



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. E032 OF 2023

REPUBLIC

PROSECUTOR

VERSUS

ISAIAH MATUKHO OKHOLA

ACCUSED

JUDGEMENT

1. The Accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63, Laws of Kenya.
2. The particulars of the offence are that on the 19/3/2023, at an unknown time at Ekambuli village, Khusiku Sub-Location within Khwisero Sub-County in Kakamega County, the Accused willingly and unlawfully murdered Daniel Okwako Ambetsa.
3. The prosecution called eight witnesses. PW1, Gerald Wycliff Omusula, recalled that on 19/3/2023 at 7.00 p.m. He had gone to shop at Khumusalaba market, and on his way back, he saw the deceased seated at the verandah of the shop eating biscuits, while the Accused was holding his hand. He claimed that the

deceased had a bottle of Vaseline in his hand. He identified the bottle he had seen, which was marked PMFI-1. He stated that he was able to identify the two because there was a floodlight on the shop's verandah, and they were 5 meters away.

4. PW1 testified that he went home, and the next day, he received news that the deceased had been found dead. When he passed by the scene, he saw the body of the deceased with his trousers pulled down, his rectum protruding, and the blue bottle of Vaseline at the scene.
5. He stated that he left the area chief, Paul Ojango, at the crime scene. He testified that he had known the deceased since his childhood and that the deceased was about 15 years old and of good health, albeit epileptic, while the Accused was a village boy whom he had known for about 20 years.
6. On cross-examination, he stated that he last saw the deceased with the Accused. However, he did not know what happened afterwards. He reiterated that the deceased was carrying a bottle of Vaseline, which he saw next to the body, and informed the Chief while at the scene.
7. PW2 was Allan Walubengo, a police officer attached to Khumusalaba Police Post under Khwisero Police Station. He testified that on 20/3/2023, at about 9 a.m., while at his Post, he received a report that a body had been found near Ekambali Secondary School. He went to the scene and found the body lying on its face, and between the legs was a bottle of Vaseline, while besides it were open shoes known as Crocs.

8. According to the witness, the deceased was bleeding from the rectum. The witness said that he learnt from another witness that the deceased and the Accused had been spotted together, holding hands, while the deceased had a bottle of Vaseline. He informed the DCI who collected the body. PW2 said that the Accused disappeared until August 2023, when he was informed that the Accused had been spotted at a funeral and wherefore he went and arrested him.
9. He produced the crime scene photographs and a certificate of processing of the photographs. He also produced the photographs, which were marked as PExh. 2 (a) (b)(c) and (d), and the certificate marked P. Exh. 3. The witness said that the Accused was arrested in August 2023, as he had disappeared from the area and had no fixed abode.
10. On cross-examination, the witness claimed that the discovery of the body was reported by a female member of the public and that one Mama Toto confirmed that she had sold the Vaseline to the Accused. He further said that the parents of the deceased had informed him that the deceased was not mentally sound and was at the shopping centre most of the time. He said that they suspected the Accused, as he was the last person seen with the deceased and that they took time to arrest the Accused, as he had fled.
11. PW3 was Paul Ochango Ombetsa, the chief of Mulwanda Location, Khwisero sub-county. He recalled that on 20/3/2023, he received a call from a well-wisher that a young man had been

found dead in a tree plantation at Ekambuli Secondary School. He proceeded to the scene and found a crowd. He saw the body of the deceased, whom he identified as Daniel Okwako Ambetsa. It was lying down with his trousers removed and buttocks exposed. There was excretion from his anus and bruises on his neck. There was a blue seal Vaseline next to him. The witness identified the photograph marked PMFI-1 (a) showing the deceased half naked with his private parts exposed, and a second photograph PMF-1 (b), showing black trousers, and a third one, marked PMFI-1 (c), and a photograph of the Vaseline blue seal.

12. He testified that he saw and examined the body well and that Vaseline had been applied to the buttocks. He claimed that he got information from the grandmother and other members that the deceased was in the company of the Accused the previous night and that the Accused had bought him snacks and Vaseline from Laban's shop at Musalaba market. He said that he knew both the deceased and the Accused, whom he had known for 10 years.
13. He stated that the police examined and took the body to the Yala mortuary, awaiting investigations and post-mortem. They looked for the Accused and on 4/8/2023 at Ebuhanza village, Musiangu sub-location, Khwisero sub-county, and he was arrested by members of the public and taken to Msalaba Police Post. The arrest was 4 to 5 months after the incident.

14. He testified that he did not see the Accused in the village during that period. He said that the deceased, who was aged between 16 and 17 years, stayed with his grandmother, was slightly mentally retarded, and used to loiter in the market.
15. When cross-examined, he denied witnessing the incident or seeing either the deceased or the Accused and stated that he was called afterwards. He confirmed that he saw the Vaseline at the scene.
16. He further said that he was informed by someone that the deceased was in the company of the Accused the previous evening, and in the company of three police officers and members of the public, they went to look for the Accused, who was a casual labourer he had known for 10 years, but to no avail.
17. He claimed that the Accused was not married and did not have a house but lived in his grandmother's house. When they went to look for him, he was not at the homestead, and his family members did not know his whereabouts.
18. PW4 was Justus Aswani Ambetsa. He testified that the deceased was his brother's son. He recalled that on 20/3/2023, he received a call from his mother informing him that his brother's son had been killed. He said that he went to the mortuary and on 30/3/2023 in the company of his mother, Priscilla Ambetsa a post-mortem was performed.
19. According to PW4, they were informed that the cause of death was asphyxia due to strangulation. He said that he saw the body had bruises on the neck and discharge from the anus which the

Doctor explained that something had been inserted in. He confirmed that the deceased lived with his grandmother, Priscilla and that he had dropped out of school in class 4, was about 19 years old, and had some mental issues. He identified the post-mortem report marked as PMF1-3.

20. PW5 was Priscila Ambesa Opunga. She acknowledged that the deceased was her grandson. She recalled that on 19/3/2023, the deceased had left home at around noon and never came back. She slept without knowing his whereabouts, and the next day, 20/2/2023, she went to the market to fetch waxes and came back at around 8.30 a.m. She was informed by her neighbours that her grandson was deceased. At 9.00 a.m., the Chief sent for her and she was taken to Ekambuli Secondary school. On arrival, she found the deceased lying face down with blood oozing from the mouth and trousers off. She cried and, when she calmed down, saw a Vaseline bottle near the body.
21. According to the witness, the deceased's trouser was torn, and his shoes were thrown away. She said that the deceased was healthy and mentally sound except that at times, he would get shocked as he was experiencing a nightmare, and he was mentally incapacitated, but he would go to school, although at that time, he had been out of school for two weeks.
22. She said that she had lived with the deceased since he was twelve (12) years old and that he knew the Accused, whom she was informed was last seen with the deceased. She said she was present when the post-mortem was conducted on 30/3/2023.

23. Cross-examined by Mr. K'ombwayo, she denied recording a statement, although she went to the police station to thumbprint a document.
24. In re-examination, she said that they went to the police station, where she was questioned by the police, but never recorded or thumb-printed any statement.
25. PW 5 was Dr. Dixon Mchana, a Consultant Pathologist based at Kakamega General Hospital, who testified and produced a post-mortem report authored by Dr. Bruno Okal. He confirmed that the autopsy was done in Yala Sub-County Hospital mortuary on 30/3/2023, and the body was identified by Priscila Ambetsa and Justus Aswani Ambesa. He testified that according to the report, the deceased's body, nails and tongue were bluish in colour and there were multiple scratches on the upper body and lower limbs. There were bruises on the lips, and bruises on the forehead and neck.
26. He confirmed that the brain was swollen and the lower end of the digestive system was open. The doctor concluded that the cause of death was asphyxia secondary to strangulation. He produced the report dated 30/03/2023 as P.EXH.3.
27. In cross-examination, he stated that if there was penetration of the deceased's body by way of sodomy, there would be bruising of the anal opening. He said that the injuries on the upper limb were due to defensive injuries. He stated that the injuries on the neck signified external pressure.

28. PW7, Kelvin Amwaya Hondo, was a Grade six pupil who gave unsworn evidence after a *voir dire* was conducted. He testified that the deceased was his neighbour. He claimed that the deceased used to throw stones at his grandmother and that the last time he saw him, he was at his grandmother's home, and then later, he saw him looking like someone who is dead near Ekambuli Primary school while they were looking for mushrooms. He said that he did not go closer to check but they called people passing by to come and see. He said that he learnt later that the body belonged to the deceased and that it was the Accused who had done it, although he did not know him.
29. PW8 was APC Patrick Adier, the Investigation Officer. He recalled that on 4/8/2023 at around 1730 hours he received a call from his boss, CI Callistus Mauko, instructing him to visit Omusalaba Police Post and re-arrest a murder suspect and bring him to the station for further investigation.
30. He stated that he reached out to his counterpart, PC Matiko but due to mechanical issues, they did not go to the Police Post. However, they approached the OCS Khwisero, who took it upon himself to bring the suspect. He testified that on 6/8/2023 at 1530 hours, the OCS bought the suspect from Omusalaba police post to Khwisero, and on 7/8/2023, the suspect was escorted to PM's court at Butere, and they were granted fourteen (14) days to conclude their investigations. He stated that the suspect had been accused of murder and had been on the run from 19/3/2023 until his arrest.

31. He stated that he looked at the exhibits, and later visited the scene, drew the sketch map, summoned the relevant witnesses and recorded their statements. He took the Accused to Kisumu for a mental assessment, and later processed the Accused and forwarded the file to the ODPP for him to be charged with murder.
32. He said that he attached photographs of the scene of the crime. He produced the photographs marked PExh 1 (a) to (d), the Crime scene investigation report marked Exh. 2. PExh 1(d), the croc-shoes that belonged to the deceased and the bottle of Vaseline marked PM1.2 produced and marked P. Exh.4 respectively.
33. He pointed out that the charge sheet had an error, and ought to be amended to reflect that the offence occurred on 19/3/2028 instead of 19/8/2023. He testified that the Accused was arrested on 4/8/2023 as he had run away after the incident, and the mental assessment was done on 15/8/2023, and another one was done on 22/8/2023 by Dr. Mbandi Florence, indicating that the Accused was fit to take a plea.
34. During cross-examination, he clarified that although the Accused had been arrested by members of the public and the police, he had gone to pick him from Omusalaba Police Post on 4/8/2023 and brought him to Khwisero on 6/8/2023. He confirmed that the crime scene report did not indicate the time the photograph was taken while P.Exh 2 report was dated 28/1/2025, which would indicate that that was when the case commenced, although the

dates can be erroneously captured. He indicated the reference number in the report as CID/KAK/CSI/C/folio 28.2025, which meant the report was for 2025. He stated that he took over the report and file on 7/8/2023.

35. He testified that PW1 saw the Accused carry the jelly, although he did not dust the jelly to confirm if the Accused had touched it. He confirmed that he visited the primary and secondary scenes. According to the witness, the secondary scene, which is the shop, is situated at Omusalaba shopping centre, and he confirmed there is a fluorescent tube light at the verandah. He stated that no swabs were taken during post-mortem; however, it was indicated that the deceased was sodomised.
36. On re-examination, with respect to P Exh. 2, he responded that the Scenes of Crime processed and documented by the photographs on 20/3/2023 at around 1000 hours.
37. In his defence, the Accused gave a sworn statement. He said that he had known the deceased for 15 years. He recalled that on 19/3/2023, he was at his home until 3.00 p.m., when he went to look for fertilizer. Upon arrival at the shop, he met the deceased, who greeted him, and he responded. He then went to the shop and proceeded back to his house on his bicycle, while carrying the fertilizer. He said that he did not know what happened, but the next day, he heard that a body had been discovered belonging to Daniel Ambetsa, and when he went to view the body, he found that it had been collected.

38. He testified that he attended the deceased's funeral and that he was arrested 3 to 4 months later. He denied the allegations that he fled, stating that he was at home. He stated that normally, if something like that happened, the members of the community would burn the suspect's home to evict him; however, his house was never burned down before or after the arrest. He denied being involved in the death of the deceased.
39. Upon cross-examination, the Accused said that he had known the deceased for 15 years and that he knew him as having a mental condition. He denied knowing if the deceased went back to their home early or late or whether he slept away from home.
40. He said that on the day of the incident, he met the deceased going to the shop belonging to Silvana Asikoye at 3.00 p.m. and met him in the corridors while going out of the same shop where he had bought the fertilizer. He denied knowing all the customers in the shop. He said that one of the witnesses, Gerald Omusula who is as a village elder, followed the deceased to the shop and saw the Accused and deceased exchange greetings. He said he later he met the village elder while he was going out of the shop and denied holding the deceased's hand after buying him a biscuit.
41. The Accused said that Gerald had no grudge with him. He denied knowing about the Vaseline or that it belonged to him, and said that no investigations were done to determine whether the Vaseline belonged to him. He denied being with the deceased and claimed that PW1 had lied. He stated that he was arrested at

the neighbours' where he had gone to borrow a rope and denied being arrested at a funeral.

42. According to the Accused, he had no witness to prove he had gone to the shop and later went back home.

43. During re-examination, he said that he bought fertilizer from the shop, and that's when he saw the deceased and Wycliff, who was behind the deceased. He denied buying Vaseline from the shop.

44. At the end of the defence case, the parties filed their submissions, which I have duly considered.

Analysis and Determination

45. The Accused person is facing a charge of murder contrary to Section 203 of the Penal Code, which provides that: **“Any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.”**

46. The burden is placed upon the prosecution to prove the guilt of the accused beyond a reasonable doubt. The prosecution must establish the following essential ingredients:

- a. *The death of the deceased and the cause of that death*
- b. *That his death was unlawfully caused.*
- c. *That the Accused committed the unlawful act which caused the death of the deceased and;*
- d. *That the death was caused with malice aforethought.*

47. The elements that have to be proved by the prosecution in a charge of murder are *mens rea*, that is, a guilty mind, and *actus reus*, that is, a guilty act that causes the death. The standard of

proof required is that of beyond reasonable doubt. In the case of ***Joseph Kimani Njau v Republic [2014] KECA 229 (KLR)***, the Court of Appeal stated that, **“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond a reasonable doubt. The trial court is obliged to ensure that before any conviction is entered, both actus reus and mens rea have been proven to the required standard.”**

48. Consequently, this court will consider these elements of the offence to determine whether the prosecution has proved the charge against the Accused.
49. On the fact and cause of death, the evidence is uncontroverted. PW5, Dr Dixon Mchana, produced the post-mortem report (P. Exh. 3) prepared by Dr Bruno Okal, which concluded that the deceased, who was identified by PW4 and PW5, had died. All the evidence points to the irrefutable fact that the person named as Daniel Ombetsa Okwako died.
50. According to the post-mortem report, Daniel Okwako Ambetsa died from asphyxia secondary to strangulation. The body exhibited bluish discolouration of nails and tongue, multiple scratches on the upper body and lower limbs, bruises on the lips, forehead, and neck, a swollen brain, and an open lower digestive system suggestive of trauma. Manual strangulation is an act of aggravated assault with fatal consequences. The defence did not challenge the findings in the post-mortem. Absent any evidence to suggest that the strangulation was done in self-defence, I find

it proven beyond a reasonable doubt that the deceased's death was unlawful. See ***Republic v Gusambizi /o Wesonga [1948] 15 EACA 65.***

51. Turning to whether the Accused caused the death, the prosecution relied on circumstantial evidence as there was no single eyewitness. The prosecution's circumstantial evidence pivoted around the fact that the Accused was last seen with the deceased shortly before the latter was found dead.

52. In ***Abanga alias Onyango v Republic (Criminal Appeal No. 32 of 1990) [1991] KLR***, the court explained the rules that must be followed when applying circumstantial evidence to prove someone is guilty. The court stated that:-

“(a) The important facts that point to guilt must be clearly and strongly proved.

(b) Those facts must point straight and strongly to the accused person being guilty.

(c) There should be no other sensible way to explain them.

(d) When you put all these facts together, they must form a complete chain with no weak or missing links, and the only reasonable conclusion must be that the accused person and no one else committed the crime.”

53. Similarly, the Court in the case of ***Joan Chebichii Sawe v Republic [2003] KECA 182 (KLR)*** expressed itself thus:-

“As we have already pointed out, the evidence in this case was entirely circumstantial. To justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

54. In **Republic v Mohammed & Another [2019] KESC 48(KLR)**, the Supreme Court laid the principles to be observed while dealing with circumstantial evidence as follows:-

“However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court “should proceed with circumspection when drawing firm inferences from circumstantial evidence.”¹¹ The court should also consider circumstantial evidence in its totality and not in piece-meal.¹² As the Privy Council stated in Teper v. R [1952] AC at p. 489, “Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast

suspicion on another.”¹¹Teper v R [1952] A.C. 480 PC as [489]¹²S v Reddy & others 1996 (2) SACR 1 (A)

59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant¹³, reasonable and not speculative¹⁴, but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established....”¹⁵ As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the “... the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ...”

55. Once the prosecution proved that the deceased was last seen alive with the Accused, a rebuttable presumption arose that the Accused is the person responsible for the death. The burden then shifted to the Accused to provide a satisfactory explanation to exonerate himself. The doctrine of last seen is rooted in Section 111 (1) of the Evidence Act which provides:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with

which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

56. Additionally, Section 119 of the Evidence Act provides:-

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

57. The last seen doctrine however cannot be used in isolation and must form part of a complete, unbroken chain of circumstantial evidence pointing irresistibly to the Accused being the person that committed the offence.

58. The circumstances surrounding the offence highly implicated the Accused as he was seen in company of the deceased, a person of reduced mental capacity the evening before the deceased died.

In his defence, the Accused confirmed that he met the deceased on the material day but claimed that PW1 lied to the court that he was holding hands with the deceased as he only exchanged greetings with the deceased and left. Yet the Accused did not challenge the said witness regarding this testimony during cross-examination but only questioned the witness regarding the distance from which he saw them and whether there was sufficient light. Further, the Accused admitted that PW1 held no grudge against him and that he had no reason to lie against him. Secondly, the deceased was later discovered in the bush with signs suggestive of sodomy. According to the eye witness and photographic evidence, the deceased had a something oozing from his rectum with Vaseline applied to his anus. There was no other person who was seen with the deceased before the incident. Further, according to PW2, PW3 and PW8, the Accused person had disappeared from the village immediately after the incident until his arrest in August 2023, which was approximately 4 to 5 months later.

59. The suspicion surrounding an accused's involvement is strengthened when he fails to provide an explanation of facts that they would be reasonably able to explain. In this context, the Accused should have adduced evidence to confirm that he had gone to buy fertilizer and carried the fertilizer to his house after exchanging greetings with the deceased on the day PW1 testified that he saw him with the deceased. He should have also provided a witness to disprove the claim that he had been on the

run for more than four months after being last seen with the deceased. He also did not provide a witness to prove that he was arrested while going for a rope at a neighbour's and not at a funeral. The fact that he merely claimed to have been at his home yet had nothing to corroborate his assertion augmented the suspicion against him.

60. I have carefully analyzed the evidence and find that the Accused person's defence was patently false. It is trite law that when a person tells a deliberate and obvious lie, such a lie can be held against him. It is clear that the Accused lied that he was never on the run after the deceased was found dead. This raises doubts concerning his credibility and reinforces the prosecution's case. The prosecution witnesses were consistent, cogent and credible. I find their evidence believable as opposed to the Accused's defence. Besides, the big question begs an answer:- If the Accused was innocent, he did not have a reason to run into hiding. Why then did he go missing after the incident?
61. Under the law, the prosecution bears the burden of proof but in this case, the Accused's defence did not dislodge the prosecution's case. The prosecution evidence confirming the Accused being last seen with the deceased and his fleeing from the village negated his defence.
62. Bearing in mind the principle that the burden of proof never shifts to the Accused, and having carefully weighed the evidence adduced by the prosecution, the inculpatory facts are incompatible with the innocence of the Accused. I am convinced

that the prosecution was able to establish a complete chain pointing to the Accused's commission of the offence as the circumstantial evidence was so overwhelming that there is nothing else that could lead the court to doubt that the Accused killed the deceased.

63. Malice aforethought has been defined under Section 206 of the Penal Code as follows:

“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.”**

64. The Court of Appeal in the case of ***Carilus Omondi Mboga & another v Republic [2019] KECA 234 (KLR)*** cited with

authority the case of ***Republic v. Tubere S/O Ochen [1945] 12 EACA 63*** when determining the elements to be considered in order to prove existence of malice aforethought and stated that:-
“...The court acknowledged that in determining whether malice aforethought has been proved the following elements should be considered: the nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident...”

65. On malice aforethought, Section 206 of the Penal Code includes the intention to commit a felony, to cause death or grievous harm. The evidence of manual strangulation, bruises, and the evidence of possible sodomy indicate premeditation or intent to commit a felony or to harm on the part of the Accused. Here, the manual strangulation and alleged sodomy are proof of malice.
66. In the final analysis, it is my finding that the prosecution has proved its case beyond reasonable doubt.
67. Accordingly, I find the Accused, Isaiah Matukho Okhola, guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Dated, signed, and delivered at Kakamega, this 2nd day of March 2026.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Chala for the Prosecution/State

Ms. Ihachi for the Accused

Court Assistant: Polycap

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