



**Republic v Oluoch (Criminal Case E023 of 2022)
[2026] KEHC 3052 (KLR) (5 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE E023 OF 2022
ACA ONG'INJO, J
MARCH 5, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

OMONDI PHILIP OLUOCH ACCUSED

JUDGMENT

1. The Accused Omondi Philip Oluoch is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. Particulars are that the accused Omondi Philip Oluoch on the 9th October 2022, at Dier Aora village, Kogelo Sub-Location, South Sakwa Location in Awendo Sub-County within Migori County murdered Kennedy Opiyo Ojwang.
3. PW1 Paul Ajode Ojwang testified that he was resident of Dier Aora village in Awendo Sub County. He said he was a farmer motor cycle businessman and mason.
4. He said he known the Accused well for over 10 years and sometimes they worked with him as masons, and sometimes he carried him on his motor cycle.
5. PW1 said that he also knew Kennedy Opiyo Ojwang who was his brother from same parents. PW1 recalled that on 9/10/2022, at about 10.00am, he got a call from Accused's brother called Morris Otieno who asked if he knew where Kennedy had taken children from home. PW1 said did not know and he told Morris Otieno as much. That Morris disconnected the phone and called again and asked him to give the phone to his brothers' wife as he wanted to talk to her. He called again and he talked to Kennedy's wife. That he left home and his uncle Bernard Ouma Ajode and his mother told him to find out more about the phone call. That he went to Bar Centre to buy credit to call Morris. When he reached Bar Center he found his brother lying down and people had surrounded him. That he heard the voice of Philip, Morris and Joshua. That he heard Philip say that he had refused to talk to them. He



- moved near where he was and called him but he did not respond. That he called Morris to ask what was happening and Morris told him he was called by Joboma who asked Samson Otieno who told him that Kennedy had sold to him a cockerel cheaply and he suspected it was stolen. PW1 said that Kennedy's body was swollen and had injuries.
6. Morris told him that Kennedy had taken alcohol. That he asked if he could go with Kennedy to wait till, he became sober. He told me to wait and talk to his son. He called Geoffrey, Joshua and Philip and the four of them talked. He called them from those surrounding deceased. Morris called and told him they had to know if he had stolen the children from Jenifer. They went to Jenifer and PW1 remained with Philip. That Philip had a short stick. That he went to buy milk and gave to Kennedy to drink but he could not drink. That he started to beat Kennedy with the stick. That he received his phone and told Kennedy to talk loudly so that he could record. He said he had recorded till that time. He continued to beat him and he said he could not change anything. Kennedy cried loudly saying 'Omondi why are you killing me' in dholuo. PW1 told Philip not to force Kennedy to admit something he did not know. That is why he was beating Kennedy.
 7. Later some boys went to jerry and he called Morris to come and help him to take Kennedy to Hospital. They had told me they did not injure him but had just beaten him a little.
 8. Morris came back and told me that because of Kennedy's condition he would call the OCS to assist him get a vehicle. PW1 said left when Morris had done nothing. He went home to call relatives because Kennedy's condition was bad. That he met his uncle Bernard and his mother and he led them where Kennedy was. That they found people had surrounded him Kennedy and his mother started to cry that Kennedy was dead. PW1 said that the Assistant Chief and village elder were at the scene. He said that when they returned, they found Kennedy had died. Police went to the scene and took the body and later he identified the body before post mortem was conducted on 19/10/2021 at Rapcom at Awendo.
 9. In cross examination by Ms Apondi Advocate, PW1 said that when he found Kennedy lying down, he had been beaten and he was not talking. PW1 said he could not tell who beat the deceased. He said that he found Kennedy at Bar market and he was surrounded by a crowd of people. Morris is same person as Otis.
 10. Morris and 3 others went aside to talk but he could not hear what they were saying. The statement was written and he signed after it was read to him and he confirmed that all was normal. He said Paragraph 6 -1 in the statement did not indicate the weapon used in court. He said that he had not stated that he saw accused beat him in such a place. He said that Philip beat the deceased. The people were just standing there around Kennedy.
 11. That when he arrived, Philip tried to call Kennedy. He said that when he saw deceased's condition he left to go home. He said his statement at page 5 is true that he had touched deceased before he went home and his body was cold It has been a while since the statement was written.
 12. PW1 said that the deceased asked why Philip was hitting him. He said there were people nearby and the other people were far off. That those present saw what was happening. There was somebody else present who witnessed Accused assault deceased.
 13. In cross examination by Ms. Apondi Advocate, PW1 said that the accused hit the deceased on the buttocks with the shot still he had on the back. He said that the deceased was hit more than once. PW1 said he talked to Morris alone because he had called him on phone and was more associated with the mother.
 14. PW2 Benson Adida Ondong testified that he was resident at Kogelo South, Mutho Village. He said he retired. He said that he knew the Accused well since his childhood as he was part of the large family



- although they lived a bit far from each other. PW2 also said he knew Kennedy Ojwang who also came from their family.
15. That on 11/10/2022 he was going to church at Bar when he saw a boy sitting in a place on seats. He said he saw one boy take one seat board and beat the deceased. They were riders who were seated in the place. It was also at Bar Centre. He said he just passed by as he feared those boys. He also said that the deceased's brother was also there at the scene. He said the Accused was beating deceased and asking him to reveal who he was with when stealing. That PW2 went home and the next day on 10th the brother of PW1 called and told him that Kennedy had died and he went for the funeral. PW2 said that the group of boda boda riders were many. He said that the accused beat the deceased with a stick.
 16. In cross examination, PW2 said that when he reached at the scene, he found Ojwang was at the scene. He said that he did not move near to see the deceased because he is old.
 17. PW3 Benard Ouma Ajode a resident of Aora village a farmer testified that he had known the Accused since his childhood as they came from same area. He said he also knew Kennedy Opiyo who was his brother's son. That on 2/10/2022 at about 11:00 – 11:30 he was in deceased's house taking tea. That Ojode received a phone call and told them that he was told that his brother had been arrested and if he delayed, he would not get his him. PW3 advised PW1 to go and see what was wrong. That after 20 -30 minutes Paul called and told him to go because Kennedy had been killed. That he was with a cousin James Odego's wife and it was confirmed that indeed Kennedy was dead. That people had gathered at the scene. PW3 said the deceased had a trouser but he had no shirt. He had bruises on the body. That at that time the accused was not there at the scene. That the area Assistant Chief went to the scene and called police and the body was taken.
 18. That on the 17th October, PW3 witnessed post mortem examination on the body of the deceased at Rapcom Hospital.
 19. In cross examination by Ms. Apondi Advocate, PW3 said that it was not true to say that PW1 was called to be asked if Kennedy left home at 10,00am.
 20. Paul was told the deceased had been brought. PW3 said he could not tell what happened to the deceased. He said he went to the home with James and that he was not with deceased's mother. Deceased's mother is called Teresa Onyango Ojwang.
 21. PW4 Yogo Jannes Onyango Assistant Chief of Kogelo Sub Location East Sakwa Location Awendo Sub County testified that on 9/10/2022 at about 2:00 p.m he was called by a village elder Pamela Wambu that Kennedy Ojwang was being beaten by the mob at Bar Centre. That he told her to protect the victim and he reported to OCS.
 22. That he found villagers had gathered and found Paul Ojwang and Pamela Wambua in charge elder. He interrogated people on what happened and Paul informed him that the victim was being beaten for having been in possession of a stolen chicken. They also told him that Joshua and accused took the chicken to the owner. They found James Opiyo who confirmed that the chicken was for Salome his mother in-law. The chicken was tied to a nearby tree.
 23. Police from Awendo Police Station arrived at the scene and collected deceased's body and took it to Rapcom mortuary.
 24. In cross examination by Ms. Apondi Advocate, the Assistant Chief said he did not witness what happened to the deceased. He recorded his statement on 10 October, 2022 and said what PW1 told him. He said that when the others came with the chicken deceased was already dead.,



25. PW5 Doctor Jared Elisha Olando and in charge of Rapcom Hospital Awendo conducted postmortem on the body of the deceased Kennedy Opiyo Ojwang on 17.10.,2022 at around 3:45 p.m
26. On examination of the body same was naked. The body was for male African with apparent age was about 41 years.
27. Nutrition status was good. The body was well built with a height of 167 cm.
The body had been preserved for 8 days.
28. On examination of external appearance, the right lower leg had superficial bruises. The right side of upper abdomen there were bruises with no deep cut. There was no obvious external injuries except for bruises. Respiratory and cardiovascular systems were normal.
29. Digestion system had no injuries to the intestine but the liver was ruptured and bled.
The bleeding went upto right chest. The other systems were essentially normal.
30. As a result of examination, Dr. Olando formed the opinion that cause pf death was massive bleeding secondary to ruptured liver due to blunt force trauma. There were no specimens taken for further r examination. He issued certificate of death and signed the post mortem forms and stamped it. He produced post mortem form as Ex P1.
31. In cross examination by Ms. Apondi Advocate PW5 said that the upper part of the abdomen (upper right quadrant) is what was hit to lead to rupturing of liver. PW5 said the body was identified by relatives of the deceased and on his part he had no space to indicate name of the person who identified the body.
32. In re-examination, PW5 said that at page 1 of the form Paul Ajode Ojwang and Bernard Ouma Ajode identified the body. He said the blood from the liver, went to the right chest. The impact was on the abdomen.
33. PW6 No. 64523 CPL Stephen Onchari. Attached to DCIO – Awendo Sub County investigated the offence herein, He testified that on 9.10.2022 in the afternoon he was at the station when he received a call from his in charge who informed him there was a murder incident in Bar Trading Centre. Together with colleagues they proceeded to scene and on arrival they found a male African adult lying dead in the centre with, no visible injuries, He draw sketch plan of the scene and collected the body and took to Rapcom Hospital Mortuary. That at the scene there was alive chicken tied to the body. He interrogated members of public and was informed the deceased was found to have stolen the hen and vigilante group in the area started interrogating him using crude weapons, kicks and blows and he sustained fatal injuries. PW5 said he did not recover murder weapon. He recorded statements and on 17.10.2022 he witnessed post mortem on the body of the deceased at Rapcom Hospital mortuary. He said the body was identified by two relatives of the deceased. He said the suspects had gone underground but with assistance of one witness he arrested one suspect.
34. On 21.11.2022. he took the suspect for mental assessment at Migori TRH. Later processed him and arraigned him in court. PW6 identified the accused as the suspect he arrested and he was among the suspects who inflicted fatal injuries on the deceased.
35. In cross examination by Ms. Apondi Advocate PW6 said he had been in the force for almost 30 years and he had been conducting investigations. He said the scene was at a trading centre. He said the members of public at the scene told him the deceased had been beaten by about 4 suspects for stealing a hen. He said he didn't recover murder weapon at the scene. He said the 3 others suspects are at large and he would not like to disclose their names as investigations are still going on. PW6 said that from



the post mortem the deceased died due to massive haemorrhage secondary to liver rupture caused by blunt objects.

36. He said the deceased's body had bruises all over and you could not distinguish which injuries were inflicted by which suspects. He said it is possible among the 4 suspects one of them hit the deceased and had the liver rupture.

In re-examination, PW6 said the accused person participated on the assault of the deceased actively.

37. At the close of prosecution case the accused person was placed on his defence and he gave sworn statement and said that he was a casual worker and he came from Mulo village. He said he was aware of the charge against him and that he was charged with murder of Kennedy. The Accused said that on 9.10.2022 he was working at Awendo Secondary School. That on the material Sunday he was the one preparing food for the children. That he heard children outside the kitchen say there was some noise coming from the centre which is about 100m, That, he proceeded to the center and found Kennedy lying down at the motor bike shade and his clothes were torn and he was rolling on the ground. He said that Paul the deceased's brother was at the scene and he said they are tired of their brother's stealing habits, That when the Accused found Kennedy rolling on the ground he pitied him they went same school. That he removed Kennedy from the scene to another shade that is used by some women and he went and brought milk which he used to feed him. After giving him milk the Accused said he went back to school. Later when he reported off duty he learnt that Kennedy had died and the body was taken by police to Rapcom mortuary. The Accused said he heard that police were looking for people who had killed Kennedy. That he slept in school as he was to prepare breakfast for the next day. When it reached mid night on 21.11.2022 police went to the school and arrested him.

38. In cross-examination by Mr. Oimbo for state the Accused said that the deceased was known to him. He said he found him at the boda boda shade at Bar center at around 11.00am. The Accused said there were boda boda riders, children and even some women at the shade. He said Kennedy was his classmate and his home is across the ridge from that of the Accused.

39. The Accused also said that Paul Ojwang PW1 was known to him and was a brother to the deceased. Benson Adida PW2 was also known to him. He said Benson Adida was like his grandfather. He said it is only Paul he saw at the scene as he was focused on Kennedy and he didn't identify the other people at the scene.

40. The Accused person denied participating in beating of the deceased. He said he had not differed with Paul or Benson who is his relative. The Accused said that when he was arrested, he was taken to Awendo Police Station where he was interrogated and he recorded a statement which he signed. The Accused said he may have thumb printed the statement but it was not true that he took a cane and beat the deceased. He said it is true he carried the deceased to another shade and bought milk and gave it to him. He said that he did not know why police recorded that he admitted that he carried Kennedy and he asked Paul he could not help Kennedy as he was rolling on the ground in pain. He said he did not ask Paul what had happened to Kennedy. That after taking Kennedy to a different shade and giving him milk he went back to school since he was on duty.

41. In re-examination by Ms. Apondi Advocate the Accused said the statement was recorded by a policeman and it was read over to him and he just accepted everything so that he could be set free. It is the experience he went through on the night of arrest that made him accept what was recorded

42. The Accused person's Counsel in submissions dated 18th November 2025 submitted that under Article 50 (2) (a) of *the Constitution* of Kenya 2010 any accused person is presumed innocent until proved



guilty. That this presumption of innocence thus forms the basis of the fact that the prosecution has to prove its case against any accused person beyond reasonable doubt.

43. It was also submitted that it is trite law that the burden of proof at all times lies with the prosecution as provided under Section 107 of the Evidence cap 80 as follows:-

“ 107 (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person”

44. The Defence Counsel cited the holding in the case of Republic v Albert Tirimba Ogata [2014] eKLR where SITATI J. stated that

“Thus the central ingredients of the offence of murder are

- a. Malice aforethought;
- b. An unlawful act or omission on the part of the accused.”

45. Under Section 206 of the penal code 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 actually 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.

46. The defence Counsel further cited the holding by Stati J(Rtd) in the case of Republic v Albert Tirimba Ogata (supra) where she stated that:

“ In other words, the prosecution must prove that the accused person herein had the intention to cause the death of or to do grievous harm to any person; that he had the knowledge that his act or omission causing death would probably cause death either to the person intended or to some other person; that he had the intent to commit a felony or that he had an intention by the act or omission to facilitate the escape from custody of any person who has committed or attempted to commit a felony.”

47. The Accused person’s Counsel referred to 2 deceased persons and 3 accused persons making this court wonder whether the submissions relate to the trial herein where there is one accused and one deceased person.

48. The defence Counsel raised the issue as to whether the three accused persons caused the death of the 2 deceased persons and whether they had malice aforethought.



49. On the issue as to whether the accused persons caused the death of the deceased it was submitted that the prosecution relied on the evidence of eye witnesses and not circumstantial evidence. It is without doubt from the evidence on record that there were a big crowd of people at the time of the incident and that it is alleged that there were other individuals not before the honourable court that inflicted injuries on the deceased persons.
50. That according to the postmortem report produced there was massive bleeding secondary to liver rupture. Upon cross examination, the doctor being PW5 stated that such would have been caused by being hit by a blunt object on the upper part of the abdomen.
51. It was submitted that PW1 stated in his testimony that he could not ascertain who exactly beat the deceased and further stated that the deceased had been hit by the deceased using a stick on the buttocks and the back. That based on this testimony it is clear that the accused person was not responsible for the death of the deceased. The eyewitnesses called by the prosecution clearly stated that when they came the deceased had already been beaten and he was unconscious at the time.
52. In regard to the evidence of PW2 it was submitted that he stated that he witnessed a group of people hitting the deceased and stated that he did not move closer to establish what was happening. According to the defence the only eye witness was PW1 and his statement is contradicting and as such cannot be relied on as during examination in chief he stated that the accused person hit the deceased and during cross examination he said that he could not ascertain who hit the deceased.
53. To support their argument the defence relied on the Court of Appeal holding in *Erick Onyango Odeny -vs- Republic (2014) eKLR* in which it was stated that;-
- “Nor do we think much turns on the alleged contradictions for the time of the commission of the offence. The trial court after hearing all the evidence accepted that the offence was committed at about 7 pm in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in *Twehangane Alfred -v- Uganda, Criminal Application No. 139/2001 (2003) UGCA 6*
54. It is not every contradiction that warrants rejection of evidence. As the court put it:
- “With regard to contradiction in the prosecution’s case the law as set out in numerous authorities in that grave contradictions unless satisfactory explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”
55. Further they relied on the case of *Gladys Wanjiku Kanyotu v Republic [2020] eKLR* where the court stated that:
- “..... The test of as to whether the contradictions and inconsistencies if any are fatal to the prosecution case is whether they have cast doubts in the prosecution case to the extent that the reasonable conclusion is that the witnesses were not telling the truth. If they show that the witnesses were deliberately not telling the truth, doubts in their evidence will be given to the accused.’
56. The defence Counsel submitted that the contradictions herein are touching unto the person who caused the injuries that caused death of the deceased and they cast doubt on the prosecution case and as such the same doubt should be used in favor of the accused person and this honourable court should



acquit the accused person of the charge herein and hold that they did not cause the death of the two deceased persons.

57. It was also submitted that the accused person, had no malice aforethought as he even went to the extent of buying milk and giving the same to the deceased and moving him to a shade. The prosecution did not present any evidence as against the accused person showing that he had any malice aforethought towards the deceased person.
58. The defence urged the court to find that the prosecution did not prove its case to the required standard and the accused persons ought to be acquitted of the charges herein

Analysis And Determination

59. The task of this Court is to determine whether the prosecution proved the offence of murder beyond reasonable doubt.
60. From the evidence on record for the prosecution and defence the issues for determination are:
1. Whether the death of the deceased was proved.
 2. Whether the accused caused the death by an unlawful act or omission.
 3. Whether malice aforethought was proved within Section 206.
 4. Ultimately, whether the ingredients of murder were proved beyond reasonable doubt
61. On proof of fact and cause of death there is no dispute that the deceased, Kennedy Opiyo Ojwang, died on 9.10.2022. PW5, the doctor from Rapcom Hospital, performed the postmortem and opined that the cause of death was massive internal haemorrhage secondary to liver rupture due to blunt force trauma. The injury was localized to the upper abdomen (right upper quadrant). There were additional superficial bruises but no other deep injuries. The fact and cause of death are therefore proved.
62. On whether the Accused caused the death, the prosecution relied primarily on two witnesses (PW1 and PW2) who allegedly saw the accused beat the deceased. The Court must therefore scrutinize their testimony to determine whether it satisfies the threshold of proof.
63. PW1 the brother to the deceased testified that he found the deceased already lying on the ground, surrounded by a crowd and he was badly injured, swollen, unresponsive. PW1 claimed that the accused beat the deceased with a short stick on the buttocks and the back. He repeatedly stated in cross-examination that he did not know who had beaten the deceased initially. He also admitted that the accused was not the only person present at the scene and he did not witness the earlier assault. He conceded that his statement to police did not mention the weapon or the details he later gave in court. Crucially: the fatal injury was not on the back or buttocks, but on the upper abdomen. PW1 therefore does not place the accused as the author of the fatal blow, nor does his evidence rule out prior severe assault by others before he arrived.
64. The second prosecution witness, PW2 is an elderly relative of the Accused and a passer-by. He stated that he saw “a group” of boda boda riders assaulting the deceased. That he was far away, fearful, and did not approach. He allegedly saw the accused hit the deceased once with a plank/seat-board and he confirmed the deceased was already lying on the ground and partially injured. PW2 does not testify that the accused targeted the abdomen. He also acknowledges multiple attackers were involved. This evidence again does not connect the accused to the fatal blow.
65. PW6 the Investigating Officer was candid in his testimony. He said he found the deceased already dead and he was told the deceased was beaten by four suspects and not one. He also said he was unable to



recover any weapon at the scene and he could not distinguish which suspect inflicted which injuries on the deceased. He admitted that any one of the four could have ruptured the liver. Thus, even the prosecution's own investigator could not place the fatal blow on the accused.

66. In his defence the accused stated that he found the deceased already injured, rolling on the ground. And he moved him to a shade and bought him milk to drink. The Accused denied beating the deceased but admitted signing a police statement but said he accepted what was recorded under distress and in hope of release. His account that he tried to help the deceased was corroborated in part by PW1, who confirmed the accused had milk and attempted to have the deceased drink it.

This conduct is inconsistent with participation in a fatal assault moments earlier.

67. For the prosecution to prove that the Accused was linked to the fatal act that caused the death of the deceased they needed clear, consistent and credible evidence placing the Accused at the center of the assault and as the person or one of the persons who delivered the abdominal blow.

68. However, from the evidence of both PW1 and PW2 it is apparent that they found the deceased already severely injured and they confirm multiple assailants were involved. Neither witness saw the accused hit the abdomen, where the fatal injury occurred.

69. There is contradiction concerning whether PW1 truly witnessed the accused beating the deceased as PW6 confirms multiple suspects inflicted blows and none could be isolated as the fatal assailant. More than one person was involved in the assault and liability cannot be attributed to the accused unless it is proved that he participated in a manner causally linked to the fatal harm. The evidence fails that test and the court therefore finds that the prosecution did not prove that the accused caused the death.

70. Whether malice aforethought was proved, the evidence shows there was no prior dispute between accused and deceased who were said to have been former school mates; the Accused attempted to give milk to the deceased; there was no evidence of intention to cause grievous harm or knowledge that harm would probably cause death; assault, if any was not a planned or targeted attack. Thus, malice aforethought is not proved. The prosecution bears the burden of proving each element of murder beyond reasonable doubt.

71. This case is marked by contradictory testimony; doubt as to who inflicted the fatal injury; multiple assailants; no reliable evidence linking the accused to the fatal blow; absence of malice and the conduct of the accused inconsistent with murderous intent. In such circumstances, the law requires that doubt be resolved in favour of the accused.

68. This court therefore finds that there is no sufficient evidence to establish the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code beyond reasonable doubt.

72. The accused is hereby acquitted under Section 322(1) of the Criminal Procedure Code. The Accused shall be released forthwith unless otherwise lawfully held.

Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 5th DAY OF MARCH, 2026.

HON. ANNE ADWERA- ONG'INJO

JUDGE

In the Presence of:

Victor – Court Assistant

