



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. 38 OF 2018

REPUBLIC

PROSECUTOR

VERSUS

OMUKANDI BEN WAWERE **1ST**

ACCUSED

JONAH BARAZA **2ND**

ACCUSED

ANTHONY WAFULA MUKAMBI **3RD**

ACCUSED

JUDGEMENT

1. The Accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars being that on the 6th day of July 2018, at Machukhuni area, Kulumbeni Sub-location, Kiliboti Location, Matete Sub-County within Kakamega County, they jointly murdered Vincent Okoti.
2. The matter proceeded before Hon. W. M. Musyoka J. and Hon. S. C. Chirchir J. who concluded the hearing. The parties sought directions

that the matter do proceed from where it had reached. This court will then proceed to write Judgement pursuant to Section 200 of the Criminal Procedure Code.

3. The prosecution adduced evidence through five (5) witnesses. The first witness, referred to as PW2 was Susana Naliaka Juma. She said that she knew the Accused but knew the 2nd Accused as Jonah and the 3rd Accused as Wafula but did not know the 3rd Accused. She said she also knew Vincent Okoti as a businessman at Nandwa Canteen where he used to sell “ngumu” cakes. She recalled that on 6/7/2018, an in-law’s child Fred told her that she was being called by her mother-in-law. Her mother-in-law Salina told her to go and check on a person lying near the cane farm. She went there and found it was Okoti lying face down and dead. She screamed and people came. Among them, she recognized Mukasa, also known as Idd and Jonah. Officers came to the scene and took the body and she later recorded her statement.
4. On cross-examination, she said that Salina and Fred knew the body was there and that Fred had seen the body first then informed Salina who sent him to call her. She said that it was 11.00 a.m. on the fateful date and the body was slightly hidden besides the cane in the farm. She said that as she got there, she saw Jonah leaving the spot where the body was although he was not holding anything in his hands. She stated that she did not recall telling the police that Omukunda and the deceased drunk from the same cup.

5. PW2 was Loice Nasimiyu Wafumbo. She testified that she was also Salima Hassan and that Fred was her grandson, while Susana Naliaka was her daughter-in-law. She said that she knew Jonah the 2nd Accused and Makandi the 1st Accused. She recounted that on 6/7/2018 she was at home when Fred came and informed her that he had heard some people whom he suspected might be stealing her maize. She went there. She saw Jonah leaving the maize farm. She went to the spot and saw someone lying there. She heard a strange sound and on turning, she saw Wamakandi, the 1st Accused holding someone. She only saw the 1st and 2nd Accused. She said she did not know the 3rd Accused. She said that she saw the 1st Accused holding a person who was on the ground on the throat. She screamed and people came but the Accused persons fled. She said that "PW2" meaning Susan Naliaka was the one who screamed. The person lying on the ground was Okoti. A village elder came and called police officers who came and took Okoti away.
6. When cross-examined, the witness said that Jonah did not have anything on his hands. According to her, she could not tell whether the deceased was drunk nor what could have caused him to lie at the scene the way he was. She said the 1st and 2nd Accused were local youths while she knew the 3rd Accused was called Wafula from Kamuda and had bought a farm in the area.
7. PW3 was a 16 year old boy called Fred Wasilwa. He recounted that on 6/7/2018 he was with his grandmother at home and it was

around 11.00 a.m. The grandmother sent him to fetch water at the river. As he approached, he saw some two people he could not identify killing someone whom he used to see living at the market. They were strangling the person. One person was strangling him while the other one was keeping watch over the road. There were no other persons nearby. He turned to call his grandmother and when she reached the scene, they found that the person had already been killed, and his trousers removed. PW3 said that they were removing money from the deceased's trousers and when his grandmother asked what they were doing, the 2nd Accused said that the person had come to their home and was drunk and they were putting him in place. The other man warned his grandmother not to scream. She challenged them. She sent the witness to go and call his uncle's wife Susi. He went to call her. She was five (5) minutes away. She accompanied him to the scene and when the Accused saw her, they left to their houses. Susi screamed and people came and on asking who was responsible, they informed them that it was Jonah and Wamakondi. He identified Jonah as the 2nd Accused and Wamakondi as the 1st Accused. The witness said that he later saw the 1st and 2nd Accused having been arrested by the police. He said he knew the deceased as Okoti a businessman living nearby who used to pass by their place as he would go to drink. He said he did not see the 3rd Accused at the scene.

8. Cross-examined, PW3 said that it was the 1st and 2nd Accused who were involved. He denied saying in his statement that his grandmother was compensated with a goat. He reiterated that the grandmother did not scream but asked him to call Susi. He said there was no weapon at the scene. He stated that he knew the 2nd Accused before the incident but not the 1st Accused. He further said that Jonah was standing on the road keeping watch and was not doing anything to the deceased.
9. When re-examined, PW3 said that he came to hear the 1st Accused was called Wamakondi when the crowd arrived. He also said that he did not see Jonah assist the deceased and that Jonah was the one who removed the deceased's trousers.
10. Dr. Edward Bilembwa from Webuye County Hospital testified as PW4. He produced the post-mortem report done by Dr. Habel Misiko whom he said was his colleague who had been transferred to North Eastern. He said that he could recognize Dr. Misiko's handwriting and signature. He tendered the post-mortem report as evidence with no objection from the Accused persons.
11. The post-mortem was done at Webuye County Referral Hospital mortuary on 11/7/2018 at 11.30 a.m. on an African male adult. Externally, there were bloodstains on both nostrils, the scalp and the face. There were scratch marks around the neck measuring about ½cm. The neck was swollen. On the left palm on the posterior aspect, there was a bruise measuring approximately 5 cm.

On the lower limb, there were bruises on the patella region. There was a superficial burn on the anterior aspect of the right tibia. On the left lower limb, there were bruises on the anterior tibial aspect and bruises on the patella region of the knee. Internally, there was haemoperitoneum and a rupture of the spleen measuring about 5cms in length. Ruptured blood vessels caused internal bleeding in the abdomen. There was inter cerebral haemorrhage collection of blood in the brain tissue. The scalp was pale in appearance but no fracture. There was intercerebral haematoma. All the other organs were normal. The Doctor concluded that the cause of death was haemorrhagic shock secondary to ruptured spleen and closed head injury and multiple blunt trauma following assault.

12. Cross-examined, PW4 said that shock is always connected to the head and there was no fractures on the head. He later clarified that haemorrhagic shock is caused by blood loss caused by a ruptured spleen.
13. PW5 was the Investigating Officer, Inspector Erastus Njonjo. He testified that on 6/7/2018, the OCS Matete Police Station instructed him to proceed to a murder scene at Omujumbo village after receiving a report of murder from the Assistant Chief Kulumbeni Sub-location. He proceeded to the scene with other officers and on arrival, found that the villagers had arrested two (2) suspects and forced them to sit beside the body of Vincent Okoti, the deceased. Also detained was the deceased's wife and a chang'aa seller. Upon

- inquiries, he established that an old woman and her grandson had called the villagers after they found the deceased being assaulted by the 1st and 2nd Accused.
14. PW5's further evidence was that the young boy had been sent to the river and while on the way, found the 1st and 2nd Accused having restrained the deceased and pinned him to the ground near the grandmother's maize shamba and he rushed back to call the grandmother and they went to the scene. The old woman sent the young boy to go and called the villagers and by the time they arrived, the 1st and 2nd Accused had disappeared and the deceased had died. They raised alarm after being given the identities of the 1st and 2nd Accused, mobilized themselves, and managed to arrest the 1st and 2nd Accused then subjected them to mob justice. They also arrested the deceased's wife and the chang'aa seller who had sold chang'aa to the 1st, 2nd, 3rd Accused, the deceased and his wife.
 15. During interrogation of the 1st and 2nd Accused persons by the members of the public, they mentioned the 3rd Accused and stated that he had requested them to have the deceased at the chang'aa den. During interrogation by the police, the 1st and 2nd Accused persons mentioned the 3rd Accused again. The witness said that he established that three Accused persons attacked the deceased under the supervision of the 3rd Accused, who was not drunk and hid himself within the maize plantation when he noticed the small boy. ON 8/7/2018, the 3rd Accused was arrested by villagers and handed

- over to the police. The witness said that having confirmed the cause of death after a post-mortem, and based on the witness statements, he prepared murder charges against the three Accused persons.
16. On cross-examination, PW5 said that the deceased was assaulted by the 1st and 2nd Accused persons who mentioned the 3rd Accused while under interrogation and claimed that he had planned the attack and promised to pay them after the attack and that he was in their company during the incident.
 17. The court found that a prima facie case had been established against the 1st and 2nd Accused but acquitted the 3rd Accused. When placed on their defence, the 1st and 2nd Accused persons chose to give sworn statements but did not call any witnesses. The 1st Accused took the stand as DW1. He said he did not know why he was in court. He denied ever meeting the deceased on the material date and said he was with his maternal aunt. He said that on 6/7/2018, he went to drink local brew at a neighbour's house then went home afterwards. After a while, people went to his home and accused him of killing someone then took him and his co-accused who is his relative. According to him, he got to know of the deceased's death when the people went to pick him.
 18. On cross-examination, he said that he saw the deceased drinking and left the place alone. He said that he did not know if his co-accused were present. He denied assisting the deceased's wife,

- who was his aunt, kill the deceased. He said that he had no differences with Salima Hassan and did not know what would make her lie about him. He admitted passing by Salima Hassan's farm.
19. The 2nd Accused testified as DW2 and also denied killing the deceased. He said that he had never seen the deceased. He said that on 6/7/2018, he had gone to borrow money at Mama Jane's house then went back to work at the farm in his home. People went for him and alleged that he had killed someone. They beat him as they led him to the scene of crime where the body was.
 20. Cross-examined, DW2 denied ever being at DW1's home though they were neighbours. He said he and DW1 were together on 6/7/2018. He said he did not know a woman called Salima or a lady called Khayanga. He denied telling the police that he was with his co-accused and denied being at the drinking place nor assisting his co-accused to kill the deceased. On re-examination, he reiterated that he went to Mama Jane's to borrow money and not to drink but stated that Jane used to brew chang'aa.
 21. After the close of the defence case, directions were taken pursuant to Section 200 of the Criminal Procedure Code. The Accused persons' Counsel submitted that the Accused would be comfortable with the matter proceeding from where it had reached.
 22. The 2nd Accused person jumped bail and despite warrants of arrest being issued, had not been arrested by 16/2/2026. Since both parties had filed their submissions, their Counsel agreed that

Judgement be written and the warrants of arrest against the 2nd Accused remain in force.

Submissions by the Prosecution

23. The prosecution submitted that they had proven that the deceased person had died and that the cause of death was unlawful.
24. They submitted that there was evidence through PW2 and PW3 that the 1st and 2nd Accused were seen assaulting the deceased while the 3rd Accused was mentioned by the first two Accused persons.
25. The prosecution further submitted that they had proven that the act was actuated by malice aforethought and relied on **Nzuki v. Republic [1993] KLR 171.**

Accused Persons' Submissions

26. The Accused persons submitted that a post mortem alone was not sufficient proof that the deceased had died as only the Doctor who performed the post mortem identified the body. They also submitted that there was no evidence that the cause of death was unlawful or that it was the Accused persons who inflicted the injuries on the deceased. They contended that the prosecution did not adduce evidence to prove that they were responsible for the offence as they were not properly identified. Further, the Accused persons faulted the prosecution for failure to test the presence of alcohol and the failure to take photos of the scene. The Accused persons argued that the absence of forensic evidence meant that the witness testimonies was insufficient to support the prosecution's

case. They posited that the use of finger prints would have aided in establishing who exactly among the Accused persons strangled the deceased and the absence thereof contravened the provisions of Section 77 of the Evidence Act.

Analysis and Determination

27. To sustain a conviction for murder, the prosecution must prove the following crucial ingredients beyond reasonable doubt:-

- (i) *That the deceased died.*
- (ii) *That the death was caused by an unlawful act or omission.*
- (iii) *That the unlawful act or omission was by the accused.*
- (iv) *That the act was committed with malice aforethought.*

(See **Republic v. Mohammed Dadi Kokene [2014] eKLR** and **Anthony Ndegwa Ngari v. Republic [2014] eKLR**).

28. Regarding the death of the deceased, the evidence of PW1, PW2 and PW3 was that a person they knew as Okoti was killed as they saw the body. A post-mortem was conducted and a burial permit issued in respect of the deceased. It is trite knowledge that a post mortem can only be performed on a dead body. The post-mortem report indicated that the body was identified by two witnesses as that of Vincent Okoti. There is no doubt whatsoever that the person known as Vincent Okoti is deceased.

29. Under Article 26 of the Constitution, the right to life is protected by law and can only be taken away under exceptional circumstances provided therein. In the premises, every homicide is deemed to be

unlawful unless authorized or excusable under the law, or under justifiable circumstances such as self defence or defence of property. See **Guzambizi Wesonga v. Republic [1948] 15 EACA 63.**

30. The post mortem evidence was that the cause of death was haemorrhagic shock due to rupture to the spleen and a closed head injury and multiple blunt trauma following assault. The severe blunt force trauma leading to a rupture of the spleen indicates a violent attack. Assault is an unlawful act as it is an offence according to the law. the death of the deceased was therefore proven to have been caused by an unlawful act.
31. As to whether the Accused persons were the ones that caused the unlawful act, there was direct evidence by PW2, Loice Nasimiyu Mafumbo also known as Salima Hassan and her 16 year old grandson. PW3 that they saw the 1st and 2nd Accused attacking the deceased. PW2 said she saw the 1st Accused holding the deceased by the throat. PW3 also stated that he saw two people whom he did not identify, one strangling the deceased whom he knew while the other one was watching over the road. According to the post mortem report, the deceased bore multiple scratch marks on the neck, which was swollen. These injuries corroborate the evidence of PW2 and P3 and although the cause of death was not strangulation, it was from multiple blunt and open trauma. The said injuries could only have been the result of assault.

32. Having carefully reviewed the evidence, there is no doubt that the 1st and 2nd Accused was known to PW2. Indeed, she was able to inform the members of the public whom she had seen assaulting the deceased as a result of which the 1st and 2nd Accused persons were arrested.
33. It is trite that whereas forensic evidence is desirable, its absence is not fatal to the prosecution's case in the presence of credible direct or circumstantial evidence. Similarly, whereas a properly processed crime scene is important, failure to process the scene does not vitiate the prosecution's case where direct evidence exists. The direct evidence of PW2 and PW3 places the 1st and 2nd Accused at the scene, and outweighs the claim by the defence that the deceased may have been killed elsewhere and the body dumped at the scene.
34. Regarding the 2nd Accused, although he was not seen assaulting the deceased, he was seen on the look-out, keeping watch on behalf of the 1st Accused. Section 20 of the Penal Code provides that:-
- “(1)When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—**
- (a)every person who actually does the act or makes the omission which constitutes the offence;**

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission."

35. From the evidence, I am convinced that the 2nd Accused acted in concert with the 1st Accused to assault the deceased and although the two were not seen inflicting all the injuries on the deceased, their presence at the scene and 1st Accused persons active engagement in the assault under the watch of the 2nd Accused leads

to the conclusion that the two were responsible for the fatal injuries in light of the fact that both Accused person's defence was a bare denial which did not displace the prosecution's case.

36. Section 206 of the Penal Code defines malice aforethought as:-

“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.”

37. The multiple injuries on the deceased demonstrate extensive use of force.

38. In **Nzuki v. Republic [1993] KECA 83 (KLR)**, the Court of Appeal set out the principles applicable in determining whether malice aforethought exists and stated that:-

“...Malice aforethought” is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237.”

39. Assaulting a person to the extent that his spleen ruptures and he sustains a closed head injury as well as strangulation demonstrate an intention to cause grievous harm or death. This aligns with Section 206 of the Penal Code.

40. In the end, I am satisfied that the prosecution proved its case beyond reasonable doubt and I find the 1st and 2nd Accused guilty as

charged and accordingly convict them of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Dated, signed, and delivered at Kakamega this 28th day of April 2026.

**A. C. BETT
JUDGE**

In the presence of:

Mr. Munyendo holding brief for Ms. Mahuni for the Accused

Ms. Chala for the Prosecution/State

Court Assistant: Polycap