

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL CASE NO. E005 OF 2022

REPUBLIC.....PROSECUTION
COUNSEL
VERSUS

ASHLEY ATIENO OTIENO.....1ST
ACCUSED

SAMSON ODHIAMBO AGWANDA.....2ND
ACCUSED

JUDGEMENT

1. The two accused persons herein **Ashley Atieno Otieno** and **Samson Odhiambo Agwanda** are vide the information dated 9th February, 2022 jointly 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 23rd day of January, 2022 at Orongo village in Kisumu East Subcounty within Kisumu County, the two accused persons jointly murdered **George Otieno Nyabute** (hereinafter “the deceased”).
2. Both accused persons denied the charge on 23rd February, 2022, calling for a full trial.
3. It is important to note that at the time of plea taking, the 1st Accused person was a 16-year-old subject. She has since attained the age of majority.

4. The trial initially proceeded before my sister **Shariff J.**, who conducted the entire prosecution case. I took over the conduct of the trial, particularly the defence case, following the transfer of **Shariff J.** to another station.
5. The prosecution case was founded on the **evidence of** witnesses.
6. The first prosecution witness was **Joan Naswa Omollo** (PW1), who testified and told the court that the deceased was a friend to her gardener one **Eyan** and that on 23rd January, 2022, her gardener called her and informed her that the deceased, whose nickname was **Junior**, had been stabbed. He explained to her that he was not able to reach the deceased as the deceased had locked the gate. PW1 immediately asked her gardener to inform the deceased's parents as she embarked on finding a spare key in order to have access to the deceased.
7. PW1 then rushed to the scene and opened the gate and found that the incident had occurred in an adjacent plot. She proceeded to the window of the house on that plot and saw the deceased squatting next to the door while supporting his tummy. She proceeded to the bedroom window and saw a bunch of keys therein. **Eyan** arrived shortly and managed to retrieve the keys using a long stick and access was now possible. However, upon checking on the deceased, the

witness found that he had no pulse and immediately reported the matter to Nyamasaria Police Patrol Base and police officers who went to the scene removed the deceased's body to the mortuary.

8. Upon cross examination by **Mr. Okoth**, learned Counsel for the 1st accused person, PW1 told the court that the deceased and **Eyan** were living in the same house and that she was the one who permitted the deceased to live there, when he disagreed with his parents. She told the court that she did not witness the stabbing. She stated that she heard people at the scene call out the name **Ashley** at the time the deceased's body was removed from the scene and that **Ashley**, a young girl, was then arrested and whisked away by a police vehicle.
9. On being cross examined by **Mr. Bagada**, learned Counsel for the 2nd accused person, the witness stated that she did not see the 2nd accused person at the scene.
10. The prosecution called **Barrack Otieno Ogada** as the second witness (PW2), who told the court that the deceased was his cousin. The two accused persons were not known to him.
11. In his testimony, PW2 explained that on 23rd of January, 2022 at about 7am, he had gone to fetch water when he met a girl and a young man, who asked him whether he knew one

Omwami who worked in a nearby home as a gardener. PW2 informed the two that **Omwami** was at work in another farm and he sent them to him. He shortly heard the girl asking **Omwami** to hand over to her a phone. PW2 then went about his business and as he was having his breakfast, he heard screams from the house where **Omwami** resided and rushed there to find out what was happening.

12. At the house, PW2 found the deceased lying on the ground and people gathering. As he had other work to do, he left the scene.
13. On being cross examined by Counsel for the 1st accused person, PW2 stated that he heard the girl that he had met earlier that day telling **Omwami** to hand over to her a phone that she said was hers. He explained that the deceased was his cousin.
14. Upon cross examination by Counsel for the 2nd accused person, PW2 stated that he found the two people that he met the two people at the gate near the compound where **Omwami** worked.
15. **Eyan Onyango Amambiya** testified as Pw3 and told the court that on 19th January, 2022, the 1st accused person, whom the witness said was the deceased's girlfriend and whom she knew well visited the house where PW3 and the deceased

were living in and while there, started receiving phone calls which the witness described as inappropriate, prompting him to take away the 1st accused's cell phone.

16. PW3 told the court that on 23rd January, 2022, he went to his employer's (PW1's) compound to lock up PW1's dogs, leaving behind the deceased, whom he was residing with at a servant's quarter that had been provided by PW1. PW3 then proceeded to water crops.

17. The witness told the court that at about 7am, PW2 informed him that there were two people within the compound where he resided whom PW2 described as a young man and a young lady. PW3 then asked PW2 to tell the two visitors to see him where he was working but the latter shortly informed the former that the two visitors had left.

18. In his further testimony, PW3 told the court that the two visitors returned and PW2 led them to the witness. He stated that one of the visitors was **Ashley** (the 1st accused person), who then demanded, while conversing across a barbed wire fence, for the cell phone that he had taken from her, to which PW3 responded and told her that he would call her later and hand over the cell phone to her, after he was done with the work that he was doing. The 2nd accused person, whom the witness referred to as **Samson** then gave PW3 a cell phone

number through which he would contact the 1st accused person.

19. That at that point, the 1st accused person told the witness in Swahili that “*basi weka weka kwa akili yule jamaa umewacha huko - **Junior** - ndio anaumia*”. The two visitors then promptly left on a motorcycle, with the 2nd accused riding the same. The witness, noting the words of the 1st accused person, asked PW2 to join him to and see and confirm that the deceased was safe.

20. In his further testimony, PW3 told the court that PW2 joined him to the house where the former resided but they found the gate locked. He then called out the deceased and threw a pebble on the roof, thinking that the deceased was asleep, but there was no response. The witness then climbed over the gate and on looking into the house, saw the deceased, who was kneeling and bending forward while holding his stomach. There was a knife next to him and blood flowing. The witness immediately informed PW2 and immediately rushed to inform his employer, who told him to inform the deceased’s father, which PW3 did.

21. PW3 told the court that on returning to the scene, he found that his employer had opened the gate using a spare key. Using a long stick, PW3 managed to retrieve the keys to the house from the window. The house had been locked.

22. The witness told the court that upon gaining ingress to the house, he proceeded to the position where the deceased was and on touching him, the deceased fell down. He saw blood gushing out from five stab wounds in the deceased's navel and stomach area. The deceased was lifeless.
23. The witness was cross examined by Counsel for the 1st accused and told the court that he left for work on that day, leaving the deceased in the house. He said that he did not hear any screams as he was working. He stated that he had given the 1st accused person's cell phone to the deceased after confiscating it from her when she was communicating with other men. The witness, on being further cross examined, stated that he was also arrested as a suspect but later released. He denied being sexually involved with the 1st accused person.
24. Upon being cross examined by Counsel for the 2nd accused person, the witness told the court that he was not acquainted to the 2nd accused person prior to the incident. He stated that the 2nd accused person gave him his cell phone number and that he gave the number to the police, which the investigators used to track the 2nd accused person.
25. The witness stated that he owned the knife that was used to stab the deceased.

26. The prosecution called **David Kiara Muthoni**, a government analyst working with the Government Chemist Department as PW4. The witness told the court that on 9th February, 2022, he received from **Police Constable Brian Kariuki** of Directorate of Criminal Investigations, Kondele an exhibit memo form of even date, which accompanied a kitchen knife with a blue handle, faded white bed sheets with blue stripes which was heavily stained with blood that was in a brown envelope and fingernails extracted from **George Otieno Nyabute** (the deceased). The request in the exhibit memo form was for the witness to analyze the exhibits and compare them with the fingernails and ascertain if the same had the deceased's DNA.

27. The witness proceeded to conduct his analysis and reached the findings that the knife and bedsheets were stained with the blood of a human being that matched the DNA profile of the deceased.

28. The witness prepared a report on his findings, dated 9th September, 2023. He produced the exhibit memo form at PExh1a and his report as PExh1b.

29. PW5 was **Police Corporal Anthony Egesa**, a gazette forensic crimes scenes investigator. The witness told the court that he proceeded to the scene at Korongo area in the

company of **Inspector of Police Ogot** on 23rd January, 2022 and other officers, following a reported case of murder that had been reported at Nyamasaria Police Patrol Base.

30. Pw5 stated that the officers found the deceased's body lying in a pool of blood at the scene. The deceased had been stabbed severally in the stomach and was still bleeding. Besides the body was a blood-stained knife. The officer processed the scene and took 18 photographs of the scene, both inside and outside the house, which he later processed and issued the certificate for the same.

31. PW5 produced the photographs as PExh2(a) 1 to 18 and the certificate of photography as PExh2.

32. **Grace Auma Timateo** was the 6th witness that the prosecution called (PW6). The witness stated that on 23rd January, 2022 at about 7.20am, she saw PW3 carrying a watering can from a store. After a short while, PW6 saw PW3 standing by the fence while conversing with another person whom she could not see. She told the court that the deceased was not known to her.

33. In his testimony, **Charles Nyabute Odawa** (PW7) told the court that the deceased was his son and that on 23rd January, 2022, he was informed by PW3 that the deceased had been stabbed to death. He proceeded to the scene in the company

of his first wife **Elizabeth** and found the deceased's body lying in a pool of blood. The witness immediately informed the area chief **Elijah Omumbo**, who then escorted PW3 to the nearby Administration Police Post.

34. The prosecution called **Dr. Ombok Lucy** as PW8. The witness told the trial court that he conducted a postmortem on the deceased's body on 31st January, 2022. She noted that there was massive bleeding in the abdomen due to multiple stab wounds caused by a sharp object, likely a knife. All other systems were normal.

35. In conclusion, the doctor formed the opinion that the cause of the deceased's demise was massive abdominal bleeding due to multiple stab wounds.

36. The witness completed the post mortem form which she produced as PExh3.

37. The last prosecution witness was the investigating officer, **Police Constable Brian Kariuki** (PW9), who told the court that following the report of a murder incident that had been reported at Nyamasaria Police Patrol Base, he visited the scene of crime in the company of his colleagues on 23rd January, 2022, where he found the deceased's body, which had several stab wounds, lying in a pool of blood. There was a knife next to the deceased's body, which the officer recovered.

The officer also recovered a blood-soaked bedsheet. At the time, three suspects had been arrested and were in police custody – the 1st accused person, PW3 and one **Rolex Okoth**.

38. The officer told the court that he applied for and obtained a court order in Winam Chief Magistrate’s Court vide *Miscellaneous Application number 13 of 2022* which allowed him to detain the suspects for 14 days as investigations were conducted and that on 27th January, 2022, a fourth suspect – the 2nd accused person – was arrested.

39. PW9 told the court that an autopsy was conducted on the body of the deceased on 31st January, 2022 at Jaramogi Oginga Odinga Teaching & Referral Hospital Mortuary and a report submitted to him.

40. The witness stated that after conclusion of the investigations, the two accused persons were charged after the Office of the Director of Public Prosecutions approved the charges.

41. On being cross examined by **Mr. Okoth**, learned Counsel for the 1st accused person, PW9 told the court that PW3 was arrested by members of the public as a suspect but became a prosecution witness as he had left the deceased in the house before he was murdered.

42. Upon cross examination by **Mr. Bagada**, learned Counsel for the 2nd accused person, the witness told the court that he received the murder report on 23rd January, 2022 and that the same was first made to Nyamasaria Police Patrol Base by PW1 on the same day.

43. The witness further stated that the body of the deceased was found inside the locked house and that the key to the house was inside the house. He said that the knife belonged to PW3 and the deceased. The officer stated that there were a number of witnesses who cited PW3 in the compound. He stated that although the order of the Winam Court directed that the 2nd accused person be remanded at Kondele Police Station, he was as a matter of fact taken to Kodiaga Prison where he was detained. The officer however denied that he is the one who took him to Kodiaga.

44. PW9 produced the knife and bedsheet that were recovered at the scene of the crime as PExh2 and PExh3 respectively.

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48. the deceased was his brother

49. iminal offence and has now moved this Court seeking to be released on bond pursuant to *Article 49(1)(h)* of the *Constitution*, which guarantees the right to bail unless there exist compelling reasons to warrant continued detention and the Court is therefore enjoined to consider whether the prosecution has satisfactorily discharged its burden of demonstrating the presence of such exceptional circumstances as would justify the limitation of this constitutional right.

50. The onus to prove the existence of such compelling reasons lies with the State (see ***Republic v Kennedy Ochieng Kisakwa [2013] eKLR***) and the standard of proof that the reasons presented meet the compelling reasons test is on a balance of probabilities (see ***Walford Ngugi & 2 others v Republic [2017] eKLR*** and ***Republic v Ahmed Mohammed Omar & 6 others [2010] eKLR***).

51. As was held in the case of ***Republic v Fredrick Ole Leliman & 4 others [2016] eKLR*** the availability of bond and/or bail under *Article 49* of the *Constitution* is not an absolute right. In other words, the right to liberty is among those rights that may be limited under *Article 24* of the *Constitution*, through denial of bond where compelling reasons are provided.

52. In the present case, although the prosecution sought for and was granted time to file an affidavit sworn by the

investigating officer through which the compelling reasons would be presented to the court, no such affidavit was filed. The learned Prosecution Counsel **Ms. Muema**, during bond hearing instead opted to rely on the bail information report that was filed by the Probation and Aftercare Service Office. In particular, **Ms. Muema**, in opposing the granting of bond to the accused person, relied on the following paragraph in the report:

“My Lord, in conclusion, the accused person has a history of mental illness and has a tendency of relocating without the knowledge of his family members which makes them reluctant to consider standing as sureties. The community’s opinion is that he is a flight risk hence he is not suitable to be released on bond.”

53. The aptest manner, in my view, of presentation by the prosecution of compelling reasons is by filing an affidavit through which the same are laid before the court.

54. As stated above, the prosecution elected not to file any affidavit or other evidentiary material and instead relied solely on the reproduced paragraph contained in the pre-bail report prepared by the Probation Department, which alludes to the accused person having a history of mental illness and a tendency to relocate without informing his family members, culminating in the opinion that the community considers him a flight risk and hence unsuitable for release on bond.

55. As we have seen above, the burden of proving compelling reasons rests squarely on the prosecution and such reasons must be established through cogent, credible and admissible evidence rather than through bare allegations or unsubstantiated assertions, especially in light of the fact that the right to liberty is a fundamental constitutional entitlement that cannot be curtailed on the basis of speculative fears or generalised community perceptions.

56. While a pre-bail report is a valuable tool intended to assist the Court in appreciating the social circumstances of an accused person, it does not, standing alone, amount to evidence capable of displacing the prosecution's duty to substantiate its opposition through sworn affidavits or other formal documentation, particularly where the adverse information contained therein is contested or unsupported by objective proof.

57. The Court therefore must treat the contents of such a report cautiously, ensuring that no adverse inference is drawn against an accused person in the absence of independently verifiable material.

58. The prosecution's reliance on the alleged "history of mental illness" and alleged "tendency to relocate without notice" is, in the Court's view, insufficient to constitute a compelling reason

within the meaning of *Article 49(1)(h)*, especially where no witness affidavits or investigative reports have been presented to demonstrate that the accused person is presently unstable, incapable of complying with bail terms, or likely to abscond.

59. The mere fact that family members have expressed reluctance to stand as sureties does not, without more, amount to proof that the accused poses a real and substantial risk of absconding, given that the Court retains discretion to impose alternative or enhanced bond conditions.

60. Furthermore, the Court notes that the concept of a “community’s opinion” regarding the accused’s supposed flight risk, as recorded in the pre-bail report, is not supported by any formal statement or affidavit by any identifiable person or authority, and thus amounts to hearsay that cannot be treated as a factual basis for curtailing a constitutional right.

61. Compelling reasons must be specific, demonstrable and grounded in verifiable evidence and cannot be inferred from generalised sentiments that have not been subjected to evidentiary scrutiny or cross-examination.

62. To accept such untested allegations as a sufficient basis to deny bond would be to dilute the evidentiary threshold required by the *Constitution* and the *Bail and Bond Policy*

Guidelines and would risk normalising detention on speculative grounds.

63. In the totality of the circumstances, the Court finds that the prosecution has not furnished compelling reasons to warrant the denial of bond, and the concerns highlighted in the pre-bail report, though relevant to the shaping of appropriate conditions, do not rise to the level of justifying the deprivation of liberty at this stage of the proceedings.

64. Accordingly, the accused person is hereby admitted to bond. He may be released on a bond of Ksh.600,000/- with one surety of similar amount.

DELIVERED (virtually) DATED and SIGNED this 1st day of December, 2025.

JOE M. OMIDO
JUDGE

APPLICANT: Present.

PROSECUTION COUNSEL: **Ms. Muema.**

DEFENCE COUNSEL: **Ms. Odipo.**

COURT ASSISTANTS: **Mr. Ngoge & Mr. Juma.**