



REPUBLIC OF KENYA



KENYA LAW
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**State v Opondo (Criminal Case E012 of 2023)
[2025] KEHC 940 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E012 OF 2023
RE ABURILI, J
JANUARY 31, 2025**

BETWEEN

STATE PROSECUTION

AND

SAMSON OCHIENG OPONDO ACCUSED

JUDGMENT

Introduction

1. The accused person Samson Ochieng Opondo is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63 Laws of Kenya. The particulars of the offence as detailed in the amended information dated 7th February 2024 are that on the 27th February 2023 at Abwao village, Bolo location in Nyakach sub-county within Kisumu County, he murdered Florence Adhiambo Opondo.
2. The accused person who is now an adult and who was a minor at the time of the alleged offence pleaded not guilty to the charge against him and the case proceeded to full trial.
3. The prosecution called a total of eight (8) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

4. PW1 Joseph Damianus Wandiga from Nyakach testified that on the 26th February 2023 at 9pm, his in-law had gone to his house panting saying she wanted help as there was a problem at her home where she was alone where her son was quarreling with one, Florence, and that they were likely to harm one another.
5. He testified that he went to her home and found that Florence Opondo had been stabbed already and the assailant had escaped. It was his testimony that he checked her pulse and discovered that she was



already dead so he called his Assistant Chief Zedekiah who was offline after which he called a retired Chief, Mr. Omullo and informed him of what had transpired and further told him to call the police at Sondu Miriu which he did but that he called back saying the police could not be reached. PW1 testified that people gathered at the scene and he went and reported to 'Nyumba Kumi'. It was his testimony that he knew the assailant who was like a son to him. PW1 identified the accused before court.

6. In cross-examination, PW1 testified that he did not see the accused stab the deceased and further that when he reached the scene, he did not find the accused and neither did he get the weapon.
7. PW2 Peter Opondo Onchoro testified that the deceased was his wife. He testified that on the 13th March 2023, he had some issues in his home with his children when his wife, Florence Adhiambo was killed. He testified that she was taken to Bolo Hospital and a postmortem was done on her body. PW2 testified that his brother Phabian and himself identified the body.
8. PW3 Florence Atieno Onchoro testified that on the 27th February 2023 at 8pm, she was in her house when she got out to visit her grandmother Florence Adhiambo Opondo, the deceased herein who was to go to a certain meeting the following day, a Tuesday and as such, asked her to give her a sewing needle to sew her skirt. She testified that her grandfather was not yet in the house.
9. PW3 testified that she heard Samson Ochieng and Gordon making noise as if they were drunk and when her grandmother asked her as to who was making noise outside, she told her it was Samson and Gordon. She testified that Samson then came and walked towards her grandmother and questioned her why she had reported him to the Chief stating that 'If I am arrested, then I will do something.' It was her testimony that her grandmother told Samson to stop making noise and that Samson left with Gordon as they continued abusing her grandmother after which her grandmother left for Samson's home to ask his mother why her sons were abusing her.
10. PW3 testified that she saw Samson approach her grandmother who told him that she was talking to Gordon then she saw Kevin running towards her and told her that Ochieng had stabbed their grandmother. It was her testimony that when she went to where her grandmother was, she found her lying down, called her but she was silent. She testified that she lit the torch at her and saw blood on her chest. PW3 testified that her grandmother never responded and that they called a neighbour, Miba, who told them to take her to hospital.
11. It was her testimony that her grandmother was not taken to hospital because by the time they returned from calling their neighbour Miba, she had already passed on. She testified that the police arrived and removed her body to the mortuary. She testified that she did not know of any differences between Florence and Samson as they were family members. PW3 testified that she knew Samson Ochieng Opondo, the accused herein, who was a family member whom she had known from 2020 and were also neighbours.
12. In cross-examination, PW3 testified that Samson did not specify what thing he would do in case he was arrested and that he was not arrested before doing something. She further testified that Florence complained of the noise made by Samson and Gordon and that PW3 did not see the persons who stabbed the deceased but that it was Kevin who was the one who told her that Ochieng had stabbed her grandmother. She testified that Gordon is also called Ochieng.
13. In re-examination, PW3 stated that her understanding of the Ochieng that Kevin spoke of having stabbed her grandmother is that it was Samson.
14. PW4 Gordon Ochieng Opondo testified that the deceased was his mother and PW2 his father. He testified that on the 27th February 2023 at 4pm, Clinton, his friend whom they used to club together



visited him and they proceeded to Kwanya Subaru club and stayed until around 7pm when they left for the Centre as he was to buy flour.

15. It was his testimony that they passed through Clinton's house who then escorted him to his home. He testified that on arrival, he found that his son Samuel who was in class 4 had not yet arrived home so he went to sleep. He testified that his son came to wake him up saying Ochieng had stabbed PW4's mother so he went and found his mother lying on the ground with a stab on the chest. He testified that he went to look for Ochieng Samson in his house but he was not there so he went to his mother's house who told him that Samson had been quarreling with PW4's mother and that it appears Ochieng had vanished. He testified that Ochieng's mother also disappeared. He testified that they stayed until morning when the police arrived and he accompanied the body to Bolo mortuary.
16. PW4 testified that as Ochieng Samson had disappeared and the police had given him their phone number, one month later, Ochieng resurfaced and he was arrested. He testified that he was not with Samson on the night his mother was killed. He testified that the distance between his mother's house to Samson's house is about 100m and that he found his mother lying inside the homestead of Samson, ten meters from Samson's mother's house.
17. In cross-examination, PW4 testified that on the 27th February 2023 he had taken alcohol at Kwanya Subaru but was not drunk. He testified that he went, bought food and returned home. He reiterated that he never had a disagreement or scuffle with his mother and that neither did he witness the incident. He testified that he did not find a knife though he was told the accused stabbed his mother with a knife.
18. PW5 Irene Atieno testified that on the 27th February 2023 at about 8pm, she returned home and found people wailing. She testified that she went and found her grandmother lying at the homestead of Samson Ochieng, the accused herein and her brother-in-law who was not at his home. She testified that Gordon Ochieng her elder brother-in-law was present at the scene and sitting near her grandmother. It was her testimony that he went to call Cosmas Onyvera but did not find him but found his wife, a nurse, who went and examined her grandmother and confirmed that her grandmother had already died. She testified that the body was removed to the mortuary.
19. In cross-examination, PW5 testified that she did not witness the stabbing of the deceased as she returned in the night. She testified that Gordon Ochieng is her elder brother-in-law and that he takes alcohol. She testified that she could not tell if he was drunk but he was at the scene. She further admitted that Gordon is also called Ochieng and that she was aware that Gordon used to have some misunderstandings with his mother which started a while back.
20. In re-examination, PW5 testified that on the material day, she was not aware of any disagreements between Gordon and his mother.
21. PW6 No. 77673 PC Adam Shalamo attached to Nyakach DCI office testified that on the 28th February 2023 he received a report through a call by OCS Sondu Miriu Police station of a murder incident and he rushed to the scene with officers from Sondu Miriu Police station where he found the body of a woman lying down with a stab on the chest.
22. PW6 testified that the body was removed to the morgue at the nearby mission hospital (Bolo). He further testified that some relatives of the lady were at the scene so he asked them to record their statements. He testified that in his investigations, some witnesses mentioned Gordon Ochieng as being with the suspect during the incident and that he found that it was Samson Ochieng who stabbed the deceased. He testified that an eye witness, Kevin Omondi, the deceased's grandchild recorded a statement saying he witnessed everything that took place.



23. PW6 testified that the accused was arrested and he stated that he was below 18 years so they took him to hospital and his age was found to be 17 years. (as at the time of writing this judgment, the subject had become an adult hence, the reference to accused as opposed to subject). The witness produced the Age Assessment Report for the accused as P. Exhibit 1. He further testified that a mental assessment was done and the subject was found to be of sound mind.
24. In cross-examination, PW6 testified that he did not recover any knife at the scene of crime. He testified that he did not arrest the subject as the subject was arrested long after the incident. He testified that Kevin was the only witness to the murder and that he was informed that both Samson and Gordon went to the deceased's home that night.
25. PW7 Dr. Bernadette Achieng, a medical officer and Medical Superintendent at Chulaimbo County Hospital testified that on the 13th March 2023, she carried out a Postmortem on the body of Florence Adhiambo Opondo at St. Claires Bolo Mission Hospital at 11.20am.
26. On general observations, she noted that the body was of a female, naked, 65 years old, well nourished, built physique, 5 feet 11 inches' height and that the body was well preserved by embalming.
27. She testified that externally, peripheral cyanosis noted on upper limbs – darkening of fingers, there was fresh blood on anterior chest cavity on the neck, a cut on right chest cavity 3cm x 2cm x 3cm deep while internally, in the respiratory system – the right lung had collapsed with features of cyanosis, accumulated clotted blood on anterior surface of right lung and heart. It was her testimony that the right lung had a cut 4x1cm and blood clot on the right pectoralis major muscle and that all other systems were essentially normal.
28. Dr. Achieng testified that she opined the cause of death to be hypovolemic shock secondary to hemorrhage (excessive bleeding) due to stab wound to the chest. She testified that they did not collect any sample and that she signed the Postmortem Report which she produced as Exhibit 1. PW7 testified that the body was identified by Peter Opondo and Jackson Odongo.
29. PW8, Kevin Omondi Okumu a minor of 15 years was taken through a voire dire examination and found to understand the meaning of an oath and the difference between telling the truth and lies and so he gave a sworn testimony. He testified that the deceased was his grandmother.
30. It was his testimony that on 26th February 2023, a Tuesday evening, after they had eaten dinner, Samson went to his grandmother's house and asked her why she had reported him to the Assistant Chief to which his grandmother said that she had not reported him to the Chief but rather that it was her husband who had reported him to the Chief. PW8 testified that Samson said that if he was to be arrested, he would kill someone.
31. PW8 further testified that Gordon Ochieng came and started insulting his grandmother for long and his grandmother was bitter and left their compound as Gordon left and went to their gate and together with Samson, they continued insulting the deceased. He testified that the deceased went to see the mother of Samson to tell her that Samson was insulting her. It was his testimony that Gordon told Samson to give him the panga which he had at that time and that Samson told his grandmother not to call out his name to which his grandmother told Samson's mother to warn Samson that she was not talking to Samson.
32. PW8 further testified that as his grandmother was returning to her house, Samson ran after her, stabbed her with a knife and ran away. He testified that his grandmother screamed and called him to go and call a doctor to attend to her. It was his testimony that he went to call the doctor who told him to look for



a neighbour who had a car to take her to hospital but that he went back and found his grandmother already unconscious.

33. PW8 testified that he called neighbours but that as the deceased was being lifted to be taken to hospital, a doctor passed by and said she was already dead and so the police were called. He testified that the body remained at the scene until the following day when it was removed to the mortuary. PW8 identified Samson as the accused in court who was their neighbour and whom he had known for long.
34. In cross-examination, PW8 reiterated his testimony and stated that he saw the whole incident happening. He testified that Samson had a sword which he used to stab his grandmother then he ran away with it. In re-examination, he testified that he saw something looking like a knife which Samson used to stab his grandmother.

The Defence Case

35. Placed on his defence, the accused who had now become of age testified as DW1. It was his testimony that on the 7th May 2023, he was at home when Gordon started abusing his grandmother who threatened to report him to the Chief. He testified that Gordon quarreled with his mother while he was at his home. The accused testified that he went to ask the deceased why she reported him to the Chief but she abused him saying he was born out of wedlock. He testified that he went to watch television and left her with Gordon then he heard screams and went to find out what was happening. He testified that he saw Gordon escaping and that people started coming to the scene.
36. The accused testified that he went back to where he had been watching television and that people came and asked him where Gordon had gone to which he responded by stating that he did not know. It was his testimony that Gordon is his neighbour and a cousin and that as he was testifying, he had been informed by his father on phone that Gordon had died after being killed by a mob on accusations of having killed his own mother. He further testified that Gordon used to quarrel with his grandmother. He testified that they both were known as Ochieng in the village.
37. The accused testified that when the incident took place, Gordon Ochieng had come to the gate of his grandmother while he was in his grandmother's house. He testified that he was arrested in June 2023 while Gordon had been arrested following this incident but he did not know how the case progressed. He testified that his family (house) and that of the 1st house did not have a cordial relationship.
38. In cross-examination, the accused testified that the deceased told him that he was not born of that home and this annoyed him. He testified that he saw Gordon come and testify in this case but that he had heard that he died the previous night though he could not tell the reason for his killing/death. In re-examination, he reiterated that his father had called him and informed him that Gordon had been killed.

Analysis and Determination

39. The offence of murder is created by section 203 of the *Penal Code* in the following terms:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
40. Section 203 defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the accused charged and that the unlawful killing was with malice aforethought. The onus of



proving a criminal offence like this one before the court lies with the prosecution who must prove the offence beyond reasonable doubt.

41. The issue for determination is therefore, whether the prosecution has proved all the elements of the offence of murder against the accused person herein beyond reasonable doubt.
42. On the fact of death and its cause, there's no doubt about the deceased's death. The same is confirmed by the testimonies of all prosecution witnesses. In addition, the post-mortem carried out by Dr. Achieng confirmed the deceased's cause of death as hypovolemic shock secondary to excessive hemorrhage due to stab wound to the chest.
43. On whether the death was due to an unlawful act or omission, the evidence on record from all the prosecution witnesses is that the deceased sustained a stab wound to the chest. The postmortem report produced by Dr. Achieng revealed that as a result of the stab, the deceased sustained a collapsed right lung with massive internal bleeding. It is without a doubt that the death of the deceased resulted from an unlawful act.
44. On whether it was the accused person herein who unlawfully killed the deceased, the identity of the person that caused that death has to be established beyond reasonable doubt. The evidence adduced by the prosecution was generally to the effect that the deceased was stabbed by a person called Ochieng.
45. From the evidence presented, both the accused and PW4 were known as Ochieng in their village and further, the evidence by PW3 was that the accused and PW4, Gordon Ochieng, were together on the night of the incident and that they proceeded to make some noise at the deceased's homestead prompting the deceased to come out of her house and engage them after which she proceeded to the accused's mother's home to ask her to intervene and have the accused stop abusing her.
46. PW3 also testified that the accused told the deceased during their confrontation that 'if he was arrested then he would do something,' though PW3 could not clarify what the accused meant by this statement.
47. PW8 was the only prosecution witness presented who actually witnessed the incident. PW8 being a minor was put through a *voire dire* examination and found understanding of the nature of an oath and the difference between telling the truth and lies and thus gave sworn testimony which was subjected to cross examination.
48. PW8 testified that following the exchange of words between the accused and the deceased, the accused left and the deceased followed him to go and tell his mother to tell the accused to stop abusing her. That as the deceased was departing the accused's mother's home, the witness-PW8 saw the accused run after the deceased, stab her, then he run away with the weapon. PW8 was firm under cross-examination that it was the accused that stabbed the deceased. He further testified that when the accused stabbed the deceased, PW4, Gordon Ochieng was present.
49. On his part, the accused denied committing the offence. He however admitted that he had a confrontation with the deceased, after which he left her with PW4, Gordon Ochieng who was her son and with whom she had disagreements as he proceeded to watch television and later he learnt that the deceased had passed on. He further informed court that he later learnt that PW4 was killed by a mob on accusations that he had killed the deceased.
50. This court cautions itself of the dangers of relying on a single identifying witness, PW8.



51. In *Abdulla Bin Wendo & Another vs Reg* (1953) 20 EACA 166 followed in *Roria vs Rep* (1967) EA 583, it was stated that:

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

52. PW8 clearly identified the accused at the scene and as the one who stabbed the deceased. PW8’s testimony remained unchallenged even in cross-examination. PW8 who testified that he saw Samson ran after his grandmother, stabbed her with a knife and he ran away. He testified that his grandmother screamed and called him to go and call a doctor to attend to her. It was his testimony that he went to call the doctor who told him to look for a neighbour who had a car to take her to hospital but that he went back and found his grandmother already unconscious. This witness was emphatic that he saw the accused run after the deceased as she was leaving the accused persons’ home. The accused person disappeared after this incident and was arrested when he returned, a month later, conduct consistent with his fear for what he had done.

53. PW3 testified that she was present at the house of the deceased when Samson, the accused herein came and walked towards her grandmother and questioned her why she had reported him to the Chief stating that ‘If I am arrested, then I will do something.’ It was her testimony that her grandmother told Samson to stop making noise and that Samson left with Gordon as they continued abusing her grandmother after which her grandmother left for Samson’s home to ask his mother why her sons were abusing her.

54. PW3 testified that she saw Samson approach her grandmother who told him that she was 21 talking to Gordon then she saw Kevin, PW8 running towards PW3 and told her that Ochieng had stabbed their grandmother. It was her testimony that when she went to where her grandmother was, she found her lying down, called her but she was silent.

55. PW8 was firm that it was the accused person herein who stabbed the deceased and that he saw a sword-knife which he used to stab her then he escaped. The accused was arrested a month after, following the incident and his escape. The incident happened at about 8pm and the accused does not deny going to the deceased’s home and having an altercation with her, when he went to ask the deceased why she reported him to the Chief but that she abused him saying he was born out of wedlock.

56. The accused’s testimony that he received information that PW4 was killed on accusation of having killed the deceased cannot in my view, be taken to be credible evidence of culpability of PW4. It is hearsay which is not verified. I am thus persuaded based on the direct evidence of PW8 and the evidence surrounding circumstances under which the deceased died that it was the accused who committed the unlawful act that led to the deceased’s death.

57. I now turn to the element of malice aforethought. Section 206 of the *Penal Code* defines malice aforethought in the following terms:

206. Malice aforethought



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.

58. In *Republic v Benjamin Kyalo Mulonzi* [2019] eKLR, the Court had this to say at paragraph 30:

“It is therefore clear that malice aforethought is the conscious, premeditated intent to kill another person, without any provocation or just cause. The Court of Appeal in the case of *Republic v Tubere S/O Ochen* (1945) 12 EACA 63 held that an inference of malice aforethought can be established by considering the following: -

- a. The nature of the weapon used.
- b. The manner in which the weapon was used.
- c. The part of the body targeted.
- d. The nature of the injuries inflicted either single stab/wound or multiple injuries.
- e. The conduct of the accused before, during and after the attack.”

59. In this case, the nature of the weapon, a knife was used. The accused used this weapon to stab the deceased in the chest. The weapon was not recovered as the accused escaped after the stabbing the deceased and therefore, I have no doubt that he had ample time to dispose of the lethal fatal weapon. Additionally, failure to produce a murder weapon is not fatal to the prosecution’s case.

60. The postmortem report showed that as a result of the stab, the deceased sustained a collapsed right lung and suffered massive internal bleeding. By stabbing the deceased in the chest, the intention was to kill the deceased. It is also not lost on this court the evidence adduced by the prosecution witnesses specifically PW3 that the accused remarked at the deceased that if he was arrested then he would do something to the deceased. The accused himself testified that he was angry at the deceased for her alleged words that he was born out of wedlock. This statement in addition to the weapon used by the accused in stabbing the deceased demonstrates that the accused had the intention to kill the deceased. Therein lies the accused’s motive. Although the murder weapon was not recovered, the accused person had time to dispose it off the weapon because he escaped after the incident and only resurfaced a month later. I have no doubt that the accused intended to cause grievous harm on the deceased. I find that malice aforethought was proved beyond reasonable doubt.

61. On the whole, I find and hold that all the elements of murder were proved beyond reasonable doubt. I find the accused person Samson Ochieng Opondo Guilty of the offence of murder as charged under section 203 of the *Penal Code* and he is hereby convicted accordingly.



62. Sentence shall be pronounced after records and mitigation.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI VIA MICROSOFT TEAMS
THIS 31ST DAY OF JANUARY, 2025**

R.E. ABURILI

JUDGE

