



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Owiso (Criminal Case 38 of 2011)
[2024] KEHC 627 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 38 OF 2011
PJO OTIENO, J
JANUARY 26, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

CHRISPO OWISO ACCUSED

JUDGMENT

1. The accused, Chrispo Owiso, is 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 the 3rd day of June, 2011 at Ebuyangu Milaya village, West Bunyole location Vihiga County within Western province, the accused jointly with another not before court murdered Simon Otiaka.
2. The accused person pleaded not guilty to the charge and in order to discharge the burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from four witnesses who testified as below;

The Evidence

3. PW1, Philip Kulundu Julius, testified that he was a neighbor of the accused and that on 2/6/2011 between 7:30PM to 8PM he was in the house when he received a call from his nephew David asking him to help him with a wheelbarrow to help carry the deceased who had allegedly been cut by the accused. They went to the scene and the deceased was taken to Yala Hopsital and he was told by the people at the scene that the accused had gone to the police. He stated that he did not witness the incident and that he had good relations with the accused.
4. On cross examination he stated that he informed the police that he was told that the killer was the accused and not Edward and that he did not know Edward.



5. On reexamination and upon wearing his glasses he stated that he was informed that it was the accused and Edward who had killed the deceased though Edward had escaped.
6. PW2, Florence Oyela Tiaka, testified that the deceased was her first born son and that on 6/6/2011 he went to Yala Mortuary where she identified his body.
7. PW3 No. 70146 PC David Kosgey of Port Police Station testified that on 2/6/2011 he was stationed at Embali Patrol Base under Lwanda Police Station preparing for patrol when the accused went to the base and informed him that he had been attacked by robbers whom he had not identified and that he snatched a knife from them which knife he had and was blood stained and which was produced as PEXH 1. He stated that the accused had no injuries and this raised suspicion prompting him to call his colleagues who took the knife from the accused. Some two Samaritans then brought the deceased in a wheelbarrow which was blood stained and he claimed that he had been killed by Chrispo Atiel and Edward Mahia and he said that he had been stabbed two times. The deceased was taken to Yala Hospital while they headed to the scene which was half a kilometer from the base. They returned to the base, interrogated the accused and took his red t-shirt which was blood stained and which was produced as PEXH 2. The next day he received a call from the deceased's uncle informing him that the deceased had died the previous night.
8. On cross examination he stated that the accused's red t-shirt had blood stains yet he had no injuries. He further stated that he did not take the t-shirt for examination of the blood stains.
9. PW4 No. 82206 CP Sammy Sanshu testified that he was the investigating officer having taken over from two other officers whom one had retired and the other had died and that according to witnesses, the deceased was approached by the accused with whom they went to an unknown destination and later on a cry for help was heard and one Apeli Otiaka headed to the scene where he found the deceased in a pool of blood with one Edward and the accused standing nearby with the accused holding a knife. The deceased was then put in wheel barrow and taken to Yala Hospital where he died. He further stated an autopsy was conducted and according to the report the deceased died from excessive hemorrhage due to several stab wounds. The report was produced as PEXH 3.
10. On cross examination he stated that he was seeing the accused person for the first time in court.
11. The evidence of PW4 marked the close of the prosecution case and the court ruled that a prima facie case had been established against the accused person and he was thus placed on defence.
12. The accused person was the only person to testify for the defence and in his sworn evidence he stated that he was a metal smith and denied the charges he was facing. He stated that on the morning of 2/6/2011 he left for work and returned in the evening using a matatu and on reaching a junction as he was heading home, he heard someone say that he had been cut by another. He identified them as Edward Maiya and the deceased and they were fighting and they had blood stains. He then screamed that people were killing each other and Edward asked him to leave which he did and ran towards Embale Patrol Base to report what he had seen since Edward had threatened him. He met PW3, made a report and in the company of another officer they made their way to the scene but on the way they met PW1 pushing the deceased in a wheel barrow and he told them that the deceased had informed him that it was Edward who had assaulted him. PW1 further stated that he had heard his voice at the scene and he was made to record a statement. The next day he received news that the deceased had died. He indicated that he knew the deceased and Edward very well and that they were his neighbours.
13. On cross examination he stated that when he got to the station his clothes were not blood stained and that he did not have a knife with him.



14. The defence closed their case and I can only see the submissions by the prosecution on record.

Submissions By The Prosecution

15. It is their submission that they have proved the offence of murder against the accused beyond reasonable doubt in that the death of the deceased was proven by PW2 who identified the body of the deceased before post mortem and further by the post mortem report which was produced by PW4. On whether the death of the deceased was occasioned by an unlawful act they submit that it was the opinion of the pathologist in the post mortem report that the deceased's cause of death was massive hemorrhage from multiple cut stabs and wounds on the right side of the chest secondary to assault.
16. On whether the accused person was the person who committed the assault they submit that it was the testimony of PW1 that on the fateful day he heard someone screaming on the road and when he went to the scene he found the deceased screaming for help as he had been injured and people at the scene informed him that it was the accused who had assaulted the deceased. They argue that PW3 further gave evidence that the accused went to the station to report that he had been attacked by robbers and that he had snatched a knife from the said robbers. The knife was blood stained and so was his shirt which made him doubt the deceased because he had no physical injuries. PW3 also stated that while at the station the deceased was brought to the station by two Samaritans in a wheelbarrow and he indicated to him that he had been killed by Chrispo Atiaka and Edward Mahia who had stabbed him two times. They claim that the deceased made a dying declaration to PW3 and that in his defence, the accused placed himself at the crime scene and fabricated a story that he saw the deceased fight with Edward.
17. On the element of malice aforethought on the accused, they submit that the deceased suffered multiple cut and stab wounds on his chest caused by a sharp knife and the nature of the weapon used and the part of the body targeted infers malice.

Issues For Determination

18. The offence of murder is defined in section 203 of the [penal Code](#) as any person who of malice aforethought causes death of another person by an unlawful act or omission.
19. Therefore, for the prosecution to sustain a conviction, all the ingredients contained in section 203 of the [penal code](#) ought to be proved beyond reasonable doubt.
20. That said, the issues that arise for determination by this court are as follows:-
- a. Is Simon Otiaka deceased?
 - b. Was the death of the deceased alluded to by unlawful acts or omission?
 - c. Did the accused kill the deceased?
 - d. Whether the accused was actuated with malice afore thought in causing the death of the deceased

Whether Simon Otiaka is deceased

21. There is no contention that Simon Otiaka is deceased. His death was confirmed by PW2, his mother, who stated that he identified his body at the Yala Mortuary. His death is further confirmed by the production of the post mortem report dated 6/6/2011 which captures that the deceased died on 2/6/2011 at 0030hrs.



Whether his death was alluded to by unlawful acts or omission

22. The right to life is protected and guaranteed under Article 26 of the Constitution of Kenya, 2010 and any action that tends to take the life of another is unlawful.
23. According to the autopsy report, the deceased died due to massive hemorrhage from multiple cuts and stab wound on the right chest due to assault.

Did the accused kill the deceased?

24. This is case where there was no eye witness to be assault of the deceased which assault led to his death. The case is hinged on circumstantial evidence and the dying declaration of the deceased.
25. It was the testimony of PW3 that when the deceased was brought into the station by PW1 while being carried in a wheelbarrow and he indicated to them as follows; “He was crying that he had been killed by Chrispo Atieka and Edward Mahia. He said he had been stabbed two times.”
26. The law on dying declarations is contained in section 33(a) of the Evidence Act Cap 80 Laws of Kenya provides that;

“ 33 Statements written or oral of admissible facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases –

- (a) When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death and whatever may be the nature of the proceedings in which the cause of her death comes into question”.

27. The guidelines for placing reliance on dying declarations were set out in the case of *Dzomo Chai vs Republic* Mombasa HC Criminal Appeal No. 256 of 2006 where the court held as follows: -

“ A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes in question is admissible under Section 33(a) of the Evidence Act. Although the court can in law solely rely on such evidence, there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction.”

28. The deceased identified his assailants by name and the accused in his defence stated that he knew the deceased and that they were neighbours. The dying declaration of the deceased is further corroborated by the circumstances and facts leading to his death.



29. The test to be applied in considering whether circumstantial evidence placed before a court can support a conviction was set out by the court of appeal in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR where it was held as follows;

“Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 this Court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

30. It was the testimony of PW1 that when he got to the scene of crime he was told that it was the accused and Edward who had assaulted the deceased. PW3 testified that the accused went to the station on the fateful night holding a knife which was blood stained and wearing a t-shirt which was also blood stained and he claimed to have been attacked by robbers though he did not have visible injuries. According to PW3 which statement was confirmed by the accused, the deceased was brought to the station having been stabbed. The accused claimed that he had been attacked by robbers. Since he knew the deceased very well, why did he not mention that the robbers were known to him. The accused placed himself at the scene of crime by stating that he saw the deceased fight with one Edward and that Edward asked him to run away. Why did he run if at all he had not done anything wrong and with the deceased being attacked, I believe the most humane thing would have been to call for help and be there when the help arrives. Also, if at all he had not injured the deceased and the deceased and one Edward were fighting, why did he first run to the police station to make a report. Did he know that the deceased had been stabbed? The circumstances of the case only confirm that indeed the accused participated in the killing of the deceased.

Whether the accused was actuated with malice afore thought in causing the death of the deceased

31. The elements of malice aforethought are set out in section 206 of the *Penal Code* to be as follows: -

- “(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.”

32. The East African Court of Appeal in the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 set out the circumstances in law under which malice aforethought can be inferred to be;

- a. The nature of the weapon used (whether lethal or not).
- b. The part of the body targeted (whether vulnerable or not).
- c. The manner in which the weapon is used (whether repeatedly or not).
- d. The conduct of the accused before, during and after the attack.

33. Malice aforethought can also be inferred from the manner of the killing as held in the case of *Abanga alias Onyango v Republic* Court of Appeal Cr. Case No. 32 of 1990 where it was observed as follows;

“The deceased in this case was stabbed severally with a sharp object apparently the knife recovered by PW6. The knife once used for a commission of the offence like grievous harm or murder is a lethal weapon. It is clear from the postmortem report that the accused targeted the head, neck anteriorly and posteriorly. The medical doctor described the interior stab wounds in the following manner:

3 stab wounds anteriorly on the face, right chest, 2 stab wounds measuring 5cm and 4cm in length, a through and through stab wound though the next anteriorly measuring 15 cm running from left to right. Four stab wounds to the head and neck, the largest being a 10 cm through and through wound to the nape of the neck being left to right on the neck. A 6 cm stab wound between the shoulder blades. A 4 cm stab wound over the left scapula and 5 cm stab wound over right scapula.

On the right shoulder a 5 cm and 7 cm deep stab wound on the dorsten of the right hand and 3 cm long stab wound.

There is no dispute that the assailant herein had an opportunity and time to inflict the extensive injuries. He was not a person in a hurry. The vulnerable parts of the body were targeted.”

34. The autopsy report details the injuries inflicted on the deceased to be as follows; multiple deep cut wounds on the left upper limb four in number, two deep cut wounds on the right upper limb, a wound on the right thigh and deep stab wound on the upper right back which was 6cm deep.

35. The multiple stab wounds inflicted on the deceased and which included stabbing the deceased on his right chest can only infer malice aforethought on the part of the accused.

36. Accordingly, the court finds the accused person guilty for the offence of murder as charged and convicts him accordingly.

DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 26TH DAY OF JANUARY 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:



Ms. Chala for the Prosecution

Mr. Osango for the Accused

Accused in person

Court Assistant: Polycap

