

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. E005 OF 2024**

STATE ..... PROSECUTION

VERSUS

WICKLIFE OLUOCH OTIENO ..... ACCUSED

**J U D G M E N T**

1. Vide an information dated 5/3/2024, the accused 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 26/1/2024 at Kamgan village in Upper Nyakach Location of Nyakach sub-county within Kisumu County he murdered **Silvance Oyata**.
2. He pleaded not guilty and it fell upon the prosecution to discharge its burden of proof and disprove his innocence as provided for in *Art. 50(2)(a) of the Constitution*. The prosecution called seven (7) witnesses in support of its case.
3. **Pw1 Dr. Collins Kipkoech** testified that he conducted the deceased's autopsy at St Joseph's Mission Hospital at Nyabondo on the 6/2/2024 under the escort of one Sharamo and 2 witnesses who identified the deceased's body to him. That externally there was digital cyanosis (dark blue) multiple bruises on

the abdomen, face and back. That there was a deep cut on the neck below the chin measuring 6cm x 3cm x 4cm. That most vessels were cut through, multiple teeth were missing while internally, the respiratory, cardiovascular, digestive, nervous system, spinal cord & column and genito urinary systems were normal.

4. That on the head, the tongue was cut through, part of the mandible was cut most anterior neck vessels were cut through. That as a result of the examination, he formed the opinion that the cause of death was penetrating neck cut due to sharp object cut in the background of assault.

5. When cross-examined, he stated that he could not tell who declared the deceased dead nor the day when he died. That from the narration by the police officer and witnesses to the autopsy, the deceased was assaulted. That he also saw the cuts on the deceased's body which enabled him to deduce the cause of the injuries.

6. **Pw2 Mathews Oyata**, the deceased's father, testified that on the **25/1/2024** he was with the deceased from 11am to 8.30pm as the deceased was helping him build a house for his younger wife. That the deceased was called on his phone and excused himself saying he was going somewhere and would return but never returned.

7. That on the **26/1/2024**, he left home for church with his wife Belinda and on his return from Nyabondo at the main road at around **5.40am**, he found many

people gathered. That he established that someone had been found dead though he could not tell who it was as the body was facing down.

8. That on his arrival home, his sister-in-law Jacinta informed his wife that someone had called her and told her that Silvance had died. He then returned to the scene and when the body was turned up, he recognised it to be of his son. That the deceased was badly beaten and injured on the head. In cross-examination, he stated that he did not see or know who assaulted his son.

9. **Pw3 Donald Otieno Olero**, a manager at Tableland Bar & Restaurant testified that he knew the deceased who was his fellow villager. That on the **25/1/2024**, the accused and the deceased among other patrons were drinking in the bar upto about 11pm when he closed the bar. They started watching football until after 1am. That when he closed the bar at 2.20am, the deceased and the deceased were the last to leave together. In cross-examination, he stated that there was no commotion when the two left. He admitted that he did not know what happened after the two left.

10. **Pw4 Zablon Owino Owiti**, the Assistant Chief of East Kadera sub-location testified that he knew both the accused and the deceased. That on the **26/1/2024** at about 5.30am, he received a call from one Beatrice who was on her way from Nyabondo and who claimed to have found a dead body.

11. That he proceeded to the scene where he found a body lying in a pool of blood which prompted him to call OCS, Nyakach. That at the scene, he heard someone saying that “Manyaki” had blood stained clothes so he informed the OCS and DCI who had already arrived at the scene. That he approached “Manyaki”, the accused herein, and tricked him to leave the crowd. The accused got into a vehicle and was taken to Pap Onditi Police Station.
12. In cross-examination, he stated that he saw blood stains on the accused’s clothes and that he was the one who informed the police that the accused was also known as “Manyaki”.
13. **Pw5 PC Chacha Francis Manwa No. 257218** testified that he knew both the deceased and accused. That on the **26/1/2024** at 5am, he was briefed by **Corporal Vincent Oyunge** to go to the scene where a lady, Beatrice reported that a person had been found dead. That he went to the scene where he found the deceased and he informed the OCS who came with the DCIO.
14. That while at the scene, they received a tip that the suspect was in the crowd. So they asked the Assistant Chief to remove the suspect (the accused) from the scene and have him placed in his car before proceeding to the Police Station. In cross-examination, he testified that he was not part of the investigating team.
15. **Pw6 Polycarp Lutta Kweyu**, the Government Chemist produced the Government Analyst Report prepared on the **21/1/2025** as **PExh2**. That on

1/2/2024, he received the following samples from PC Adan of DCI Nyakach with instructions to carry out DNA analysis on them to establish the presence and origin of biological evidential material;

a) *A white/blue/black short sleeved checked shirt marked “A”*

b) *A black long-sleeved jacket marked “B”*

c) *A piece of wooden plank marked “C”*

d) *Blood sample from Sylvance Oyata (deceased) marked “D”*

e) *Blood sample from Wycliffe Oluoch Otieno marked “E”*

16. That as a result of his analysis he found that;

a) *The shirt A and jacket B were lightly stained, while wooden stick C was moderately stained all with blood of human origin. That the DNA profile generated from the blood stains on the shirt A, jacket B and wooden stick C were identical and matched the DNA profile of the deceased.*

b) *The DNA profile Wycliffe Oluoch Otieno (the accused) did not match with any of the above DNA profile.*

17. **Pw7 No. 77673 PC Adan Sharamo** testified that on 26/1/2024, he received a call from the DCIO informing him that there was a body found at Nyabondo area. That he proceeded to the scene in the company of the OCS where they found the body near the road to Nyabondo Hospital. That as they processed the

scene, the area Assistant Chief told them that there was someone with blood stains on his shirt and black jacket.

18. That as the crowd was getting enraged, the OCS asked the Assistant Chief to secure the suspect which the Chief did with the help of PC Chacha. That on inquiring from the accused as to where he got the blood stains, the accused initially failed to explain but later informed him that he got the same as he was assisting the police to carry the body of the deceased.
19. That he took the jacket and shirt as exhibit and blood sample from the suspect for forward transmission to the government analyst and following the analysis the government analysis concluded that the blood stains on the shirt and jacket all matched the deceased's DNA.
20. That the accused's allegation that he assisted the police at the scene to carry the deceased's body was untrue as he was whisked away from the scene by the Assistant Chief and PC Chacha prior to the processing of the scene. That he did not know the accused prior to the incident.
21. In cross-examination, he stated that he did not have any other evidence to show that the accused wore the clothes forwarded to the government analyst other than the witness statements of other witnesses. That the accused did not go home after his arrest but that he asked him to call a relative to bring him clothes to the Station. He did not see the relative who brought the accused other clothes.

22. That he recovered the bloodied shirt and jacket from the accused. That no one saw the accused assault the deceased. That he recovered the wooden stick forwarded to the government analyst at the gate of the compound where the accused was living.
23. When placed on his defence, the accused gave a sworn statement stating that he knew the deceased as a fellow villager. That on **24/1/2024**, he was at Land Bar Restaurant also known as Villa Restaurant where the deceased was also sitting in a different table with 5 other individuals.
24. That the deceased and his friends left before him at about past midnight looking for another open bar whilst he was left behind watching football. That he left 40 minutes later and headed to his home. That on the **26/1/2024**, the deceased's body was found beside the road and as he was going for his morning walk at about 6.00am, he met a crowd gathered and he saw a body face down.
25. That the previous night he wore a red t-shirt and red jacket with a black trouser whereas in the morning as he went to the scene, he had put on a white long-sleeved shirt and black jacket with a navy blue trouser. That at the scene, they were informed not to touch the body but wait for the police. That after the officers examined the scene, they requested 7 of them to carry the body to the vehicle to be taken to the mortuary.

26. That prior to carrying the deceased's body, his clothes were not blood stained. That the body of the deceased had a cut wound on the left side of the neck, there was blood on his chest and he had contact with the body as he used his knees to lift it. That together with Jackie, Mama Winnie, Vaina & Jacob carried the deceased's body and headed to the morgue with it while he left for the market.
27. That on the way to the market, he met the area Assistant Chief who informed him about a land case between his mother and step father before leaving. That he was subsequently called by the area Assistant Chief who inquired if he had seen the deceased the previous night and urged him to help the officers with the investigations.
28. That the investigating officer inquired about his blood stained clothes as well as a piece of wood he had recovered from the scene. He then arrested him and placed him in custody. That he had no differences with the deceased and they were like brothers.
29. In cross-examination, he detailed how the accused got him at the bar where he was watching football. That he got into contact with the deceased's body at the scene after the officers had examined the scene and that it was Mama Winnie who informed him that he had smeared himself with the deceased's

blood. That he did not notice any of the other persons who carried the deceased's body having come into contact with the deceased's blood.

30. In re-examination the accused stated that Mama Winnie also had blood stains after carrying the deceased's body to the vehicle. That he was holding the upper part of the deceased's body and used his knee to lift it into the vehicle.

31. 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.*

32. On the fact of death, **Pw1** testified how he was with the deceased on the 25/1/2024 before he received a call and leaving them behind. He also testified how the following morning the body of the deceased was found besides the road

from Nyabondo. There were also the testimonies of **Pw2, Pw3, Pw4, Pw5, Pw6** and **Pw8** who saw the deceased's body at the scene from where it was recovered.

33. Accordingly, I am satisfied that the prosecution proved this element to the required standard.

34. The second element is the cause of death. **Pw1, Dr. Kipkoech** carried out autopsy on the body of the deceased on **6/2/2024**. He produced a post-mortem report which he prepared in respect thereof as **PExh1**. He testified that on examination, he discovered digital cyanosis (dark blue) multiple bruises on the abdomen, face and back. That there was a deep cut on the neck below the chin measuring 6cm x 3cm x 4cm. That most vessels were cut through and multiple teeth were missing. That on the head, the tongue was cut through, part of the mandible was cut and most anterior neck vessels were cut through. He opined that the cause of death was a penetrating neck cut due to sharp object cut in the background of assault.

35. I am satisfied that the cause of death was a penetrating neck cut due to sharp object cut in the background of assault.

36. The third element is whether, the cause of death was as a result of the wrongful act or in-action of the accused. None of the prosecution witnesses saw the accused assault the deceased. It follows that the evidence linking the accused

to the offence is circumstantial. I 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, must be cogently and firmly established;*
- b) *Those circumstances should be of a definite tendency unerringly pointing towards the 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.*

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

38. The chain of events leading up to the accused's arrest came from seven prosecution witnesses. The only evidence connecting the accused with the deceased's murder is that the accused was the last to be seen with the deceased prior to his death and further that the accused had blood stained clothes which

upon analysis by **Pw6**, the government analyst, were found to match the deceased's DNA.

39. **Pw3** Donald Olero, the manager of Tableland Bar & Restaurant was firm in his testimony that the accused and others were with the deceased until after 2am on the 26/1/2024. That the accused was the last to leave the bar with the deceased. His evidence was not displaced in cross-examination.

40. **Pw7**, PC Sharamo, the investigating officer testified that prior to processing the scene, the area Assistant Chief, **Pw4**, informed him that there was someone with blood clothes in the crowd and that the crowd was getting agitated and wanted to lynch the suspect. That the OCS instructed **Pw4** to secure the accused before he could be lynched which he did with the help of PC Chacha.

41. **Pw4** had testified that on arrival at the scene and after calling the OCS, as the OCS and DCI processed the scene, he heard someone in the crowd murmuring that "Manyaki" had blood stained clothes. He therefore informed the OCS of that fact and subsequently had the accused secured from the scene to avoid lynching. This testimony was corroborated by **Pw7**, the Investigating Officer who testified that, as they processed the scene, he received information that there was someone with blood stained clothes at the scene and that the individual was secured to avoid being lynched by the crowd.

42. Juxtaposed against this was the testimony by the accused. He denied leaving the bar with the deceased. He did not raise any of the issues he stated in his defence when cross-examining **Pw3**. Further, he attributed his blood stained clothes to carrying the deceased's body at the scene. However, this was contrary to the evidence presented by **Pw3** and **Pw7** who were categorical that he was secured and removed from the scene well before the scene was processed. The body cannot have been removed as he sought to allege before the processing of the scene. The testimonies of **Pw3 and Pw7** were firm that the accused was secured from the scene before the scene was secured.

43. The accused admitted that the clothes that were blood stained belonged to him and that he was wearing them at the scene.

44. The accused's testimony on how he got his clothes blood stained does not make sense. He asserts that after the deceased's body was taken to the morgue, he continued walking to the market in blood stained clothes and did not change them.

45. Not to forget that the accused failed to explain away the fact that he was the last person to be seen with the deceased. Being the person last seen with the deceased when he was alive, the doctrine of last seen sets in. The Court of

Appeal in Mwambegu v Republic [2023] KECA 866 (KLR) enunciated the doctrine of last seen as follows: -

*“This Court (Makhandia, Mbogholi-Msagha & Omondi, JJA) explained the application of the doctrine of “last seen with” as follows in Chiragu & Another vs Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR):*

*“24. ... Regarding the doctrine of “last seen with” we will revert to Nigerian case of Moses Jua v. The State (2007) LPELR-CA/IL/42/2006. The court, while considering the ‘last seen alive with’ doctrine held:*

*‘Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.’*

*In yet another Nigerian case considering the same doctrine, in Stephen Haruna v. The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:*

*‘The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.’*

*Quoting from another jurisdiction, to be specific India, the courts there have developed the doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Another v. State of Andhra Pradesh, JT 2006(4) SC 16 for instance the court held:*

*‘That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when*

*the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.'*

*Therefore, for "the last seen with" doctrine to be applicable, there should be overwhelming circumstantial evidence and corroboration that exclusively links the accused person to the death of deceased both in terms of timing and cause."*

46. Under the proviso to **section 111(1) of the Evidence Act**, the prosecution having established that the deceased was found dead after they had left the Bar healthy, the accused is deemed to have had special knowledge of what may have happened to the deceased in the intervening period, from the time he was seen with the deceased and the time the body of the deceased was recovered.

47. This shifted the evidential burden upon the accused to explain what happened in that intervening period if, indeed, he was not responsible for the deceased's death. At what time and place did they part? He never explained. Compounding this was the testimony of **Pw7** who recovered a blood-stained wooden stick at the gate to the accused's compound which the accused failed to explain.

48. The circumstantial evidence herein irresistibly points at the guilt of the accused and meets the threshold set by the Court of Appeal in **Chiragu & Another v. Republic [2021] KECA 342 (KLR)**. Further, applying the doctrine of last seen, there is enough evidence to the required threshold in law to hold the accused culpable. In this Court's view, the accused's defence was an afterthought meant to mislead the Court and the same is rejected.
49. In light of the above, it has been demonstrated by way of evidence that the death of the deceased was as a result of an unlawful act by the accused.
50. The last element is whether the accused had malice aforethought. The manner of injuries the deceased sustained perfectly fall within the meaning ascribed to malice aforethought in ***section 206 of the Penal Code***.
51. In **Tubere s/o Ochen {1945} 12 EACA 63**, in considering whether there was malice aforethought, the court stated that the trial court should look out for characteristics such as; the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted whether vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also **Dafasi-Magayi v Uganda [1965] 1 EA 667**).

52. In the present case, the deceased was injured on the neck and head with critical vessels injured. Clearly the body parts targeted indicates the motive to murder.

The injuries inflicted were so severe that they point towards an intention to cause the death of or to do grievous harm to the deceased. There was knowledge that the act would probably cause the death of or grievous harm to the deceased. This Court holds that there was clear malice aforethought.

53. From the foregoing, the Court has reached the inescapable conclusion that the prosecution has proved all the ingredients of the offence of murder against the accused. The Court finds him guilty as charged and convicts him under *section 322(2) of the Criminal Procedure Code.*

It is so held.

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

**A. MABEYA, FCI Arb**

**JUDGE**