

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL CASE NO. E020 OF 2021

REPUBLIC.....PROSECUTION
COUNSEL
VERSUS

PETER **OMONDI**
ODERA.....ACCUSED

JUDGEMENT

1. The accused herein **Peter Omondi Odera** is vide the information dated 25th June, 2021 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 night of 15th and 16th of April, 2021 at Jimo East Sublocation in Nyakach Subcounty within Kisumu County, the accused murdered **George Odongo Ochienjo** (hereinafter “the deceased”).
2. The accused denied the charge on 1st July, 2021, calling for a full trial.
3. The trial initially proceeded before my sisters **Kamau J.** who conducted part of the prosecution case before her transfer to another station. My sister **Shariff J.**, took over the conduct of the trial. I took over the conduct of the trial, particularly the defence case, following the transfer of **Shariff J.** to another station.

4. The prosecution case was founded on the evidence of nine witnesses.
5. The first prosecution witness was **David Yogo Okela** (PW1), who testified and told the court that he was at his home on 16th April, 2021 when at about 10.00pm - 12.00 midnight he heard screams and awoke his son **Emmanuel Ochieng**. He then, in the company of his son, proceeded out to where the screams had come from, where he saw a person lying on the ground and with blood on his face, whom upon inquiry, was told by the accused was a thief who had stolen the accused's vegetables. He explained that the man person looked unconscious and he could not identify him.
6. PW1 told the court that he left for his home as other people kept gathering where the injured man was. The witness stated that he had known the accused person for more than 10 years.
7. Counsel for the accused, **Mr. Onsongo**, had no questions for the witness in cross examination.
8. The second prosecution witness was **Jonathan Otieno Ondiko** (PW2), who told the trial court that he was a driver and that he arrived at his home in Nyakach from work on 15th April, 2021 at about 8.00pm. He shortly retired to bed and was awoken at about midnight by screams. He went out to see

what was happening and met a number of people walking down towards a nearby river.

9. PW2 explained that when he got to the scene, he found the accused, whom he had known since his childhood, the accused's son one **Ochieng** and a third person who was lying unconscious on the ground. He then took a torch and confirmed using its light that the person on the ground was **Odongo**, the deceased. On inquiring what had happened, PW2 was told by the accused that the deceased was a thief, who had been stealing his kales and that he had hit the deceased with a *rungu*.
10. The witness told the court that he left for his home as other people arrived at the scene.
11. The witness stated that he was later asked by the police to record his statement, which he did.
12. On being cross examined by learned Counsel for the accused, **Mr. Onsongo**, PW2 told the court that it was necessary to use a torch as it was dark. He stated that he did not witness the assault on the deceased and did not know the number of people who participated in the same.
13. The third prosecution witness was **Irene Atieno Odongo** (PW3), who recalled the events of 15th February, 2021. She told the court that on that day at about 9.00pm, she cooked for

and had dinner with her husband and that the latter left for a funeral at a nearby house at about 10.00pm, leaving PW3 behind with her children.

14. PW3 told the court that at about 2.00am, three people - **Odhiambo Chienjo, Ben Awili** and **Festo** - knocked on her door and told her when she opened that something had happened to her husband. They asked her to remain in the house as they went to check on her husband and that moments later, the three returned and told PW3 that her husband had died at **Pila's** place.

15. PW3 told the court that at about 5.00am, one **Odhiambo** called her and asked her to go where her husband had been killed as police were at the scene and wanted to remove the body to the mortuary. She proceeded to the scene where she saw her husband's (the deceased's) lifeless body on the ground. The body was loaded onto a police vehicle and PW3 was left behind as she had a baby.

16. PW3 explained that she went to the mortuary the following day where she identified her husband's body, following which an autopsy was carried out.

17. PW3 was not cross examined by the learned defence Counsel.

18. **Okello Olonde Were** testified as the fourth prosecution witness (PW4). The witness told the court that on 16th February, 2021, he was at his home in Nyakach when at about midnight he heard noises emerging from the direction of a nearby road. He left his house to confirm what was happening at his (unnamed) friend's place after unsuccessfully trying to contact the friend on phone.
19. On the way out, PW4 realized that the noises were coming from the direction of a nearby river. He awoke one **Gayi** and one **Vincent**, who joined him and together, the three men walked down towards the river through a forest. As they neared the river, PW4 saw torches flashing and a group of people. He was able to identify the people as **David Yogo**, his son **Ochieng**, **Jonathan Odiko** and **Otieno** who were all standing on one side while the accused was standing on the other side, alone.
20. The witness told the court that he heard the accused lamenting that he could not continue working as someone else "ate from his sweat". The witness then saw a person lying next to the accused, whom he realized was the person the accused was complaining that "had been eating his sweat."
21. The witness stated that he remained at the scene for about 15 to 30 minutes and then left for his home. Those that he had gone to the scene also left for their respective homes.

22. In his further testimony, PW4 told the court that the next day while on his *boda boda* errands, he met the accused who was in the company of **George Odhiambo** and who told the witness that if anyone asked him about the incident of the previous night, he should tell them that it was a case of mob justice but the witness responded that that would cause him problems with the police.
23. PW4 told the court that a few days later, while he was carrying **Vincent** on his *boda boda*, he met the accused who again told the two that they should say that it was a mob justice incident if anyone inquired about the same.
24. In his further testimony, PW4 told the court that days later while while he was at **Gayi's** place with **Vincent**, the accused, who used to graze his cattle on a nearby shamba again told the two to state that it is a mob that assaulted the deceased, if anyone asked then and that he would then deal with the issue. That in response, **Gayi**, who was also present, asked the accused not to involve the three in the matter.
25. On being cross examined, PW4 told the court that he did not witness the assault on the deceased. He stated that he found the deceased lying down at the scene and that there were many people there. He stated that he did not go close to the deceased's body.

26. **Police Corporal Patrick Marete** was the fifth prosecution witness (PW5). The officer told the court that he was attached to DCI Nyakach, Pap Onditi Police Station at the time material to this case.
27. In his testimony, PW6 told the court that on 16th April, 2021, he was asleep in his house when at about 3.00am he received a phone call from his superior, **Inspector Owiti**, the DCIO Nyakach, who told him that he had received information from the OCS Pap Onditi Police Station to the effect that there was a person who had gone to steal kales from a farm and who had been cornered and beaten to death.
28. PW6 joined the DCIO Nyakach and the OCS Pap Onditi to the scene, where they found about 15 men, some with torches and crude weapons. They found the deceased's body lying in a maize plantation that was about 100 metres from the kale farm. There was at the scene a manilla sack that was three quarter full of kales.
29. The officer stated that the people at the scene were questioned and identified the deceased as **George Odongo Ochienjo**, who was married with four children and lived in a rental house at Store Pamba area and that the deceased's spouse had a kiosk in the same area where she sold kales. The

officer established that the kale farm that was along Asawo river belonged to the accused.

30. In his further testimony, PW5 told the court that he established from the accused that he left his house at about 9.00pm that night and went to guard his kale farm as there had been recurring thefts from the farm and that at about midnight, the deceased went to the farm to steal kales and the accused person, whom the deceased had not seen, gave an allowance of about 20 minutes for the deceased to harvest the kales and that when he was done, the deceased followed him while armed with a crude weapon - a club - which the witness stated he recovered from the accused person and which had blood stains.

31. PW5 stated that he took photographs of the scene using his cell phone and that on the next day, he took the investigating officer to the scene, who also took photographs of the same. He stated that the investigating officer took custody of the club (*rungu*).

32. Upon being cross examined by **Mr. Onsongo**, PW5 told the court that he did not record in writing what the accused told him at the scene. He stated that the 15 men he found at the scene were armed with crude weapons, but that he only recovered one *rungu*. The witness added that he did not have

any information when the 15 men arrived at the scene. The witness stated that he did not arrest the accused person.

33. **Dr. Agwanda Amfilled** testified as the 6th prosecution witness (PW6). The witness told the court that on 5th May, 2021, at about 3.30pm, he conducted an autopsy on the body of the deceased at Nyakach County Hospital and recorded his observations findings in the post mortem form of even date.

34. The witness noted that the deceased's body had general pallor due to lack of blood and had blood and mud smears on the head. The doctor noted a laceration on the right temporal region on the right side of the head that was approximately 3cm. The deceased's clothes were blood-stained and there was blood in the right ear. The face and the left pinna had bruises. There was a deep longitudinal cut wound on the left forehead just above the left eye, about 7cm long, caused by a sharp object. The doctor further noted a sharp edged semi-elliptical shaped cut in an arch form, across the left chin.

35. With respect to the deceased's limbs, the doctor noted lacerations on the upper left limb and over the distal regions of the right lower limb. The left lower limb appeared shortened and extremely rotated with closed fracture of the mid tibia, fibula region.

36. The doctor also noted friction burns on the gluteal area and mid-abdominal region.
37. Internally, the doctor noted congestion and pale lungs and liver. There was haematoma over the right temporal region of the scalp and diffusely spread subdural haematoma over the right occipito-tempo-parietal regions of the brain.
38. As a result of the autopsy, the doctor formed the opinion that the cause of the deceased's death was due to haemorrhage shock due to excessive bleeding from deep cut wounds secondary to assault, compounded by subdural haematoma.
39. He stated in his report that finger and toe nail chips were extracted from the deceased's body for purposes of DNA examination.
40. The witness produced the post mortem form as PExh1.
41. On being cross examined, the witness stated that the assailant must have been armed with a sharp object and further that there was a possibility that the assailants were more than one as the deceased was hit severally.
42. The seventh prosecution witness was **Police Constable Stephen Musyoka** (PW7) of DCI Nyakach, who was the investigating officer in the matter.

43. In his testimony, PW7 told the court that he was instructed to conduct investigations in the matter on 17th April, 2021. He stated that the incident occurred on the night of 15th and 16th April, 2025 at a kale or *sukuma wiki* farm that belonged to the accused.
44. The officer stated that on 19th April, 2021, together with PW5, he visited Store Pamba area where the deceased and his family resided. On inquiring, the officer was informed that the deceased left the house at about 9.30pm on 15th April, 2021 after dinner and told his spouse (PW3) that he was proceeding to a nearby bereaved home for burial preparations.
45. The officer stated that the deceased then proceeded to the accused's kale farm with the intention of stealing the vegetables. That night, the accused, whose kales had been severally stolen, had decided to keep vigil over his farm, while armed with a panga, club and torch, in order to nab the thief.
46. The officer explained that on that night, the deceased proceeded to harvest the accused's kales and putting them in a sack, oblivious of the accused's presence. After a few moments, the accused emerged from his hiding place and subjected the deceased to beatings and occasioned him the fatal several deep cuts on his body. He then made a distress call to the neighbours, that he had caught a thief. Several

neighbours went to the scene and found the deceased on the ground. Among the first to respond were PW1 and his son **Emmanuel Ochieng**, who told the investigating officer that they found the deceased on the ground injured with a sack of kales that he had stolen from the accused's farm.

47. The officer stated that other witnesses who arrived at the scene, including PW2, PW4, **Gayi Juma Hempstone** told him that they found the deceased injured and lying on the ground. The body of the deceased was removed to Nyakach District Hospital Mortuary, where post mortem on the same was subsequently conducted.

48. The officer stated that PW1 and **Gayi** informed him that the accused later attempted to coach them to tell the police that the deceased was a victim of mob justice, but they declined.

49. The officer stated that he took custody of a *rungu* that had been recovered by PW5 on the night of the incident and forwarded the same, vide an exhibit memo form dated 2nd June, 2021 to the Government Chemist Department for DNA sampling and analysis. As at the time of testifying, he had not received the report from the Government Chemist. The witness produced the exhibit memo form as PExh2.

50. On being cross examined, PW7 stated that no sharp weapon was recovered at the scene or from the accused. He stated

that PW5 did not inform him that there were other people at the scene who were armed with crude weapons but added that indeed PW5 recorded in his statement that there were people at the scene who had crude weapons, but did not disclose their names.

51. The witness admitted that there was no forensic evidence that showed that it is the accused who attacked the deceased.

52. The 8th witness that the prosecution called was **Godwin Amala Wanyama**, a government analyst working with the Government Chemist. The witness told the trial court that on the request by PW7 vide an exhibit memo form dated 2nd June, 2021, he received and examined two exhibits, namely a *rungu* packed in a brown khaki wrapping marked “A” and finger and toe nail samples extracted from the body of the deceased marked “B”.

53. The officer proceeded to conduct the examination and established that item “A” was moderately stained with the blood of human origin. The witness proceeded to generate DNA profiles and, in his analysis, reached the conclusion that the blood stains on the *rungu* matched the DNA from the samples “B” that were extracted from the deceased.

54. PW8 produced his report dated 18th April, 2023 as PExh3.

55. The witness was not cross-examined.

56. The last prosecution witness was **George Kennedy Odhiambo**, who told the court that the accused and the deceased were his village mates. The witness narrated the events of 15th April, 2021 and told the trial court that on that day past midnight, he was awoken by a call from one **Martin Dede** who then informed him of the incident. He went out, armed with a torch and heard screams. He then saw a group of people and a man, whom he did not recognize, who was critically injured, lying on the ground. There was a sack that had vegetables beside the man. He was then informed that the man was **Odongo**, the deceased.

57. The witness stated that moments later, police officers arrived at the scene and took away the deceased's body.

58. Upon being cross examined, PW9 told the court that some people in the crowd at the scene were armed with pangas, knives and torches. He stated that he did not see anyone assaulting the deceased.

59. The prosecution closed its case at that stage.

60. In her considered ruling rendered on 28th June, 2024, **Shariff J.** found that the prosecution had made out a *prima facie* case the accused he was subsequently placed on his defence.

61. In his sworn testimony, the accused told the court that he was a vegetable farmer and that he learnt that the deceased was killed by a mob.
62. The accused stated that there had been instances of theft of farm produce in his village and that he had severally been a victim of the theft, as his vegetables would be stolen in the night and that he informed the area chief after every incident, who only told him to secure his farm in a better way. He stated that in April, 2021, he experienced a fourth theft incident of his kales.
63. The accused told the court that on the night of 15th and 16th April, 2021, he saw a person entering his farm and raised an alarm and the person ran away. Neighbours responded and the accused told them that the thief had fled towards the river.
64. The accused stated that he followed up in the direction of the river, armed with a torch, where, at the scene, he found the deceased on the ground, who had been badly beaten and injured. There were several people at the scene and many others arrived. He stated that the area chief and assistant chief were called to the scene and in turn called the police, who took away the deceased's lifeless body. The officers recovered a sack of vegetables that the deceased had.

65. The accused stated that he formally reported the matter at Pap Onditi Police Station on 16th April, 2021 and that on 26th June, 2021, he was summoned by the police and was subsequently arrested and charged.
66. The accused was emphatic that he did not assault the deceased and that he only found him after he had been critically assaulted and injured.
67. The accused did not call any witness.
68. The defence relied on the earlier submissions on no case to answer and the prosecution filed submissions.
69. I have anxiously considered the charge facing the accused, the entirety of the prosecution evidence, the sworn defence tendered by the accused, the submissions by both learned Counsel and the applicable law.
70. The accused, **Peter Omondi Odera**, stands charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. The burden rests squarely upon the prosecution to prove each and every element of the offence beyond reasonable doubt, and that burden never shifts to the accused.
71. Flowing from the evidence and the law, the following issues commend themselves for determination by this court:

- a. Whether the prosecution proved the fact and cause of the death of **George Odongo Ochienjo**.
 - b. Whether the said death resulted from an unlawful act or omission.
 - c. Whether it was the accused who committed the unlawful act or omission leading to the deceased's death.
 - d. Whether the prosecution established malice aforethought as defined under *Section 206* of the *Penal Code*.
 - e. Whether the circumstantial evidence relied upon satisfies the legal threshold to sustain a conviction for murder.
 - f. Whether the evidence on record amounts to mere suspicion and, if so, whether such suspicion can found a conviction.
72. The first issue for determination is whether the prosecution proved the fact and cause of the death of **George Odongo Ochienjo**. The fact of the deceased's death is not contested. PW3, the deceased's widow, testified to having identified the body of her husband at Nyakach County Hospital Mortuary.

This evidence was corroborated by PW6, the pathologist, who conducted the post-mortem examination on 5th May, 2021.

73. PW6's findings were detailed and graphic. He observed multiple injuries on the deceased's body, including deep cut wounds, lacerations, bruises, fractures and significant intracranial bleeding.

74. Internally, the deceased had a subdural haematoma and evidence of massive blood loss. The doctor formed the opinion that the cause of death was haemorrhagic shock due to excessive bleeding from deep cut wounds secondary to assault, compounded by subdural haematoma.

75. The post-mortem report was produced as PExh1 and was not challenged. I therefore find that the prosecution proved beyond reasonable doubt both the fact of death and its medical cause.

76. The second issue for me to address is whether the said death resulted from an unlawful act or omission.

77. The deceased sustained multiple severe injuries inflicted by blunt and sharp force trauma. There is no suggestion that the injuries were accidental or self-inflicted. No lawful justification such as self-defence or accident was raised or established.

78. It is trite law that every homicide is presumed unlawful unless the contrary is proved. In the absence of any evidence to suggest lawful justification, I find that the death of the deceased was the result of an unlawful act.

79. I will proceed to determine the third, fifth and sixth issues together, and will thereafter address the fourth issue. The third, fifth and sixth issues are; whether it was the accused who committed the unlawful act leading to the deceased's death, which is the central and most contested issue; whether the circumstantial evidence relied upon satisfies the legal threshold to sustain a conviction for murder; and whether the evidence on record amounts to mere suspicion and, if so, whether such suspicion can found a conviction.

80. The prosecution did not call any eyewitness to the assault. The case against the accused is therefore founded entirely on circumstantial evidence.

81. The law on circumstantial evidence is settled. In ***Abanga alias Onyango v Republic [1990] eKLR***, the Court of Appeal held that for such evidence to sustain a conviction, the inculpatory facts must be incompatible with the innocence of the accused, incapable of explanation upon any other reasonable hypothesis than that of guilt, and must form a complete chain with no missing links.

82. The prosecution relied on several circumstances; that the deceased was found at the accused's farm stealing kales, that the accused allegedly admitted to PW2 that he had hit the deceased with a *rungu*, that a blood-stained *rungu* linked to the deceased was recovered and that the accused allegedly attempted to influence witnesses to describe the incident as mob justice.

83. As regards the alleged admission, PW2 testified that the accused stated that he had hit the deceased with a *rungu*. This statement was not recorded, was not made before a magistrate and did not comply with *Sections 25 and 25A of the Evidence Act, Cap 80 Laws of Kenya*. Such utterances, made in informal and emotionally charged circumstances, must be approached with circumspection. Standing alone, they cannot be elevated to the status of a confession.

84. Turning to the *rungu*, PW5 recovered the club bearing blood stains, and PW8, the government analyst, confirmed through DNA analysis that the blood matched that of the deceased. This evidence establishes contact between the *rungu* and the deceased. However, it does not conclusively establish that it was the accused who wielded the weapon. PW5 himself conceded that there were about fifteen people at the scene, several of whom were armed with crude weapons.

85. Crucially, the medical evidence disclosed that the deceased sustained deep cut wounds caused by a sharp object. No such sharp weapon was recovered or produced in evidence. PW6 further opined that the injuries were consistent with multiple blows and that there was a possibility of more than one assailant. This medical testimony significantly weakens the prosecution's theory that the accused alone inflicted the fatal injuries using the recovered *rungu*.
86. Several witnesses, including PW4 and PW9, testified that they found many people at the scene, some armed with *pangas* and knives. None of the witnesses saw the accused assault the deceased. The time, manner and actual perpetrator of the fatal assault therefore remain shrouded in uncertainty.
87. When the circumstantial evidence on record is considered holistically, the chain is far from complete. While the accused's farm or its environs was the *locus* of the incident and the deceased was found with alleged stolen farm produce, these facts alone do not irresistibly point to the accused as the killer to the exclusion of any other alternative explanations consistent with innocence.
88. The presence of numerous armed individuals at the scene, the medical findings that it was a sharp weapon that was used used to inflict the fatal wounds and the doctor's evidence

suggesting multiple assailants constitute co-existing circumstances that weaken the inference of guilt.

89. In ***Sawe v Republic [2003] eKLR***, the Court of Appeal warned that courts must guard against the danger of basing convictions on suspicion, conjecture or probabilities. The circumstantial evidence in this case falls short of the exacting standard required in criminal trials.

90. The conduct attributed to the accused, including the alleged attempts to persuade witnesses to describe the incident as mob justice, undoubtedly raises suspicion. However, suspicion, however strong or morally compelling, cannot take the place of legal proof. The Court of Appeal in ***Sawe*** (supra) emphatically stated that suspicion alone cannot be the basis of a conviction. The court held that:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

91. Similarly, in ***Mary Wanjiku Gichira v Republic [2016] eKLR***, the court held that post-offence conduct, without clear proof of participation in the act causing death, cannot sustain a conviction for murder. The court held that suspicious conduct after an offence, without evidence connecting the accused to the commission of the crime, is insufficient to found a conviction.

92. The fourth issue for me to determine, which I will now address as the last one, is whether the prosecution established malice aforethought as defined under *Section 206* of the *Penal Code*.
93. Even assuming that the accused participated in the assault which led to the death of the deceased (which has not been established on the evidence) the prosecution nonetheless failed to prove malice aforethought as required under *Section 206* of the *Penal Code*.
94. Under the law, a charge of murder comprises two fundamental elements: the *actus reus*, being the unlawful act, which causes the death of another, and the *mens rea*, being the requisite malice aforethought or guilty mind.
95. In the offence of murder, malice aforethought may be established by evidence of an intention to kill or cause grievous harm, or knowledge that one's unlawful act will probably result in death or grievous harm. Both *actus reus* and *mens rea* must be proved beyond reasonable doubt by the prosecution before a conviction can be entered.
96. In the present case, the evidence does not demonstrate that the accused had the intention to kill or to cause grievous bodily harm, nor does it conclusively show any actions that he undertook knowing that such actions would probably result in

the death of the deceased or in the deceased sustaining grievous harm.

97. Without credible proof of both the physical act (*actus reus*) and the mental element (*mens rea*), the essential ingredients of murder are absent and a conviction cannot be sustained. It is incumbent on the prosecution to prove every element of the offence beyond reasonable doubt.

98. Being of the foregoing findings, I reach the result that the charge of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code* has not been proved against the accused beyond reasonable doubt. I am therefore compelled to conclude that the accused cannot be lawfully convicted. I proceed to acquit him of the charge against him.

99. The accused's surety is hereby discharged and the security shall be released to the surety.

100. This file is hereby closed.

DELIVERED, DATED & SIGNED this 9th day of February,
2026.

JOE M. OMIDO
JUDGE

ACCUSED: Present.

PROSECUTION COUNSEL: **Ms. Muema.**

DEFENCE COUNSEL: **Mr. Onsongo.**

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