Otieno v Republic (Criminal Appeal 119 of 2018)
[2025] KECA 1634 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1634 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 119 OF 2018

HA OMONDI, LK KIMARU & JM NGUGI, JJA

OCTOBER 3, 2025

BETWEEN

CHARLES OWADE OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Siaya (Makau, J.) dated 6{{^th}} April, 2017 in HCCRC No. 23 of 2015)

JUDGMENT

1. Charles Owade Otieno, the appellant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 7th August 2014 at Nyagoko sub-location, Rarieda sub- location within Siaya county, he murdered Peter Oyalo Giro [deceased].

2. The appellant pleaded not guilty to the charge and the prosecution called six witnesses in support of its case, whilst the appellant in his defence, gave a sworn testimony. Upon determination, the trial court found that the prosecution had proved the case against the appellant, convicted him, and sentenced him to death.

3. The appellant, being dissatisfied with both the conviction and sentence has now appealed to this Court faulting the learned judge for failing to find that the offence was not proved to the required standards and in meting out a death sentence which he contends is a harsh and excessive sentence.

4. Briefly, the facts of the prosecution case were that on 7th August, 2014 at around 9:00 pm Jael Awino Oyolo [Jael], the deceased's wife who testified as PW1, was in their house when the appellant, the deceased's brother called the deceased "Oyolo, Oyolo" twice and the third time the deceased responded to the appellant: "if at all you are calling me then I am coming", the deceased left. Immediately after, Jael heard them talking as if they were arguing. Jael went out but did not find them. The appellant later

came carrying the deceased, as she heard the deceased ask the appellant "Owade, why are you killing me?". PW3, George Otieno [George] the deceased's son opened the door for them and the appellant brought the deceased into the house and laid him on the ground with his legs facing the door. At that time, Jane was in her bedroom as she was not feeling well. The appellant told them he had brought the deceased so that he could not be rained on. The appellant then left.

5. Jael took a mobile phone and flashed it on the deceased in a bid to wake him to eat but he did not answer. Jael could hear him groaning, as she sat on a chair in the sitting room. Jael further stated that between 3:00 am to 4:00 am, she found the deceased had vomited blood and was already dead.

6. Jael called the village elder, Ochanda Langi, who came and proceeded to report to the area Chief, who came accompanied by the Assistant Chief, and confirmed that Peter Oyolo [deceased] was already dead. They then went to report to the police officers who came; and after confirmation of the death, proceeded to the home of Charles Owade, but did not find him but saw his trousers and shirt stained with blood. The police returned and took Jael and the deceased to Madiany Police Post, then Aram Police Station.

7. George Otieno Oyolo, the deceased's son, told the court that on the night between 9:00 pm and 10:00 pm, he was at his father's home in Nyagoko, when he heard his father talking as if he was coming home. He also heard Charles Owade calling him "Oyolo Oyolo," to which he replied, asking Owade, "Are you calling me?" and told him he was coming. The two left together and returned after about an hour. As they were returning, George heard his father's voice asking the appellant, "Owade, why are you killing me?" Upon hearing this, George rushed out to see what was happening. When he flashed his mobile phone's light, he saw the appellant carrying the deceased on his shoulder, saying he had brought the deceased home so he would not be rained on. The appellant then dropped the deceased where he usually left him whenever he was drunk. George left him to sleep where he was dropped near a chair. Between 3:00 am and 4:00 am, he noticed that the deceased had vomited blood. When he observed his father, he noted he was bleeding from the mouth and had blood oozing from the left side of his head and both his hands were fractured, while his legs had cut wounds.

8. They informed the village elder and other people who came to their home. The following morning, they went to the Chief's office, and on their way back, they found his father's shoes at the gate and the appellant's hat stained with blood. The police from Aram Police Station were informed, and when they arrived, they were escorted to the appellant's home, but they did not find him there. They then returned to the deceased's home, collected the body, and took it to Madiany Hospital Mortuary. George stated that at the appellant's home, they found blood-stained clothes placed on a net inside his bedroom in the presence of his wife.

9. PW4, Samuel Odhiambo Otieno [Samuel] both the appellant and deceased's brother told the court that on 8th August 2014 at around 5:00 pm, he was called by Jack Giro Odawa, informing him that the appellant had killed the deceased. Samuel proceeded to the appellant's house and found him asleep and told him not to go anywhere. He then went to the deceased's home, and later, accompanied by relatives and police went to the appellant's home, but did not find him. The appellant was later arrested and Samuel took the appellant to the police on a motorbike at around 3:45 pm. Samuel identified Charles Owade, as his brother at the dock.

10. Chief Inspector Francis Ngugi, PW5, investigated the matter, having received a call from OCS, Aram Police Station, on 8th August 2014 at 8:00 am, informing him of a murder at Nyagoko sub-location, Omande village. He took a vehicle in the company of PC Munene, PC Wamalwa and Assistant Chief of West Asembo; proceeded to the scene, he met the wife of the deceased and members of public; and was shown the body of the deceased, which was inside a house at the sitting room lying on a mat. He

viewed the body and noted, it had a deep cut above the left eye, the right leg had a fracture and the left shoulder had a cut wound.

11. PW6, Dr. Oyera Alphonce of Madiany Sub-County Hospital conducted the postmortem examination on the body of the deceased on 12th August 2014 at 3:45 pm. On physical examination, Dr. Oyera noted a distal 1/3 fracture of ulna and radius, right mid-tibial and fibular compound wound measuring 4cm x 2cm, distal 1/3 fracture of the femur, proximal 1/3 fracture of tibula & fibula incision with regular edges on the medial aspect left measuring 7cm x 3cm, and under left lateral muscles and 2 occipital cut wounds with straight edges measuring 9cm x & 4cm x 3cm. He opined that the cause of death was due to massive bilateral haemothorax secondary to blunt trauma.

12. Placed on his defence, the appellant gave a sworn statement and called no witnesses. He told the court that on 7th August 2014, at around 7:30 pm, he was returning from his casual work. When he reached the gate of his brother, Peter Oyolo Giro (deceased), he found him drunk and talking to himself. As it was about to rain, he told him to get up and go home. He got up and they walked together to his house. His phone, which was in his trouser pocket, was ringing, so he told his wife to keep the phone for him. He then left the deceased with his wife and went home. The following day, at 6:00am, his brother Samuel Odhiambo came and asked if he had seen the deceased. He told him he had left him at his home. Samuel then informed him that he had received a call stating that the deceased had passed on at 4:00 am. Samuel advised him not to go to the deceased's home as many people were there. Around 9:00 am, while grazing his cows, the police came to his home but did not find him there, leaving a message for him to report to Aram Police Station. He later went and reported to the police, was arrested, placed in cells, and subsequently charged with this offense.

13. In support of the appeal, the appellant argues that the elements of murder were never proved. He points out that in their testimony, all the witnesses stated that the deceased was an alcoholic and that on that day he was brought home by the appellant, he was drunk.

14. It is further contended that in her evidence, Jael admitted that when the appellant brought the deceased, he left him at the usual place and that Jael flashed the deceased's face, calling his name but he did not respond. She left him there and went to sleep.

15. The appellant argued that despite the allegations that the deceased had two cut wounds on the back of the skull, none of the witnesses stated in evidence that they saw blood flowing. He maintains that anything could have happened between 7:00 pm when the deceased was brought home to 3:00 am when the deceased was found dead as a result the evidence tendered did not directly link the appellant to the death of the deceased.

16. Regarding the sentence, the appellant relies on the case of Francis Kariokor Muruatetu and Another v Republic [2017] eKLR where the Supreme Court held that the mandatory death sentence as provided under Section 204 of the penal code is unconstitutional. The appellant prayed that the conviction be quashed and an order for re-sentence be issued.

17. The respondent opposes the appeal and contends that they proved the offence charged beyond a reasonable doubt. The trial court rightly found that the death of the deceased was established through the testimonies of PW1, PW3, PW4, and PW5, and was supported by the postmortem report produced by Dr. Ayiera. It is further submitted that the appellant did not contest the death. As for the cause of death, the evidence, including the postmortem report and the testimony of the investigating officer clearly showed that the deceased died from massive bilateral haemothorax caused by blunt trauma.

18. Regarding identification, the respondent submitted that the trial court relied on circumstantial evidence and found the appellant culpable. Relying on the case of Sawe v Republic [2003] KLR 364

and Elizabeth Gatiri Gachanja and 7 others v Republic, CRA No. 51 of 2004, the respondent contends that there was unrebutted evidence from PW1 and PW3, whom the trial court observed for their demeanor and found credible. The witnesses testified that the appellant, a person well known to them, called the deceased at about 7.00 p.m. and left with him. Shortly after, the appellant returned carrying the deceased on his shoulder and left him lying in the house by the door.

19. It is contended that the appellant was positively identified as the person who left with the deceased while walking on his own only to return shortly thereafter with the deceased unable to walk, had the onus to raise contrary account that would have broken the chain of circumstantial evidence linking him to the deceased's injuries.

20. Regarding malice aforethought, the respondent contends that the serious injuries inflicted on the deceased were proof of malice aforethought in line with section 206 of the Penal Code. The injuries were meant to cause grievous harm and or cause death,and ultimately caused death of the deceased as such malice aforethought was proved.

21. Turning to the sentence, the respondent conceded to the setting aside of the mandatory sentence as held in Muruatetu. Owing to the circumstances of the offence, the respondent proposed a sentence of 25 years imprisonment.

22. This being a first appeal, this Court is mindful of its duty as a first appellate Court. This duty was well articulated in Erick Otieno Arum v Republic [2006] eKLR https://kenyalaw.org/caselaw/cases/view/20642 as follows:

> " It is now well settled that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same".

23. Having carefully considered the record of appeal, submissions by respective counsel, and the law, the two issues that call out for determination are whether the prosecution proved the offence of murder against the appellant as required in law and whether the sentence imposed on the appellant was appropriate.

24. The appellant was charged under Section 203 of the Penal Code.

The section provides that:

> " Any person who of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

25. For the offence of murder to be proved, three elements which the prosecution must prove beyond a reasonable doubt are the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought. See Roba Galma Wario v Republic [2015] eKLR http://kenyalaw.org/caselaw/cases/view/111709

26. It is common ground that the deceased died as the fact is not substantially in dispute. From the evidence of Jael and George, they noticed that the deceased had vomited blood and was not responsive.

Paul Osumba, the deceased's son, identified the body at Madiany Police Station for post-mortem examination while Dr. Oyera performed the autopsy and opined that the cause of death was due to massive bilateral haemothorax secondary to blunt trauma.

27. Was the appellant responsible for the death of the deceased?

From the evidence tendered before the court, it is clear that none of the prosecution witnesses saw or witnessed the appellant or, indeed, any other person kill the deceased. Thus, there was no direct evidence linking the appellant to the death of the deceased. The prosecution's case on this aspect was hinged on circumstantial evidence.

28. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, this Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver, and Donovan [1928] Cr. App. R 21: 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

29. Further, the conditions for the application of circumstantial evidence to sustain a conviction in any criminal trial have been laid down in several authorities of this court. In Abanga alias Onyango v Republic CR. App No. 32 of 1990 this Court held 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 guilt of the accused;
>
> iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

30. And in Sawe v Republic [2003] KLR 364, the Court of Appeal amplified on the above thus:

> " 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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shift to the party accused."

31. Jael testified that on the fateful evening, the appellant came to the deceased's house and called him. The deceased heeded the call and they left together. Moments later, the appellant returned carrying the deceased who was unresponsive and placed him on the floor. He never explained what had transpired and left. The deceased had sustained serious injuries at the time.

32. In his defence, the appellant admitted being with the deceased on the fateful night. He told the court that on 7th August 2014 at around 7:30 pm, he was on his way from his casual work and on reaching the gate of his brother Peter Oyolo Giro, the deceased, he found him drunk, talking to himself and as it was about to rain, he told him to get up and go home. The deceased got up and they walked together to his house and left him with his wife. He was later informed that the deceased had passed on. In his determination, the learned judge observed as follows:

> " The accused in his evidence admitted he returned with the deceased but the deceased was walking and talking. I observed the demeanour of PW1 and PW3 and found them to be credible witnesses. I do not believe the accused was telling the truth as regards the injuries the deceased had sustained as with a fractured hand and legs he could not have walked to his home. I believe the deceased sustained the injuries when he went out with the accused and not at his home or elsewhere; unfortunately, the deceased could not explain what had happened but he was heard by PW1 and PW3 asking the deceased why he was killing him before he stopped talking any further. PW1 and PW3 noted that the deceased had fresh injuries with blood oozing from his head and bleeding from his mouth, the observation of the injuries by PW1 and PW3 were noticed immediately after the accused left the deceased's home. In my view, the chain of events from the time of the accused called the deceased to accompany him somewhere at night and returned the deceased carrying him on his shoulders was not broken; the concatenation of the events and the short interval between the leaving of the deceased home and the returning of deceased being carried by the accused on his shoulders. The accused upon returning with the deceased injured, he did not take time to explain to his wife PW1 and his son PW3, how the deceased sustained such injuries or what befall him, so that the deceased sustained such serious and life threatening injuries. He did not bother to have the deceased taken to the hospital. In his evidence, I find the accused was not telling the truth and I find him to be incredible witness."

33. It is trite that once the primary facts are established and the prosecution discharges its legal burden of proof, the appellant bears the evidential burden to offer a reasonable explanation for the same, in this case, being placed in the company of the deceased herein. In the premises, the prosecution's evidence placed upon the appellant a burden to discharge a rebuttable presumption of having been last seen with the deceased and he ought to have explained how the deceased sustained the fatal injuries. The statutory rebuttable presumption is spelt out under sections 111(1) and 119 of the *Evidence Act*. These sections stipulate as follows:

> " 111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist:

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

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

34. From the evaluation of the evidence, the inculpatory facts in this case are incompatible with the innocence of the appellant, and are incapable of explanation upon any hypothesis other than that of guilt of the appellant. Thus, the trial Judge cannot be faulted for holding the same.

35. Regarding malice aforethought, Section 206 of the Penal Code defines malice aforethought in the following terms:

> " 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 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."

36. For malice aforethought to be established, the predecessor of this Court, the East African Court of Appeal observed in the case of Rex v Tubere s/o Ochen (1945) 1Z EACA 63, that;

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and the part of the body injured."

37. And in the English case of Hyam v DPP (1974) AC the House of Lords held that;

> " Malice aforethought in the crime of murder is established by proof beyond a reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

38. From the evidence on record, it is evident that the appellant was aware that the assault on the deceased could result in grievous harm or lead to his death. Dr. Oyera performed the autopsy and opined that the cause of death was due to massive bilateral haemothorax secondary to blunt trauma.

39. Considering the injuries inflicted on the deceased, there is no doubt that the appellant knew or ought to have known that such injuries would cause death or grievous harm to the deceased, as such

malice aforethought was proved to the required standards. Consequently, we find the appeal against conviction devoid of merit and hereby dismiss it.

40. In meting out the sentence, the trial court considered that the appellant was a first offender who was remorseful, and had six children who would suffer if he was incarcerated since he was a significant breadwinner to the family. The court, however, meted out the death sentence, pointing out that due to the mandatory nature of the penalty, its hands were then tied. In relation to the death sentence, the Supreme Court decision in the Francis Karioko Muruatetu case did not outlaw it, rather, it declared the mandatory nature of the death sentence unconstitutional as it impedes judicial discretion in the determination of sentences. However, it does not prohibit, deter or limit the imposition of the sentence in deserving cases. The Supreme Court took the view, further, that the trial court should take into account the circumstances of the offender and the offence in meting out the sentence.

41. In the present case, the appellant lured his blood brother; inflicted injuries including broken limbs, exhibiting merciless infliction of pain and although he expressed remorse, his conduct may not necessarily attract the ultimate sentence of taking away his life, in the spirit of an eye for an eye, but in our considered view, it warrants a punitive measure. We consider a sentence of forty (40) years imprisonment to be appropriate.

    We, therefore, set aside the death sentence that was imposed on the appellant, and substitute thereto a sentence of forty (40) years imprisonment which shall run from the date of conviction.

42. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER, 2025.

H. A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR