



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NYAMIRA  
(CHERERE-J)  
HCCRC E021 OF 2022**

**BETWEEN**

**REPUBLIC.....**

**...PROSECUTOR**

**AND**

**NELSON BOSIRE OTUKE ALIAS ZEPHANIA.....1<sup>ST</sup>  
ACCUSED**

**ZABLON NYABUTO OTUKE.....2<sup>ND</sup>  
ACCUSED**

**JOHN JONTE OTUKE.....3<sup>RD</sup>  
ACCUSED**

**JUDGMENT**

1. The three accused persons, namely Nelson Bosire Otuke alias Zephania (Accused 1), Zablun Nyabuto Otuke (Accused 2) and John Jonte Otuke (Accused 3), were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge were that on the 06<sup>th</sup> day of October 2022 at Kiomoso Village, Girango Sub-location, Masaba North Sub-County within Nyamira County, they jointly murdered Elkanah Omwoyo Bosire (Omwoyo). Each of the accused persons denied the charge. The matter proceeded to full trial.

3. The prosecution called seven witnesses. PW1 testified that at about 4.00 p.m. on 06<sup>th</sup> October 2022 he witnessed Accused 1 and Accused 3 beat Omwoyo with sticks. He stated that after the beating, Accused 1 left the scene, went to his home, and returned with a panga that he had concealed inside his gumboots with his trousers tucked over it. When Omwoyo noticed Accused 1 approaching, he fled into a tea farm. PW1 followed the chase. Shortly thereafter PW1 heard Omwoyo cry out that he had been cut by Accused 1.
4. PW2 testified that he arrived at the hospital on 06<sup>th</sup> October 2022 at around 5.00 p.m. and found Omwoyo conscious and able to communicate. Omwoyo informed him that he had been ambushed by Accused 1 and Accused 3. PW2 stated that this disclosure was made in the presence of medical personnel, though none of those personnel were subsequently called to testify.
5. PW3 was selling goods by the roadside on the material day. She saw Accused 1 approach Omwoyo near her stall, take her sugar-cane cutting knife, go to where Omwoyo had placed his goods, and then return the knife. She did not witness the fatal assault and did not see Accused 2 or Accused 3 at the scene.

6. PW4 was not present at the scene and could not speak to events on the material day. PW5 transported Omwoyo to hospital at about 5.00 p.m. but did not observe any injuries and did not converse with him.
  
7. PW6, the investigating officer, testified that he visited the scene on 7th October 2022 and recovered a panga, suspected to be the murder weapon, from the accused's premises. He conceded, however, that the panga was neither subjected to fingerprint analysis nor documented through an inventory at the point of recovery. He further acknowledged that no independent civilian witnesses were present during the recovery, and that the alleged weapon was not produced in court as an exhibit. He confirmed that the decision to prefer charges was based on the recorded witness statements.
  
8. PW7, a medical doctor, conducted the post-mortem examination on the body of Omwoyo. On external examination she observed that the left leg had been immobilised with a splint above the knee. Omwoyo had a sutured laceration on the scalp measuring 6 cm by 3 cm, a laceration on the anterolateral aspect of the left thigh measuring 11 cm by 7 cm, and a subgalea haematoma corresponding to the sutured scalp laceration, consistent with recent medical intervention. Upon further

examination, the doctor noted a fracture of the occipital bone of the skull and a fracture of the distal left femur. She formed the opinion that the cause of death was exsanguination due to fracture of the femur caused by injury with a sharp penetrating object, consistent with assault.

9. Each of the accused persons elected to give unsworn statements in their defence. They denied assaulting the deceased, Omwoyo, and stated that they were arrested while attending a funeral in their village.
10. The offence of murder is defined under section 203 of the Penal Code. For a conviction to be sustained, the prosecution must establish certain essential ingredients beyond reasonable doubt. The Court of Appeal recently restated these elements in **Shangasu v Republic [2024] KECA 1223 (KLR)** where it held that the prosecution must prove: first, that Omwoyo died; second, that the death was caused by the unlawful act or omission of the accused; and third, that in causing that death the accused acted with malice aforethought as defined under section 206 of the Penal Code. The court will therefore consider the evidence on record against each of these statutory ingredients.
11. From the foregoing, the issues for determination are:

- 1) Whether the death of Omwoyo and its cause were proved**
- 2) Whether the accused or any of them caused the death Omwoyo by an unlawful act**
- 3) Whether any such act was accompanied by malice aforethought within the meaning of section 206 of the penal code.**

11. On the first issue, the evidence of PW7, the medical doctor who conducted the post-mortem examination, established that Omwoyo died from exsanguination resulting from a fracture of the femur caused by injury with a sharp penetrating object, consistent with assault. Accordingly, the fact of death and its medical cause were proved to the requisite standard of beyond reasonable doubt.

12. The central question is whether the prosecution proved beyond reasonable doubt that it was the accused, or any of them, who inflicted the fatal injury. The burden of proof in criminal proceedings rests squarely upon the prosecution and never shifts to the accused person. This principle was firmly stated in **Woolmington v Director of Public Prosecutions [1935] AC 462**, where it was held that throughout the web of the criminal law there runs a golden thread that it is the duty of the prosecution to

prove the prisoner's guilt. An accused person bears no obligation to prove his innocence or to explain away the prosecution's case.

13. It follows that even where an accused person elects to give an unsworn statement, or chooses to remain silent, the prosecution must still discharge its burden by placing before the court credible and cogent evidence establishing each element of the offence beyond reasonable doubt. Suspicion, however strong, cannot form the basis of a conviction. The court must be satisfied that the evidence presented irresistibly points to the accused as the perpetrator of the offence and leaves no reasonable doubt as to his guilt.

14. In determining whether this burden has been discharged, the court must carefully evaluate the totality of the evidence adduced, including the credibility of witnesses, the consistency of their accounts, the surrounding circumstances of the incident, and any corroborative evidence linking the accused to the commission of the offence. Where doubts arise from material inconsistencies or gaps in the prosecution's case, those doubts must be resolved in favour of the accused. However, where the evidence, taken as a whole, forms a coherent and credible account pointing to the culpability of

the accused, the court is entitled to find that the prosecution has proved its case to the requisite standard.

15. Defence counsel submitted that PW1's evidence is so contradictory as to be worthless, pointing to his concession in cross-examination that he did not literally witness the moment of assault on Omwoyo. This submission overstates what the contradictions actually amount to and understates the significance of the body of PW1's evidence viewed as a whole.

16. The court accepts that where a witness's evidence contains irreconcilable inconsistencies on material particulars, great caution must be exercised (See **Ndungu Kimanyi v Republic [1979] KLR**). However, the question is not whether there is any inconsistency, but whether the inconsistencies are so fundamental as to destroy the reliability of the witness's account. The inconsistency identified in PW1's evidence concerns one specific detail which is whether he visually observed the actual assault and not the broader narrative which he maintained consistently throughout.

17. That broader narrative emerges clearly from the evidence. Accused 1 and Accused 3 first beat Omwoyo with sticks. Accused 1 then left the scene, armed himself

with a panga which he concealed in his gumboots, and returned. On seeing him approach, Omwoyo fled into a tea plantation. Accused 1 pursued him into the plantation, while PW1 followed at a distance of approximately 30 metres. Shortly thereafter PW1 heard Omwoyo cry out that he had been cut. PW1 remained consistent on each of these aspects of his evidence. The only inconsistency relates to whether he visually observed the actual moment of assault or only heard Omwoyo's immediate cry after the attack. That distinction does not undermine the coherence of the overall account of the events preceding and immediately following the assault.

18. It is also significant that PW1's account is internally logical and conforms to common human experience. A person being chased by another armed with a panga would flee. A witness following 30 metres behind a chase through a tea plantation might not see the exact moment of contact but would hear an immediate cry from the victim. The fact that PW1 did not see the precise assault does not mean he did not witness the chase, the pursuit by an armed man, and the immediate aftermath. Taken as a whole, PW1's evidence is credible and reliable on the central facts and this court accepts it.

16. The evidence of PW2 is that when he arrived at the hospital at about 5.00 p.m., approximately one hour after the assault, Omwoyo told him that he had been assaulted by Accused 1 and Accused 3. This statement is admissible under section 33(a) of the Evidence Act, which provides that statements made by a person who is dead are admissible where the statement relates to the cause of his death or to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
17. The defence sought to discredit this statement by Omwoyo on the basis that he was conscious, talking and eating, suggesting no belief of imminent death, and on the basis that the precise wording attributed to him differs as between PW1 and PW2. The court does not find these objections persuasive. The admissibility of the statement under section 33(a) does not require a belief in imminent death. The fact that Omwoyo was still alive and able to communicate does not render his identification of his attackers unreliable, if anything, it enhances reliability, as he was not in extremis and was able to give a calm and considered account. The difference in wording between PW1's version ("this man has cut me") and PW2's version (naming Accused 1 and Accused 3) is readily explained by

the different contexts that PW1 heard a spontaneous cry immediately after the attack, while PW2 received a considered account at the hospital with time for Omwoyo to name his assailants. The court should not view these differences as inconsistencies. It is entirely consistent with human nature for an initial outcry to be brief and emotional, while a later statement provides the necessary detail once the initial shock has subsided.

18. The Court of Appeal in **Simon Kiptum arap Choge & 3 others v Republic Republic [1984] KECA 4 (KLR)** set out the principles governing the admissibility of dying declarations under section 33(a) of the Evidence Act. The Court held that such statements are admissible where they relate to the cause of death or the circumstances leading to it, even where the maker did not apprehend imminent death. It nevertheless emphasised that, since the maker is not available for cross-examination, such evidence must be treated with circumspection. In that case, the alleged dying declaration was found to be vague and lacking independent corroboration, leading to the acquittal of the first appellant.

19. That principle of caution does not require automatic rejection. The court must evaluate the surrounding circumstances to determine whether the statement is

reliable. In the present case, the court has carefully considered the circumstances under which the statement was made and finds it reliable. The statement is further corroborated by the evidence of PW1 regarding the chase and the conduct of Accused 1 in deliberately arming himself with a panga before pursuing Omwoyo.

20. The court accordingly accepts Omwoyo's statement to PW2 as credible evidence identifying Accused 1 and Accused 3 as the persons who ambushed and injured him.

21. A feature of this case that the defence largely passed over in silence is the conduct of Accused 1 between the initial beating and the fatal assault. Accused 1 did not merely continue a pre-existing fight. He left the scene, went to his home, retrieved a panga, and deliberately concealed it inside his gumboots before returning. This sequence of conduct is highly significant, as it demonstrates premeditation. Accused 1 was not acting in the heat of a spontaneous quarrel when he cut Omwoyo. He had a period of reflection between the initial altercation and his return with a bladed weapon, and made a deliberate choice both to arm himself and to conceal the weapon, suggesting awareness of the unlawful nature of his intended act. Omwoyo's instinctive flight upon seeing

Accused 1 approach is entirely consistent with his appreciation of the threat posed.

22. Section 206 of the Penal Code provides that malice aforethought is established by evidence proving, inter alia, an intention to cause death or grievous harm, or knowledge that an act will probably cause death or grievous harm. In the present case, the deliberate arming with, and concealment of, a panga—a lethal bladed weapon—followed by the pursuit of an unarmed, fleeing victim, demonstrates at the very least a clear intention to cause grievous bodily harm. A panga, when used against the human body, is inherently capable of causing serious injury or death, and Accused 1 must be taken to have known this. The court is therefore satisfied that malice aforethought has been established as against Accused 1.

23. The evidence against Accused 2 is materially different. PW3 expressly confirmed that she did not see Accused 2 at the scene. PW1's account of the initial assault implicates Accused 1 and Accused 3 only, while Omwoyo's statement to PW2 names Accused 1 and Accused 3 and does not include Accused 2. The court has considered whether liability may arise under the doctrine of common intention pursuant to section 21 of the Penal Code, but finds that the prosecution has not established the evidential foundation

for such a finding. There is no evidence placing Accused 2 at the scene, or demonstrating participation, prior agreement, or shared intent. The court therefore finds that the case against Accused 2 has not been proved beyond reasonable doubt.

24. The position of Accused 3 stands on a different footing. PW1 placed Accused 3 at the scene as a participant in the initial assault alongside Accused 1. Further, Omwoyo, in his statement to PW2 at the hospital, specifically named Accused 3 as one of the persons who ambushed him. The evidence establishes that Accused 3 acted jointly with Accused 1 in the assault on the deceased. The subsequent fatal injury inflicted by Accused 1 was a continuation of that joint enterprise, thereby bringing Accused 3 within the ambit of common intention under section 21 of the Penal Code.

25. This court therefore finds as follows. The death of Elkanah Omwoyo Bosire was proved, the cause being blood loss from a panga injury to the left leg inflicted during an assault. Accused 1 was positively identified as the person who inflicted that injury, both through the sequence of events described by PW1 culminating in the deceased's immediate utterance, and through the deceased's own statement to PW2 at the hospital. Accused

1 armed himself with a panga in a deliberate and premeditated manner before returning to attack the deceased, thereby establishing malice aforethought. Accused 3 participated in the initial assault and was specifically identified by the deceased as one of the assailants, rendering him liable under the doctrine of common intention. The court is satisfied that the offence of murder has been proved against Accused 1 and Accused 3 beyond reasonable doubt. In contrast, the evidence against Accused 2 falls short of the required standard.

26. Having carefully considered the evidence on record, the submissions of counsel, and the applicable law, the court renders its verdict as follows:

**1) Nelson Bosire Otuke alias Zephania (Accused 1) is found GUILTY of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is convicted accordingly.**

**2) John Jonte Otuke (Accused 3) is found GUILTY of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is convicted accordingly.**

**3) Zablon Nyabuto Otuke (Accused 2) is found NOT GUILTY of the charge of murder. He is acquitted under section 322 of the Criminal Procedure**

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**Code and shall be set at liberty forthwith unless  
otherwise lawfully held.**

**DELIVERED AT NYAMIRA THIS 19<sup>th</sup> DAY OF  
March 2026**



**WAMAE.T. W. CHERERE  
JUDGE**

**Appearances**

**Court Assistant - Anita**

**1<sup>st</sup> Accused - Present**

**2<sup>nd</sup> Accused - Present**

**3<sup>rd</sup> Accused - Present**

**For Accused Persons - Mr. Marita for Akanga Matende  
& Co. Advocates**

**For the DPP - Mr. Chirchir (SADPP)**

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