
8. PW2 testified that he struggled with the accused and in the course of the struggle, the knife fell into his clothes and the accused thought he had stabbed PW2 so he ran away. It was his testimony that he went to the hospital at Kombewa where he was treated and later took the knife to Kolenyo Police Station where he reported the incident. It was his testimony that when he returned, the accused had been arrested. He testified that he had known the accused before the incident as he is his nephew, being his brother's son. PW2 testified that he did not see the accused kill a child.
9. PW3 Rosemary Anyango Otieno, PW2's wife testified and corroborated PW2's testimony. She identified the accused in court and stated that she had known him since he was born. She similarly testified that she did not see the accused kill the child.
10. PW4 Alfonse Onyun, the area Assistant Chief Kadero Sub-location testified that on the 28th February 2022, he was called by the village elder who told him that he had received information that Sylvester Akello had stabbed one Richard Otieno. He testified that he also received information from the accused's mother that the accused had that morning grabbed a child and vanished with the child. PW4 testified that he called the police at Kolenyo police post who went to the scene. He testified that he also went to the police post and found Sylvester already arrested. PW4 testified that he knew the accused very well as he was from his area.
11. PW5 No. 229459 PC Evans Mogare Toel testified that on 28th February 2022, while at Kolenyo Police Post at 8.24am, he received a phone call from Alphonse Orayo, Assistant Chief for Kadero Sub-location who informed him that one suspect had been arrested on allegations of stabbing 2 people using a knife, a minor and Richard Otieno Aono, an old man so they needed police help.
12. He testified that he informed his OCS, CIP Lucas Lule of Kombewa Police Station who directed him to go to the scene with his colleague, Godfrey Ombasa and brief him. PW5 testified that he went to Kamotto village where they found the Assistant Chief and the suspect arrested and already tied with ropes and so they rearrested him and escorted him to Kolenyo Patrol Base where he briefed the OCS and the accused was escorted to Kombewa Police station.
13. PW5 testified that on the 1st March 2022, the deceased's mother came and informed them that the child who was taken to hospital on 28th February 2022 had died after which she recorded her report in the Occurrence Book accompanied her to the scene where they found a sofa cushion with blood stains.



- PW5 testified that they took possession of the cushion to Kolenyo Patrol Base. He further testified that they found blood stains in the home of Richard Otieno Aono and took soil samples from the scene. PW5 identified the accused as the individual they rearrested.
14. In cross-examination, PW5 testified that the knife had a handle and was folded. He further testified that the cushion had red and bluish colour. He further testified that the child was 2 weeks old. In re-examination, PW5 testified that he did not recover the knife.
 15. PW6 David Kihara Muthoni an analyst at Kisumu Government Chemist DNA Section testified and produced the report on behalf of Mr. Polycarp Lutta Kweyu. It was his testimony that on the 4th March 2022 at the Kisumu Government Chemist Laboratories under escort of PC Kariuki Samson, DCI Kisumu the following items were submitted: -
 - a. A knife with a metallic handle, bent blade wrapped in a white paper in a brown envelope marked 'A'.
 - b. A multiple-coloured cushion in a gunny bag marked 'B'.
 - c. A torn grey baby clothes with blue spots in a brown envelope marked 'C1'.
 - d. A long-sleeved bay sweater in a brown envelope marked 'C2'.
 - e. Loose soil in a brown envelope marked 'D'.
 - f. Navy Blue Apron with reflector yellow stripes 'F1' in a brown envelope
 - g. A short sleeved red and yellow shirt 'F2' in a brown envelope
 - h. A matchbox containing 3 partly burnt cigarette like rolls of dry plant material marked 'F3'.
 - i. Bucal swab of Sylvester Akello Ochung, accused.
 16. PW6 testified that on the 14th March 2022 at their Kisumu Laboratories, the bone marrow of Palmer Kimathi Omondi was received and after analysis of the items to determine the presence and origin of biological evidential material, the following were the findings:-
 - a. The blood stain on the cushion, item B, cloth, item C1, sweater, Item C2 and shirt, Item F2 are identical and match the DNA profile of Palmer Kimathi Omondi deceased.
 - b. The blood stain on the knife item 'A' was a mixed profile of Palmer Kimathi Omondi deceased and unknown male person.
 - c. The soil item 'D' generated mixed DNA profile of Palmer Kimathi Omondi – deceased and unknown Male person.
 - d. Blood stain on Apron F1 was a mixed DNA profile of Palmer Kimathi Omondi deceased and Sylvester Akello Ochung, accused.
 - e. The knife, item 'A' generated mixed DNA profile of Palmer Kimathi Omondi deceased and an unknown male person.
 - f. The dry plant material in the matchbox 'F3' was found to be cannabis, a narcotic drug and psychotropic substance.
 17. It was his testimony that the Report was signed on 14th February 2024 by Polycarp Lutta Kweyu, Government Analyst and he produced it as P. Exhibit 1 while the exhibit memo dated 4th March 2022 was produced as P. Exhibit 2.



18. PW6 further testified that on the 4th March 2022, PC Samson Kariuki brought exhibits and an exhibit memo and that the envelope contained the dry plant material which was analyzed and found to be narcotic drug and psychotropic substance. PW6 produced the report dated 10th March 2024 and signed by Richard Kimutai Langat as P. Exhibit 4.
19. PW7 Sheifa Atieno Sile the deceased's mother testified that on the 28th February 2022, in the morning while she and her husband were asleep, someone knocked on the door but they did not open the door. She testified that the person opened the door, got into the house, went straight into their bedroom where they were sleeping on the bed and uncovered them.
20. PW7 testified that the person who barged into their room was their landlord and that he was wielding a jembe which he used to knock her husband on the leg, who got out of the bedroom. She testified that the accused started struggling with her wanting to rape her then he picked her one-month old son, the deceased, and ran out with him. She testified that she ran after the accused while screaming and that she saw the accused carrying a cushion where he placed the deceased on and she saw the accused stab her son in the abdomen using a knife after which he ran in the other direction.
21. PW7 testified that she went where her son was, covered him, got a motorcycle and rushed to Kombewa dispensary where she was referred to Jaramogi Oginga Odinga Teaching and Referral Hospital [JOOTRH] where her son was admitted and taken to theater but he died at 11pm. She testified that her son was taken to the morgue of the same hospital and that on a later date, she identified her son's body to the doctor for postmortem at JOOTRH mortuary. PW7 testified that the incident happened at around 6am. It was her testimony that when she found her son, he was facing up with his intestines out of the abdomen and was bleeding.
22. PW7 identified the accused as the person who killed her son. She testified that the accused was her landlord for a month.
23. In cross-examination, PW7 testified that the accused took her child from bed, ran and she followed him. She testified that the accused lifted the child up with one hand and placed him on a cushion and then slaughtered him. PW7 denied that he was with the accused's mother and stated that her husband ran away after the accused hit him.
24. PW8 Jane Atieno Sile, PW7's mother testified that on the 28th February 2022, PW7 called her at around 6.30am and told her that her child had been taken from the bed. It was her testimony that she asked her daughter whether they had unpaid rent and she said no. PW8 testified that she went with one Barack to the scene and found her daughter, Sheifa, holding the new born baby with intestines protruding. She testified that Sylvester, the accused, was found locked up in the house which her daughter had rented.
25. PW8 testified that the child had not died yet so he was taken to Kombewa hospital and was referred in an ambulance to JOOTRH but died later that night. She testified that she saw the child's abdomen cut.
26. PW9 Dr. Ombok Lucy testified and produced the autopsy Report done by Dr. Owiti on the deceased's body. It was her testimony that the autopsy Report was filled on 10th March 2022 by Dr. Owiti at JOOTRH mortuary at 1.50pm and that the body was of a male infant, African, in good nutrition about 55cm that had undergone postmortem changes, peeling off skin of both knee joints and was well preserved.
27. Dr. Ombok testified that externally, there was a yellow line on the right hand and a pink nametag on the left wrist, a surgical cut of 10cm on the abdomen while internally, the digestive system had a deep laceration through the left lobe of 5cm of the liver.



28. It was her testimony that on the genitourinary system, there was a cut wound 3.5cm while the rest of the organs appeared normal. Dr. Ombok testified that as a result of the examination, the cause of death was found to be traumatic abdominal evisceration due to assault. She testified that the Death Certificate 1493485 was issued and the bone marrow was removed for further analysis and that Dr. Owiti signed the Report on 10th March 2022. Dr. Ombok produced the Postmortem Report as P. Exhibit 5.
29. PW10 No. 110673 PC Kariuki Samson attached at DCI Kisumu West, Maseno Police station testified that he was the investigating officer in the instant case. He testified that on the 28th February 2022, he was briefed by the DCIO Mr. Paul Langat of a serious assault incident reported at Kolenyo Police Post, in Seme Sub-county vide OB 4/28/02/2022 where the victim was Palmer Kimathi aged one (1) month who had been assaulted by the accused. He further testified that on the 2nd March 2022, they got information of death of the victim as a result of the assault and was directed to take up the matter and investigate the murder.
30. PW10 further testified that he visited Kolenyo Post and found the accused and some exhibits already recovered by some police officers from Kolenyo Police Post from the scene. It was his testimony that he took the accused and escorted him to Maseno police station and then on 3rd March 2022 he escorted him to Maseno Law Courts under Misc. No. E007 of 2022 and applied to hold the suspect for 7 days for investigations and DNA sampling.
31. PW10 produced the following exhibits;
- a. A Blood-stained sofa cushion as P. Exhibit 6.
 - b. A navy blue overall with reflector strips yellow strips as P. Exhibit 7
 - c. Grey dotted – flowered child underpant as P. Exhibit 8.
 - d. A red plus yellow shell shirt as P. Exhibit 9.
 - e. Blood-stained kitchen knife bend as P. Exhibit 10.
 - f. A blood-stained sweater of the victim – cream as P. Exhibit 11.
 - g. Blood-stained soil sample from the scene as P. Exhibit 12.
 - h. A matchbox from the navy blue overall as P. Exhibit 13.
 - i. A child’s Birth Notification – Kimathi Palmer Omondi dated 27th January 2022 as P. Exhibit 14.
32. It was his testimony that the exhibits were taken to the Government Chemist to confirm DNA samples on the exhibits which were blood. PW10 further testified that there were 3 rolls of cannabis recovered in the matchbox that were also tested and found to be cannabis sativa. He testified that he submitted them to Government Chemist but no DNA was found on them. PW10 produced the items as P. Exhibits 15(a), (b) and (c).

The Defence Case

33. Place don his defence, the accused gave a sworn testimony admitting that he killed the deceased out of anger as he had a dispute with the deceased’s father. The accused admitted that he had used bhang when he killed the baby though he admitted that he did not know the deceased.



Analysis and Determination

34. I have considered the charge, the evidence adduced for the prosecution and the defence and the question is whether the prosecution has proved the charge of murder against the accused beyond reasonable doubt. In other words, did the prosecution establish all the essential elements of murder against the accused person herein, which proof is beyond reasonable doubt?
35. The offence of murder is created by section 203 of the Penal Code in the following terms:
- “ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
36. The onus of proving a criminal charge lies with the prosecution who must prove the offence beyond reasonable doubt. The ingredients of murder that must be proved by the prosecution to that standard are:
- a. That there was death
 - b. The cause of that death
 - c. That the death was due to an Unlawful act or omission
 - d. Identity of the perpetrator of the offence.
 - e. Malice aforethought as defined under section 206 of the Penal Code.
37. I have examined the evidence by the prosecution witnesses. It confirms without a doubt that the deceased, Palmer Kimathi Omondi, had died. Dr. Owiti confirmed the cause of death of the deceased to be due to traumatic abdominal evisceration due to assault. The post mortem report showed that the abdomen of the deceased was sliced open and his intestines spilled out. It is without a doubt that the death of the deceased resulted from an unlawful act as no baby the age of the deceased being one month could have inflicted those kinds of injuries on self and neither was the killing justified in law.
38. The identity of the person that caused that death is also not in doubt. Evidence points to the accused as the perpetrator. The deceased’s mother testified that she saw the accused who forcefully entered her house at about 6.00 am, went straight to their bedroom, found her, her husband and the baby sleeping, uncovered them then he started struggling with her, wanting to rape her before her husband wrestled him. The accused had a jembe which he used to injure her husband and that is when he picked their baby from the bed and ran off with him. She followed but was threatened by the deceased. She saw the accused slice the deceased open and the accused himself admitted to have committed the offence.
39. Considering all the evidence adduced, I am persuaded beyond reasonable doubt that there is sufficient evidence to prove the elements of death by an unlawful act, identity of the victim, the cause of that death and the identity of the perpetrator.
40. I now turn to the element of malice aforethought. Section 206 of the Penal Code defines malice aforethought in the following terms:
206. Malice aforethought
- 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.

41. In *Republic v Benjamin Kyalo Mulonzi* [2019] eKLR, the Court had this to say in paragraph 30:

“It is therefore clear that malice aforethought is the conscious, premeditated intent to kill another person, without any provocation or just cause. The Court of Appeal in the case of *Republic –vs- Tubere S/O Ochen* (1945) 12 EACA63 held that an inference of malice aforethought can be established by considering the following: -

- a. The nature of the weapon used.
- b. The manner in which the weapon was used.
- c. The part of the body targeted.
- d. The nature of the injuries inflicted either single stab/wound or multiple injuries.
- e. The conduct of the accused before, during and after the attack.”

42. In this case, the weapon used to unlawfully kill the baby was a knife, which was produced as (P. Ex. 10). The accused used this weapon to slice open the abdomen of the deceased baby, causing his intestines to spill out. By slicing the deceased’s abdomen, the intention was to kill the deceased.

43. The accused has pleaded intoxication and stated that he had used bhang prior to the incident. He testified that he killed the deceased out of anger with the deceased’s father with whom he had a dispute and that at the time he killed the deceased he had used bhang.

44. The defence of intoxication is provided for under Section 13 of the Penal Code. This section provides that:

13. Intoxication

- (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
- (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
 - (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
 - (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under



paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- (5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.

45. Other than the word of the accused that he had used bhang prior to the incident, I have no other evidence that he was intoxicated to an extent that he was not able to form the intention required to commit murder. I have noted the evidence by the Police, PC Kariuki Samson, (PW10), that some rolls of bhang were recovered from the accused and when taken to the Government Analyst for examination, were confirmed to be bhang.
46. I have considered the accused person’s defence of intoxication with bhang. I however note that upon being arrested, the accused person was escorted to hospital for mental assessment by the psychiatrist and he was found to be fit to plead. There was no evidence that he was mentally impaired prior to the incident or that he had smoked bhang and that his mental state was such that he was incapable of understanding what he was doing. Additionally, self-intoxication done with the intention of committing an offence so that a defence of intoxication can be raised is no defence at all. This was an inhumane act, barbaric in nature and horrifying in extent.
47. That defence of intoxication, in my view, is not available to the accused for the reason that just before he attacked the deceased baby, the accused had tried to steal a cow from his uncle who testified as PW2 and even got engaged in a struggle with him and stabbed his said uncle.
48. Further, the accused confirmed that he attacked the deceased because he had a dispute with the deceased’s father. Although motive is immaterial in criminal cases, therein lies the accused person’s motive to unlawfully kill the infant. Unfortunately, the nature of the dispute is unknown and even so, is killing the baby the mode of resolving a dispute with the baby’s parent?
49. The accused person stabbed an innocent baby who did not know anything and could not comprehend what was happening. The accused intended to cause grievous harm on the deceased baby. I find malice aforethought was proved beyond reasonable doubt.
50. Having considered the evidence adduced by the prosecution and the clear admission by the accused, which admission he was warned as he was not obliged to give self-incriminating evidence, and even without any forensic report on the incident, I am satisfied that the direct evidence adduced by the Child’s mother and the accused persons’ own mother points to the accused person as the person and no other person, who took the child from PW7, ran out with him and the next thing was the child being found with an open abdomen duly sliced. I am satisfied that it was the accused person who stabbed the deceased on the material day. I am satisfied that the prosecution discharged its burden of proof and has proved the charge of murder against the accused person herein beyond any reasonable doubt.
51. I find the accused Sylvester Akello Ochung Guilty of the offence of murder contrary to section 203 of the penal Code as charged and I convict him accordingly.
52. Sentence shall be pronounced after records and mitigation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF DECEMBER, 2024

R.E. ABURILI



JUDGE

