Republic v Ochieng (Criminal Case E044 of 2014)
[2025] KEHC 5153 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5153 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E044 OF 2014

RN NYAKUNDI, J

APRIL 29, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

ERICK ONYANGO OCHIENG ..... ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on 31st January, 2010 at Roadblock estate in Uasin Gishu District within Rif valley province murdered Eugine Okeyo.

2. The accused pleaded not guilty to the offence as stipulated under section 203 of the *Penal Code*. The lead prosecution counsel in these proceedings was Mr. Mugun for the state whereas the defence was under the retainer of Learned counsel Mr. Angu Kitigin duly appointed under article 50 (2) (h) of *the Constitution* but in the succeeding period the defence was led by Mr. Okara.

3. At the hearing it is incumbent upon the prosecution to prove all the essential ingredients of the offence of murder beyond reasonable doubt. To prove its case the prosecution led evidence from the following witnesses herein after referred as PW1, PW2 etc.

The Prosecution case

4. PW1 Christine Okello testified that on 30th January, 2020 at about 3:00PM her nephew Eugine Okeyo telephoned her inquiring whether she was at home so then he can pay her a visit. He responded by confirming her availability at home and subsequently Eugine and a friend made good their inquiry by visiting PW1. The friend left soon thereafter in the course of that day. At around noon on 31st January, 2020, she heard a knock at the gate and asked Eugine to go and check who was seeking help for the gate to be opened. It was after a short while she heard a second knock at the door to the house. That is

when a boy by the name Odhiambo entered the house and told her that he had been sent by one Owiti to call Eugine so that he could provide him with a mobile number of one Peter. It did not take long when Eugine woke up and accompanied the young boy but she did not know their final destination. Once again PW1 received a telephone call from her brother to the effect that Eugine's mother had received a text message claiming that Eugine had been kidnapped and the kidnapper was demanding a ransom of money. It was on 2nd February, 2020 as the search of tracing Eugine went on information was received that his body had been recovered buried in a shallow grave in their neighbour's house. That neighbour's house happened to be Owiti's house. When the body was exhumed from the grave PW1 confirmed that he was wearing the same clothing he had on when he left the house on 31st January, 2020. She was later asked to record a witness statement with the police.

5. PW2 Hellen Agwenge testified and recalled that on 2nd February, 2010, she was called by the landlord's son by the name Opiyo to inform her that they had discovered a grave where a body was buried within the compound. It was the evidence by PW2 that she instructed Opiyo to go and report the matter to the police. The police visited the scene and did move to exhume the body from that grave which was later taken the mortuary. On close observation at the time of exhumation, PW2 identified the body to be that of Eugine whom she knew very well as a child who lived in the neighbourhood and even his parents were very well known within the area. During the investigation of the incident, PW2 was requested by the police to record a witness statement in support of this case.

6. PW3 A male adult by the name George Omondi testified that on the 2nd February, 2020 he was at his place of work when he received a telephone call from his cousin William. According to PW3, he was informed that the accused in the dock was being sought by the police as a suspect who had kidnapped the deceased to an unknown place. PW3 further testified that a second call was made that the body of the deceased had been uncovered in a fresh dug grave. That in her evidence the body recovered from the grave happened to be that of the deceased.

7. PW4 Fredrick Agwingi testified that on 29th January, 2010 while he was in his compound he saw a friend passing by the road. He went to talk to that friend and as they were having a conversation, he saw a fresh dug grave near Mr. Okoth's main house. That on 1st February, 2010 at around 11 PM, PW4's wife informed him that police officers had gone to the compound looking for the accused person whom they keep on referring in these proceedings as Owiti. PW4 was later to witness the arrest of the accused person on 2nd February, 2010. He also told the court that he recorded a statement on what he knew about the murder of the deceased.

8. The prosecution closed its case and the accused was placed on his defence under Section 306 of the Criminal Produced Code. He elected to give an unsworn statement in which he denied the offence and the evidence adduced by the four witnesses of the prosecution. He also invited the court to make a finding that the prosecution did not produce any medical evidence to establish to death of the deceased and the likely cause which may have inflicted the physical injuries. All what the accused remembered was about the relationship he had with the deceased as his tutor in KCPE exams. The accused denied any involvement or contribution to the cause of deceased's death. That was the case for the defence.

Determination

9. With this background in mind, the issue I have to resolve is whether the accused person before me caused the death of the deceased. It is trite law that the standard and burden of proof is upon the

prosecution to prove all the ingredients beyond all reasonable doubt. Thomas Starkie in "A Practical treatise of the Law of Evidence" observes that:

> "What circumstances will amount to proof can never be matter of generation of definition; ..... On the other one hand, absolute, metaphysical and demonstrative certainty to the exclusion of every reasonable doubt: ... On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matter of the highest concern and importance to his won interest....." see also the principles as illuminated in the cases of Republic versus Nyambura and four other (2001) KLR 355, Sekitoleko v Uganda (1967) EA 531, Msembe & another versus Republic (2003) KLR 521, Mbuthia v Republic (2010) 2 EA 311.

10. In Kioko versus Republic (1983) KLR 289, the court of appeal held that the law does not require the accused to prove his innocence save in a few exceptional cases under Section 111 of the *Evidence Act*. The test remains that of beyond reasonable doubt not of any doubt at all.

11. In section 203 of the *Penal Code*, which provided for murder envisages the following ingredients to be proved beyond reasonable doubt:

    a. The death of the deceased,

    b. The death was unlawfully caused

    c. That in causing death of the deceased accused's unlawfully acts were accompanied with malice aforethought.

    d. That the accused is responsible in causing the death of the deceased.

12. From the evidence of the four witnesses, it emerges that this was purely a case based on circumstantial evidence. The principles are well elucidated in the following cases.

13. In the case of R v Hillier (2007) 233 A.L.R 63, shepherd v R (1991) LRC CRM 332 the courts observed that:

> "The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

14. Similarly, the Court of Appeal had occasion to consider the requirements to be met before placing reliance on circumstantial evidence in Simon Musoke v R 1 EA 715 where it observed that:

> "In a case depending exclusively upon circumstantial evidence, he (the Judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt." (See also R v Kipkering Arap Koske 16 EACA 135, Musili Tulo v R {2014} eKLR).

15. The learned author Sir Alfred Willis in his admirable book on circumstantial evidence chapter VI lays down the following rules to be observed in circumstantial evidence:

    a. The facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

    b. The burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

    c. In all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;

    d. In order to justify 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;

    e. if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted

16. Given this background of circumstantial evidence, the admitted position is the body of the deceased was found buried on 2nd February, 2010 in a shallow grave in the neighbour's compound, which was also occupied by the accused person. That evidence is supported by PW1, PW2, PW3 and PW4 who eventually visited the scene and saw the exhumation of the body of the deceased. These findings circumstantially proof beyond reasonable doubt the fact of death of the deceased. According to the prosecution witnesses it is evident that the cause of death was not possible to be noted as the body was actually taken to mortuary but no explanation was given by the prosecution as to whether there was any autopsy conducted to establish the circumstances of his death. It is to be noted in the meantime that from PW1's testimony on 31st January, 2010 PW1 was in company of the deceased in their compound as his parents escorted a visitor who had come to see them on that material day.

17. Simultaneously according to PW1, the parents had stepped out of the home, she heard another knock at the door. On further observations, it was one Odhiambo who entered, a friend and a neighbour to the deceased. According to PW1, the deceased woke up and accompanied Odhiambo and that was the last time the deceased was seen alive. The next incident was on 2nd February, 2010 when the deceased body was recovered in the same neighbourhood buried in a shallow grave in close proximity to the premises occupied by the accused person. In fact, PW1 is categorical that the body of the deceased was recovered in the compound of the accused by the police who had visited the scene.

18. The fact remains that the deceased was last seen by PW1 on 31st January, 2010. In the evidence presented by the prosecution, this is an incident which manifest an unlawful act accompanied by physical assault by reason that the body was disposed off in circumstances which were meant to hide or destroy the evidence on the cause of death. The condition of the unlawful act is such that after careful consideration of the facts, circumstantial evidence on record cannot be divorced by this court' concluding that the conduct of the person or persons who dug the grave buried this body is without hesitation that the deceased may have been physically assaulted before the burial. It appears very clearly that the deceased was on 31st January, 2010 in their house before being asked by one Odhiambo to accompany him to some place known to PW1 who was one of the last persons who saw the deceased alive. It did not take long, in a span of three days, his body was discovered within the homestead of the accused. All those facts and circumstances only lead to the inevitable conclusion that the deceased was unlawfully killed. The inevitable conclusion flows from the aspect that there was a person who looked for the implements to prepare the grave, collect or drag the body from where he had been

unlawfully assaulted, have it buried in that shallow grave, cover it to hide any credible evidence and the culmination of it was to ensure the body decomposes without a trace. The subsequent conduct of the person who dug the grave and buried the deceased is sufficient substantive evidence to prove that the death of the deceased was unlawfully caused beyond all reasonable doubt. That the settles the ingredient on causation of death.

19. At the heart of every homicide, is the element of malice aforethought as defined under section 206 of the penal code;

> " 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."

20. In the case of In Daniel Muthee -V- Rep. CA NO. 218 OF 2005 (UR), Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

> " When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*."

21. In the matter at hand, the prosecution has relied on circumstantial evidence. There is now witness who saw the accused person cause the death of the deceased. However, the body of the deceased was recovered two days late when he left alive from his homestead under the pretext that he was going to meet with the accused to provide mobile information of one peter, apparently known to the accused. It is confirmed by PW1 that Peter and the accused had some cordial relationship. Regardless of the fact that Odhiambo was never called as a witness but the body of the deceased having been found buried next to the house occupied by the accused person is in itself a red herring. It is therefore clear from PW1 that the deceased had been sent for by the accused. When he stepped out of the house alive and never to be seen, he was going to meet with the accused person to share information about peter's mobile number. Whether there was a conspiracy with one Odhiambo, who conveyed the first report to PW1 in the requirement of information being sought about peter's mobile number, will not by itself exonerate the accused person in view of the discovery of the body in his own house. The court cannot ignore and it takes judicial notice of the fact that the exhumation of the body was in a residence occupied by the accused person but the recovery of this body was done by third parties and not the accused person himself. The prosecution having traced the body of the deceased into the house of the accused person, it was incumbent upon the accused person under section 111 of the *Evidence Act* to explain the exceptional circumstances how the deceased's body was found next to his house buried at

the site. It is clear from the evidence of the accused person that his rebuttal was on an alibi defence. That alibi defence was meant to destroy culpability to the crime and to positively place him at the centre of this murder. But on the narrative provided by the accused, when closely compared to the evidence by the prosecution, his alibi defence falls apart. It is called into question viewed through the principles of an alibi defence.

22. In the case of Kiarie v R {1984} KLR The Court of Appeal laid down the following principle:

> " An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."

23. Also, in the South African case of Ricky Ganda vs. The State, [2012] ZAFSHC 59, the Free State High Court, Bloemfontein held:

> " The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favor of the state as to exclude any reasonable doubt about the accused's guilt."

24. The evidence in support of an alibi means evidence tending to show that by reason of the presence of the accused person at a particular place or in a particular area at a particular time he was not or was unlikely to have been at the place where the offence is allegedly committed at the time of the alleged commission. It is instructive though to note that no burden is vested upon the accused person to prove that he was not present when the offence was committed. It is for the prosecution to negate an alibi defence.

25. The case of R v Sukha Singh S/o Wazer Singh & others (1939) 6 EACA 145 goes to the weight I give the testimony of an alibi defence by the accused. These were the observations made by the court:

> " If a person is accused on anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into the alibi and if they are satisfied."

26. The consequences of the accused failing to disclose an alibi properly to the prosecution is that this court draws an adverse inference that this was an afterthought and the same is fabricated. While it is true that an accused person does not have to disclose his defence including alibi, the consequences of failing to disclose an alibi in a timely manner to the prosecution is that it sufficiently raises the bar of its credibility. However, for this case as noted from the evidence of the prosecution, the chain circumstantial evidence rule on the discovery of the body next the house of the accused meets the

requirement of placing the accused at the scene of crime and one whose culpability on unlawful acts of omission and malice aforethought are deemed to have been manifested in preparing and executing the offence with precision.

27. The evidence in my view was sufficient to prove the accused guilty of murder contrary to section 203 of the *Penal Code* and subsequently by the nature of the act he stands convicted for the crime subject to the sentencing hearing in compliance to pass the appropriate sentence prescribed under Section 204 of the *Penal Code*.

Ruling On Sentence

28. The accused person, Erick Onyango Ochieng, having been convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, the court is now called upon to consider an appropriate sentence in accordance with established legal principles and sentencing guidelines.

29. The starting point is the Supreme Court decision in Francis Muruatetu & Another V Republic [2017] eKLR in which the Supreme Court of Kenya while retaining the death sentence found that its mandatory nature was unconstitutional. The court stated:

> 45. To our minds what Section 204 of the *Penal Code* is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.
>
> 46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in *the constitution* does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of *the Constitution* are not exhaustive."

30. The court further pronounced:

> " 58. We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the *Penal Code*. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the *Penal Code* unfair thereby conflicting with article 25(c), 28, 48 and 50(1) and (2) (g) of *the Constitution*."

31. In mitigation, the convict, Erick Onyango Ochieng, submitted that he is sincerely remorseful for this unfortunate incident which took the victim's life. He stated that he is 33 years old and newly married with one child aged one-year-old. His wife is not employed, and they both depend on him to provide shelter, food, clothing, and other necessities.

32. The convict further informed the court that after his release from custody, he went to the family of the victim and reconciled with them, apologized to them, and they forgave him. He requested the court

to consider the many years he has already spent in custody. The convict has also pointed out that he is a first offender with no previous criminal record.

33. According to the Pre-sentence report on record, the offence in question was a culmination from watching a number of videos/movies on kidnapping by a young mind. He admits to have practiced what he had seen in the videos. He lured the victim into his house with the intention of kidnapping and asking for ransom. This went very awry when in the process, he hit the victim on the head with a jembe.

34. The victims on their part stated that the victim was a young boy aged 14 years who had just completed his K.C.P.E at SOS primary school, awaiting to join Chemilil secondary school, the two families were neighbours at roadblock estate. The victim's father during the interview reported that he has forgiven the offender's family.

35. The report recommended that the accused person is a good candidate for a non-custodial sentence given the circumstances highlighted in the case. A three-year probation period was proposed for the accused person.

36. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines to be the following:

    a. "Retribution: to punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

    d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

    e. Community protection: to protect the community by incapacitating the offender.

    f. Denunciation: to communicate the community's condemnation of the criminal conduct.

    g. Reconciliation: To mend the relationship between the offender, the victim and the community.

    h. Reintegration: To facilitate the re-entry of the offender into the society.

37. In determining an appropriate sentence, I must take into consideration both aggravating and mitigating factors. The Supreme Court in the Francis Muruatetu case provided guidelines in respect of re-hearing sentence for the conviction of murder charge to include:

    (a) Age of the offender;

    (b) Being a first offender;

    (c) Whether the offender pleaded guilty;

    (d) Character and record of the offender;

    (e) Commission of the offence in response to gender-based violence;

    (f) The manner in which the offence was committed on the victim;

    (g) The physical and psychological effect of the offence on the victim's family;

(h)) Remorsefulness of the offender;

(i) The possibility of reform and social re-adaptation of the offender;

(j) Any other factor that the Court considers relevant.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the *Penal Code* before the decision in Muruatetu."

38. In Veen v. The Queen (No. 2) (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ stated at 476:

> " sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of other who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

39. Similarly, in R v Engert (1995) 84 A Crim R 67 at 68, Gleeson CJ observed:

> " Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of this facts and circumstances to the principles laid down by stature or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment .....
>
> In a given case, facts which point in one direction to one of the consideration to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance .....
>
> It is therefore erroneous in principle to approach the law of sentencing as thought automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

40. In weighing the relevant factors of this case, I find an interplay of circumstances that must inform sentencing. The conviction rests primarily on circumstantial evidence linking the accused to Eugine Okeyo's death, with the discovery of the deceased's body in a shallow grave near the accused's residence strongly suggesting a deliberate attempt to conceal evidence. This gravity must be balanced against several mitigating considerations. The accused has no previous criminal record, has demonstrated genuine remorse for his actions, and has taken meaningful steps toward reconciliation with the victim's family actions that indicate potential for rehabilitation. Furthermore, at 33 years of age, the accused is a young man with significant family responsibilities as the sole provider for his newly married wife and their one-year-old child, whose welfare will be directly affected by this sentencing decision. These personal circumstances, while not diminishing the seriousness of the offense, properly contextualize the accused's situation within the broader objectives of justice.

41. Having considered all the circumstances of this case, the mitigating factors presented, and guided by the sentencing principles and objectives outlined above, I find that a sentence that balances retribution, deterrence, and rehabilitation is appropriate. *The Constitution* sets out certain fundamental rights and freedoms such as the right to life in Art. 26 which provides that no person shall be deprived of his life intentionally except to the extent authorised by *the Constitution* or any other written law. The combined sample of the evidence from the prosecution witnesses and the defense shows that the death of the deceased executed by the accused person was not justified or excusable in any of the exceptions stipulated in Section 17, 207 and 208 of the *Penal Code* on self-defense and provocation.

42. Given the strength of the principles in the above cited cases, including the lead authority by the Supreme Court commonly referred to as Muruatetu, both denunciation, retribution and rehabilitation have some measure of contribution to guide this court towards proportionality test in sentence.

43. In accordance with the doctrine of proportionality in sentencing, I hereby sentence the convict, Erick Onyango Ochieng, to a term of twelve (12) years imprisonment, taking into account the provisions of section 333(2) of the *Criminal Procedure Code* there is prima facie evidence that he spent 4years and 5 months in pre-trial detention which covers January 2010-July 2014 before the 1st indictment was withdrawn and substituted later with a fresh charge in Cr. Case No. 44 of 2014. In the second season of him being prosecuted for the same offence he also spent five (5) months in remand custody. That period is to be passed as credit period in favour of the accused underpinned in Article 50 (2) (A) of *the constitution* on the presumption of innocence of any accused person until the contrary is proved by the state.

44. 14 days Right of Appeal explained.

DATED AND SIGNED AT ELDORET THIS 29TH DAY OF APRIL, 2025

.....

R. NYAKUNDI

JUDGE