

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. E023 OF 2023**

STATE ..... PROSECUTION

VERSUS

SILAS ONZENGO ADEMI ..... ACCUSED

**JUDGEMENT**

1. The accused person 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 the night of 9<sup>th</sup> and 10<sup>th</sup> **September 2023** at Musunguti village in Kisumu West Sub County within Kisumu County, jointly with others not before court, the accused murdered **Edwin Olienyi**.
2. The accused was arraigned before this Court, pleaded not guilty, calling upon the prosecution to discharge its burden of proof and disprove his innocence as provided for in *Art. 50(2)(a) of the Constitution*.
3. The prosecution called eight (8) witnesses in support of its case. **Pw1 Anne Atieno** testified that she hailed from the same village as the deceased. That the accused was a nephew to the deceased. That on **9/9/2023** at 9am, she was tilling in her farm when she heard the deceased's step-mother wailing from her home.

4. That at 10am, the accused passed by where she was working and told her that the deceased's step-mother had come to his house stating that the deceased was disturbing her. That he was going to call the police to arrest the deceased as he was stubborn and that the deceased's father had tried to intervene to resolve the issue. That he then left and she continued working at her farm until 6pm. That at around 8pm she heard dogs barking but they stopped after 15 minutes.
5. That the following morning, **10/9/2023** at 7am, she heard Hosea, the deceased's brother mourning and stating that the deceased had been killed. She got out of her house and followed him to the deceased's house. That she found people at the scene where she also saw blood on the door, a jacket on the chair and the deceased's body lying in the house naked.
6. She called and informed the Assistant Chief of the incident. She then went and found the deceased's step-mother carrying her belongings in a lesso and inquired whether she knew what had happened but she only revealed that the deceased had been killed.
7. In cross-examination, **Pw1** testified that she did not meet the accused at the deceased's home when she went there nor did she find any of the deceased's family members.
8. **Pw2 Calvin Omondi Dedege**, a motorcycle rider testified that the accused used to ride a motorcycle with him. That on the **9/9/2023** at about 10am, he went

to work where he met the accused. The latter asked him to board his motorcycle before taking him to a chang'aa den. That the accused informed him that his uncle, the deceased, was disturbing his grandmother. Thereafter, between 11-12 noon on the same day, they left to go and check on the accused's grandmother whereby they found the deceased's in the farm.

9. That the accused started to quarrel the deceased over the land. **Pw2** then informed the accused that he could not intervene in the said dispute. The accused then received a call from a customer who wanted to be picked up from majengo. But before leaving, the accused told the deceased that although he was leaving to pick a customer, he would return and deal with him as the issue was not over yet. They left and the accused gave him Kshs. 150/- which he used to drink chang'aa. That on the following day when he went the stage, he heard that the accused had killed the deceased.

10. In cross-examination, he told the Court that at the chang'aa den, he drank a lot although he never became drunk while the accused drunk less. That the accused had requested him to go and rescue his grandmother who was being chased by the deceased. That he did not meet the accused after the latter left to go and pick the customer at Majengo and neither did he see the deceased again.

11. He told the Court that at the farm, they found the deceased and the accused's grandmother quarrelling. That the deceased asked the accused to go and bring his father if he wanted a place to construct a house.
12. **Pw3 Grace Karemera**, the deceased's wife, testified that on **9/9/2023** at noon, the deceased called her and informed her that he had gone to plant trees on a farm when the accused stopped him from doing so. That she informed the deceased not to quarrel with the accused as the latter was only a young man. That later, the accused called her and told her that '*today if your husband eats ugali you will see.*'
13. That at about 9.30pm, the accused called her and asked her *to come with a coffin as he had finished with him and to come and bury him*. That she immediately called the deceased but he was not reachable. That during the day, she had called the accused inquiring why he was quarrelling with his uncle, the deceased. The accused had responded that the deceased was given more land. That the following morning she received a call from her nephew Oseyo informing her of the deceased's demise.
14. That she gave the accused's number to the police and also informed her 4 children whose ages ranged from 12 - 18 years about the accused's earlier comments about the deceased.

15. **Pw4 Dr. Robert Omollo** produced the post-mortem report dated **19/9/2023** regarding the autopsy of the deceased as **PExh1**. He testified that the body had blood stains on the hand. Internally, the lungs had soot and had darkened, that there were no rib fractures nor lung contusion. That the cardiovascular, genito-urinary and digestive system were normal with normal intra-abdominal organs.
16. On the head, there was a laceration on the left occipital parietal region 5cm in length, 2cm in length on the right temporal region while internally there was subdural haematoma with brain oedema. That he also noted a haematoma on the deceased's right arm with no fracture or dislocation. That as a result of his examination, he opined that the cause of death was head injury due to head trauma secondary to assault.
17. In cross-examination, he told the Court that the injuries were possibly caused by a sharp object like a panga that caused both a cut and blunt injury. That it was unlikely that the injuries were as a result of a fall as the lacerations were on both right and left sides of the head and as the arm injury appeared to be a defensive injury.
18. **Pw5 Stephen Okach** testified that the deceased was his brother while the accused was his nephew. That on the morning of **10/9/2023**, he was at home when his neighbour arrived and informed him that there were screams at his brother's house and as such he ought to go and check

19. That he proceeded to his brother's house where he found the door halfway closed and bloody. Inside the house, he found the deceased body naked and his legs were hanging on the seat. He called the deceased twice but there was no response. He therefore went to the village elder and reported to him the incident. The both returned to the scene and the village elder called the police who came and took the body to the morgue.
20. His testimony was that the deceased had injuries on the head with blood on the head and neck. That 2 days after the incident, he and the police returned to the scene and found 2 wool marvins at the fence, one which was black and the other multi-coloured.
21. In cross-examination, **Pw5** told the Court that he did not witness the incident and that the deceased lived alone.
22. **Pw6 Raydon Vidani**, the deceased's nephew identified the body on the **19/9/2023** at the Masaba Hospital morgue.
23. **Pw7 No. 113660 Mungai Wakaba**, a certified Forensic Examiner with the DCI testified that he received an exhibit memo from one **PC Richard Bore** that included one exhibit, a mobile phone make Honking EMI No. 370362001231414 with card serial 892-540-352-100-438-740-6 belonging to the accused. That he was tasked to ascertain the sms messages therein, call logs and registered details of the owner between the dates of **8/9/2023** and **11/9/2023**.

24. He examined and produced a forensic report but that the Investigating Officer informed him that he did not get what he was looking for to support his case. He produced the report dated **26/2/2025** as **PExh 2**.
25. In cross-examination, he stated that from his analysis, there was no link of the accused to the murder and that he did not ascertain the owner of the sim card that was in the phone.
26. **Pw8 No. 243926 PC Edwin Otieno**, the investigation officer, testified that he received information about the incident on the **10/9/2023** from the area Assistant Chief and proceeded to the scene with two other officers. That on arrival, they found the body of the deceased on the floor of his house in a pool of blood with injuries on the head and neck. They then moved the body to Masaba Hospital mortuary for post-mortem.
27. That he commenced investigations and one witness, **Pw2** informed him that the accused asked him to join him and beat the deceased but that he, **Pw2**, had refused. That as the accused and **Pw2** were leaving the deceased's home, the accused threatened the deceased informing him that he would return before the day ends. That the accused was subsequently arrested by members of the public and brought to the police station.
28. In cross-examination, he told the Court that when they returned to the scene of crime with the Assistant Chief, they found two marvins but that there was

nothing to show that the marvins belonged to the accused. That they did not find any murder weapon and there was no witness who saw the accused kill the deceased.

29. That he charged the accused based on the statement of the deceased's wife who informed him that the accused had called her and informed her that he had killed her husband.

30. In re-examination, he stated that the contacts he gave the forensic examiner were not the ones used to call the deceased's wife as per the forensic report.

31. When placed on his defence, the accused gave a sworn statement stating that the deceased was his uncle and friend. That he and the deceased had never quarreled but rather the deceased had a quarrel with his mother. That on the **9/9/2023**, he left home for his work as a bodaboda rider at Mchanga stage within Vihiga sub-county.

32. That on the way, he saw the deceased quarrelling with his mother and grandson whereas **Pw3** was in the farm planting and witnessed the quarrel. That later one Doris, the grandchild to **Refa Onzego** sent him a message telling him that the deceased had cut the mother with a panga so he rushed home and found the deceased with a panga and Refa screaming and urged them to stop the skirmish.

33. That he then returned to his work until 6pm then returned home. The accused denied meeting the deceased on the **9/9/2023** or calling anyone informing them that he wanted to kill the deceased. That while at home, the village elder informed him to proceed to the police station to record a statement where he was arrested and placed in custody.
34. In cross-examination, the accused stated that he was at the boda boda stage with his colleagues though he did not intend to call any of them as a witness. That he saw the deceased on the **9/9/2023** holding a panga while the mother was screaming. That the deceased's wife and his mother had a grudge.
35. In re-examination, he reiterated that when he saw the deceased arguing with his mother on the **9/9/2023**, he asked them to stop and that he left them and from that time he never saw the deceased again.
36. I have considered the evidence on record. The accused is charged with an offence of murder. The onus was on the prosecution to prove the offence beyond reasonable doubt. The ingredients of murder that must be proved by the prosecution to that standard are: -

*a) the fact of death;*

*b) the cause of death;*

*c) that the death was caused by the wrongful act or omission of the accused;  
and*

*d) that the act or omission of the accused was with malice aforethought as  
defined under section 206 of the Penal Code.*

37. I have examined the evidence by the prosecution witnesses. There's no doubt about the deceased's death. The same is confirmed by the testimonies of the prosecution witnesses. **Pw1** and **Pw5** testified of seeing the deceased's body at the scene where it was recovered which **Pw6** later identified at the Masaba Hospital Mortuary. Accordingly, I am satisfied that the prosecution proved this element to the required standard.

38. The second element is the cause of death. **Pw4, Dr. Omollo** produced a post-mortem report that he carried out on the deceased. He told the Court that post-mortem was carried out on **19/9/2023**. That on examination, the deceased's head had a laceration on the left occipital parietal region 5cm in length, 2cm in length on the right temporal region while internally there was subdural haematoma with brain oedema. That he also noted a haematoma on the deceased's right arm with no fracture or dislocation.

39. That the conclusion was that the cause of death was head injury due to head trauma secondary to assault. Dr. Omollo ruled out the possibilities of the injuries having been caused by a fall.

40. On the foregoing, I am satisfied that the cause of death was head injury secondary to trauma from assault.

41. The third element is whether, the cause of death was as a result of the wrongful act or in-action of the accused. In the present case, none of the prosecution witnesses saw the accused kill the deceased. It follows that the evidence linking the accused to the offence is circumstantial. The Court must therefore closely examine the evidence on record so as to ascertain whether the recorded evidence satisfies the following requirements: -

*a) The circumstances from which an inference of guilt is sought to be drawn. This must be cogently and firmly established;*

*b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

*c) 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.*

42. Those principles were set out in the case of **GMI vs Republic [2013] eKLR** which echoes the *locus classicus* case of **R. v. Kipkering Arap Koske & Another, 16 EACA 135.**

43. The chain of events leading up to the accused's arrest came from eight prosecution witnesses. **Pw1** testified that on the morning of **9/9/2023** at 10am, the accused passed by where she was working and informed her that the deceased's step-mother had come to his house stating that the deceased was disturbing her. That as such, the accused was going to call the police to arrest the deceased as he was stubborn. That the accused left and on the following day, she learnt of the deceased's death.
44. **Pw2** testified of how the accused tagged him along to go and confront the deceased who was quarrelling with his grandmother but at the scene he, **Pw2** refused to intervene in the quarrel. That the accused then left the deceased at the farm after receiving a call from a customer but promised to return and deal with him.
45. **Pw3** was the deceased's wife. It is her who attempted to connect the accused to the demise of the deceased. She told the Court that the accused called her on the morning of **9/9/2023** and told her that on that day, the deceased was not to eat ugali. That later at about 9.30pm, the accused once again called her and told her to go with a coffin and bury the deceased as the accused had finished with him. That she tried to call the deceased after this but he was not reachable.

46. **Pw8**, the investigation officer, told the Court that it was the testimony of **Pw3** that he relied on to charge the accused with the offence of murder of the deceased. However, when **Pw7** testified, he told the Court that upon carrying out a forensic examination on the accused's phone that was presented to him by **Pw8**, he could not establish any link between the accused and **Pw3**. It meant that there was no communication between the accused and **Pw3** as alleged by the latter. That he did not ascertain the owner of the sim card presented to him by **Pw8**.

47. **Pw8** testified that the contacts he gave the forensic examiner were not the ones used to call the deceased's wife as per the forensic report. He did not provide the Court with evidence of any other contact and or number with which the accused allegedly used to contact **Pw3**.

48. The accused denied committing the offence. He stated that, when he saw the deceased arguing with his mother on the **9/9/2023**, he told them to stop and that he left them and from that time he never saw the deceased again.

49. From the forgoing, it is clear that the evidence presented by the prosecution does not form a clear chain linking the accused to the deceased's murder. The basis upon which the accused was charged according to **Pw8** was the alleged phone call by the accused to **Pw3**. The forensic evidence of **Pw7** disapproved that fact.

50. To the contrary, the accused was consistent in his testimony that though he saw he deceased on the morning of **9/9/2023** quarrelling with his grandmother, he never saw him after that.

51. The standard of proof in a criminal case such as this one must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on **Article 50(2) (a) of the Constitution** which guarantees individual freedoms under the bill of rights, particularly, the aspect of innocence until proven guilty. This burden of proof rests on the prosecution throughout the trial.

52. This proof need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to defeat the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour, the case is proved beyond reasonable doubt but nothing short of that will suffice.

53. Where there is doubt of any kind in a criminal matter, and evidence which would likely advance the case of the prosecution is not adduced, the effect of such an occurrence would go to the benefit of an accused person. It is a foundational principle that mere suspicion, no matter how strong, is not sufficient to convict an accused person. A criminal conviction requires that the

prosecution proves the guilt of the accused beyond any reasonable doubt. See the case of **Woolmington v DPP 1935 A C 462**.

54. Accordingly, I am satisfied that the prosecution failed to prove beyond reasonable doubt that it was the accused who unlawfully caused the death of the deceased.

55. The Court therefore finds the accused not guilty of the murder of the deceased. He is innocent of the charge and is hereby set at liberty unless otherwise lawfully held.

It is so held.

**DATED** and **DELIVERED** at Kisumu this 12<sup>th</sup> day of **February, 2026**.

**A. MABEYA, FCI Arb**

**JUDGE**