



REPUBLIC OF KENYA



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**Republic v Siku & 2 others (Criminal Case 8 of 2022)
[2025] KEHC 1072 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 8 OF 2022
JN KAMAU, J
FEBRUARY 27, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

DANIEL ASITWA SIKU 1ST ACCUSED

WALTER AMOS OMONDI 2ND ACCUSED

MICHAEL AMWAI WILLIAM 3RD ACCUSED

JUDGMENT

INTRODUCTION

1. The Accused persons herein were 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 Charge were that:-

“On the 20th day of January 2014 at Emwatsi Village, Ebuyangu Sub-Location within Vihiga County jointly murdered Japheth Oketch Okale.”
2. This matter was previously heard by Mrima, Njagi and P.J Otieno, JJ. The Prosecution’s case was heard on diverse dates between 1st July 2015 and 13th July 2022 when it closed its case. On the same date, the court found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence.
3. This court became seized of this matter on 17th April 2023 when the parties indicated that they would wish to proceed from where the same had reached. It heard the defence case between 19th October 2023 and 6th March 2024.



4. The Prosecution's Written Submissions were dated 27th June 2024. They did not bear a court stamp. However, in view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood of the Registry may have omitted to stamp the same.
5. The 1st, 2nd and 3rd Accused persons' Written Submissions were dated 5th June 2024 and filed on 29th October 2024. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

LEGAL ANALYSIS

6. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Japheth Oketch Okale (hereinafter referred to as the "deceased") died?
 - b. If so, was his death caused by an unlawful action(s) and/or omissions?
 - c. If so, who caused the unlawful action(s) and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased's death?
7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof of death of the Deceased

8. The Accused persons did not submit on this issue. On its part, the Prosecution submitted that there was no doubt in respect of the deceased's death. It added that Rodah Nyapela Munai (hereinafter referred to as "PW 1") and Christine Martha Kali (hereinafter referred to as "PW 3") testified that they identified the body of the deceased and attended the post-mortem.
9. As both the Prosecution and Defence witnesses alluded to the deceased's death, it was not necessary to seek further proof. This court found and held that the deceased's death was proved without an iota of doubt.

II. Proof of cause of the deceased's death

10. The Accused persons did not submit on the question of proof of the deceased's death. On its part, the Prosecution submitted that Dr Dickson Mchana (hereinafter referred to as "PW 6") testified that his colleague Dr Collins Otieno Oginga conducted the post-mortem on the body of the deceased. It contended that PW 6 produced the autopsy report which indicated that the cause of the deceased's death was failure of breathing due to brain injury following blunt trauma.
11. The cause of the deceased's death was a pertinent issue. Indeed PW 6 tendered a Post-mortem Report dated 22nd January 2014 in respect of the deceased herein as an exhibit in this matter. After conducting the post-mortem examination, he formed an opinion that the cause of death was brain haemorrhage/ injury with resultant cardiorespiratory arrest probably from blunt trauma.
12. It was therefore clear from his evidence that the deceased's death was not as a result of natural causes. Rather, it was due to having been assaulted. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.



III. Identification of perpetrator(s) of deceased's death

13. The 1st and 2nd Accused persons denied having been with the deceased on the material date of 20th January 2014. On the other hand, the 3rd Accused person did not deny having been with him on the said material date. He, however, denied having injured and/or beaten him.
14. The Accused persons submitted that there was no direct evidence linking them to the death of the deceased but that they were arrested merely on suspicion. They argued that suspicion alone was not a substitute for pre-requisite evidence beyond reasonable doubt as was held in the case of *Kanyi vs Republic* [1991] KLR.
15. They argued that the burden was on the Prosecution to prove their case beyond reasonable doubt but that it failed to do so. They asserted that as the Prosecution had not discharged this burden, a conviction of murder against them could not stand. They therefore urged this court to acquit them under Section 306(1) of the *Criminal Procedure Code*.
16. On its part, the Prosecution submitted that Peter Awiti Ochanda (hereinafter referred to as "PW 4") testified that on the material day, he saw the 3rd Accused person fighting with the deceased and that the 1st Accused person and one other called Shida joined in and together they assaulted the deceased. It pointed out that PW 4 stated that the 1st Accused person used kicks and blows while the 3rd Accused person had a panga which he used to cut the deceased on the head and that when they saw the deceased collapse, they walked away. It was emphatic that it was that the unlawful act of assault that led to the deceased's death.
17. It asserted that PW 4 identified the Accused persons well as they were all known to him as his neighbours. It added that No 53878 PC Wilson Kerebei Christian (hereinafter referred to as "PW 5") also testified that after receiving the report on assault from PW 4, he rushed to the scene of crime together with other officers and found the deceased lying unconsciously with physical injuries on the head and chest and that they rushed him to Yala Level 5 Hospital whereby he was pronounced dead on arrival.
18. It further contended that PW 6 testified that the deceased sustained injuries on the head, namely, three (3) scalp bruises on the forehead and internal bleeding into the brain.
19. The 1st Accused person testified that on the material date of 20th January 2014 at around 9.30p.m, he was doing his boda boda (sic) business. On his way to Luanda from Ebuyangu, while carrying a pillion passenger, the 3rd Accused person whom he knew as his father's workman, came running towards him. He stated that the 3rd Accused person told him that someone had accosted him claiming that he had befriended his girlfriend. The 3rd Accused person did not tell him the person's name but told him that the girl was called Mix.
20. He further stated that he knew the girl as they hailed from the same area. When he asked the 3rd Accused person if he had reported the matter to the police and he said that he had not, he took him to the Police Post where they met the In-charge sitting at the veranda. He explained to the In-charge what had transpired and the fact that he had brought the 3rd Accused person to report what had happened.
21. He further testified that he left the 3rd Accused person at the Police Post and took the passenger he had to Luanda. After dropping the passenger, on his way back to the boda boda (sic) base, he met one Mr Otieno, a Police Officer from the Police Post at the Chief stage. The said Police Officer asked him to take him to the Police Post where he worked and that when they got there, he found the 3rd Accused person still seated inside. He was told to sit next to him and they were then told that it had



- been reported that they had killed someone. The 2nd Accused person was also arrested and brought to the Police Station. They were all taken to Luanda Police Station and later charged for the offence herein at Kakamega High Court.
22. He stated that PW 4's evidence was false as he had been paid by the Police Officer to testify against him. He explained that his father told him that Mr Otieno, the Police Officer went to his house and demanded for Kshs 2000/= which his father gave him and he in turn gave it to PW 4. He was emphatic that PW 4 wrote his statement two (2) weeks after the incident. He denied having been involved in the death of the deceased. He pointed out that he did not know when the incident occurred and that he had no hatred for the deceased.
 23. The 2nd Accused person also denied killing the deceased. He averred that on the material day of 20th January 2014, he was called by his employer one Josam Amanyia who was also 1st Accused person's employer. He pointed out that the 1st Accused person was his brother. He stated that when he met his employer, he (the employer) left him at the hands of the Police at the Police Post. He was taken to Luanda Police Station and later charged with the offence of murder at Kakamega High Court. He denied having been involved in the death of the deceased. He was emphatic that none of the witnesses mentioned having seen him kill the deceased.
 24. The 3rd Accused person told this court that on the material day of 20th January 2014, at about 6.00p.m, he was taking milk to Ebuyangu Centre when he felt someone shaking him and telling him to give all he had. He did not know the person. The said person was drunk. He pointed out that the man attacked him when he was alone and when police officers were notified, he heard gunshots dispersing a crowd. He ran off and reported the matter at Ebuyangu Police Post. He was arrested and taken to Luanda Police Station and later charged for the offence herein.
 25. He was categorical that the evidence of No 86493 PC James Otieno Odida (hereinafter referred to as "PW 2") was false and urged this court to dismiss the same.
 26. PW 1 testified that the deceased was a son to his brother and used to take care of her cows. She told the Trial Court that on 20th January 2014, at around 6.00p.m, she was called by her mother-in-law informing her that the deceased had been killed. She stated that she went to the mortuary and witnessed the autopsy being carried out.
 27. PW 2, a Police Officer, testified that on the material day, he was at home, adjacent to the Police Post when the 3rd Accused person came to report that he had fought with others and he had been injured. After an hour, another person came and reported that there was a dead person behind the shops. He stated that he left with the in-charge to go to the scene after arresting the 3rd Accused person as a suspect. At the scene, they got a body of a person and after interrogating those people who were around, they gathered that there was a fight but witnesses refused to testify in this case.
 28. He further testified that PW 4 was the person who had reported about the incident and told the police about the employer of the 3rd Accused person. He added that PW 4 reported that the 1st, 2nd and 3rd Accused persons had fought. He together with the In-charge arrested the 1st and 2nd Accused persons and went back to collect the deceased's body and took it to the mortuary.
 29. PW 3 testified that the deceased was her son and she was informed of the deceased's death by PW 1 at about 7.30 pm on the material date. The following morning, she went to Yala Hospital Mortuary and identified the deceased's body. She also attended the post-mortem.
 30. PW 4 testified that on the material day of 20th January 2014 at around 5.30p.m, he was at the local shops when he heard people shouting from the direction towards Busia. When he got there, he found



- the 3rd Accused person fighting with the deceased. The deceased had hit the 3rd Accused person on the head. The 1st Accused person and another called Shida then joined in the fight.
31. It was his further testimony that the deceased had overpowered the 3rd Accused person and when the 1st Accused person and Shida joined they started to beat the deceased. The 1st Accused person attacked the deceased with kicks and blows. Shida chased the deceased to stop him from escaping. The 3rd Accused person cut the deceased on the back of the head. They beat him for about fifteen (15) minutes. The 1st Accused person then kicked him in the chest and he fell down. After he collapsed, they walked away and rode their motor cycles away.
 32. His evidence was that when he went to report the incident at Embali Patrol Base, he found the 3rd Accused person there. He identified the 1st and 3rd Accused persons at the dock during trial and pointed out that he knew them as they were his neighbour for over ten (10) years and he had no grudge with them. He was emphatic that he did not see the 2nd Accused person at the crime scene.
 33. PW 5, a Police Officer stated that on 20th January 2014 at around 6.35p.m, he was at the Patrol Base when the 3rd Accused person reported the case of assault complaining that he had been assaulted by the deceased. He testified that he booked him on OB No 4 of 20/1/14 but that immediately after his report, PW 4 came and reported that the 3rd Accused person had beaten the deceased who was lying unconscious behind the shops.
 34. He further stated that he detained the 3rd Accused person and rushed to the scene together with his colleague whereby they found the deceased behind the shops of Ebuyangu Trading Centre lying unconscious with physical injuries on the head and chest. He informed the OCS Luanda Police Station who came to the scene of crime with a police vehicle and they took the deceased to Yala Level 5 Hospital where he was pronounced dead.
 35. He stated that they later arrested the 1st and 2nd Accused person who were suspects. He commenced investigations and recorded the statements of the witnesses.
 36. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 4 saw the 1st and 3rd Accused persons with another not before the court fight with the deceased on the material date. He was able to see the 1st Accused person attack the deceased with kicks and blows while the 3rd Accused person cut him on the back of his head. He also saw the panga, a crude weapon, that the 3rd Accused person was carrying at the material time.
 37. PW 4 placed the 1st and 3rd Accused persons at the scene of crime. He was emphatic that the 2nd Accused person was not there during the fight. The incident happened during daytime. There was, therefore, sufficient light that was favourable for him to positively identify the 1st and 3rd Accused persons. This could not have been a case of mistaken identity. Identification was by way of recognition as they were all neighbours and knew each other.
 38. The 1st and 3rd Accused persons did not demonstrate that there was any motive for PW 4 to have framed them as the people who unlawfully caused the deceased's death on that material date.
 39. Their assertions that they were arrested on grounds of suspicion and that PW 4's evidence was false as he was paid to give evidence against them were unsubstantiated as they did not present any evidence to show that PW 4 was bribed to testify against them.
 40. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the 1st and 3rd Accused person's evidence to have been watertight enough to have weakened the inference of guilt on their part.



41. Consequently, it was this court's finding that the 1st and 3rd Accused persons' defence was mere denial and did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6.

IV. Malice Aforethought

42. Having found and held that the 1st and 3rd Accused persons' defence was not sustainable as they were positively identified as the perpetrators of the deceased's death, the next pertinent question that arose was whether or not they had malice aforethought in causing his death.
43. The Appellant did not submit on this issue. On its part, the Prosecution invoked Section 206 of the Penal Code and placed reliance on the case of Republic vs Tubere s/o Ochen[1945] 12 EACA 63 where it was held that an inference of malice aforethought could be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. It pointed out that it had adduced direct evidence that established malice aforethought on the part of the Accused persons due to injuries occasioned to the deceased.
44. This court had due regard to the case of Morris Aluoch vs Republic [1997] eKLR which cited the case of Rex vs Tubere s/o Ochen (Supra) where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted. It was further held that in determining existence or non-existence of malice, one had to look at the facts proving the weapon used, the manner in which it was used and part of the body injured.
45. Section 206 of the Penal Code provides the definition of malice aforethought and it reads 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.”
46. The ingredient of malice aforethought could therefore be express or implied. It could be deemed to have been established by evidence which proved an intention to cause death of or to do grievous harm to any person, whether that person was actually killed or not.
47. It was clear from PW 4's evidence that the 1st Accused person attacked the deceased with kicks and blows while the 3rd Accused person cut him on the back of the head with a panga. They beat him for about fifteen (15) minutes before the 1st Accused person kicked him on the chest. He collapsed and lost consciousness. The thorough beating they meted on him could only have been intended to kill him.
48. The seriousness of the injuries that he sustained was confirmed by PW 6. Upon conducting the post mortem examination, he observed that the deceased had three (3) scalp bruises on the forehead right side of skull above the right ear and on the root of the skull. Internally, he noted that there was bleeding into the brain on the right side above the ear.



49. This court was thus persuaded to find and hold that there were no variances of gaps in the Prosecution's case. The beatings the deceased suffered at the hands of the 1st and 3rd Accused persons were not only unlawful but they could not be said to have been bereft of malice aforethought on their part. It was clear that they acted in concert with each other and hence had common intention to cause the deceased harm which led to his death.
50. It was immaterial that the deceased had accosted the 3rd Accused person on allegations of befriending his girlfriend as the 3rd Accused person had alleged. They acted unlawfully by assaulting him which led to his death.
51. Having analysed the evidence that was adduced by both the Prosecution and 1st, 2nd and 3rd the Accused persons and their respective Written Submissions, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the 1st and 3rd Accused persons herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the Penal Code as having been:-
- a. Proof of the deceased's death'
 - b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
 - c. Proof of malice aforethought in the unlawful actions and/or omissions.
52. On the other hand, this court came to the firm conclusion that the Prosecution failed to establish to the required standard, which in criminal cases, was proof beyond reasonable doubt that the 2nd Accused person contributed and/or caused the deceased's death.

Disposition

53. For the foregoing reasons, the upshot of this court's decision was that the 1st and 3rd Accused persons herein be and are hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
54. Accordingly, as no evidence pointed to the 2nd Accused person as having contributed to the deceased death, he is hereby acquitted under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
55. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF FEBRUARY 2025

J. KAMAU

JUDGE

