



**Republic v Aseno (Criminal Case E014 of 2022)  
[2024] KEHC 2264 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL CASE E014 OF 2022  
RPV WENDOH, J  
FEBRUARY 29, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**TOBIAS OCHOLA ASENSO ..... ACCUSED**

**JUDGMENT**

- 1 Tobias Ochola Aseno the accused, faces a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
- 2 The particulars of the charge are that on 1/7/2022 at Mapera village. Mapera Location in Suna East Sub County, murdered Paul Ooko Okello. Accused denied the offence and the case proceeded to full trial with the prosecution calling a total of eight witnesses while the accused testified on Oath and called one other witness.
- 3 PW1 Kevin Odhiamboof Mapera village, a cousin to the deceased, recalled hearing screams on 2/7/2022 at about 1:00a.m. he went out of his house and about 90 metres from his house, found the body of Paul Ooko Okello lying besides the road with injuries to the head with brain matter oozing out.
- 4 At the scene, he found inter alia Abraham Omola and Julita Akongo the deceased’s mother. They followed some blood trail that led to George Amimos’(PW4) bar which was by then closed. PW1 said that he had last seen the deceased along the road as he went home and they exchanged greetings and passed each other. Police arrived at the scene and went into the bar and later collected the body from the scene. While at the scene, Felix Magungu informed people that Aseno committed the murder and he was arrested and taken to Mapera Centre where Eric Ochola was also arrested when he claimed to know who murdered the deceased, i.e. AseNo He said that Felix was also arrested but released. On 4/7/2023 PW1 was present and he identified the body of the deceased to the Doctor before post mortem was done.



- 5 Felix Magungu Onyango (PW2) recalled that on 1/7/2020 about 8:30 p.m he closed his business of pool table and went to Apples bar in Mapera belonging to Goerge Amimo. He joined George Amimo (PW4) at his table and was given some alcohol; that about 8:40p.m Aseno entered the bar followed by the deceased who appeared very drunk; that the deceased Ooko was making a lot of noise and staggering and George, the owner of the bar expressed his displeasure; that the accused claimed to have been with the deceased and offered to take him outside which he did; that accused came back to the bar after about 5 minutes but PW2 did not know where he had taken the deceased; that accused drink his alcohol and later left. PW2 stayed at the bar till 11:00p.m. He went home and slept till 4:00a.m when he received a call from Nicholas informing him of the deceased's death. He confirmed the death from deceased's nephew Brian. He went to the scene which was about 200 metres from George's bar. He observed the body and saw that the head was dented. He denied seeing a trail of blood from George's bar to the scene. PW2 denied knowing where the deceased went to after he was taken outside by Accused .
- 6 PW3 Josephine Aliviza Okongo, a resident of Mapera recalled that on 1/7/2022 she had a ceremony following her husband's death and among those who attended are the deceased and Accused; that the visitors ate food and drunk Chang'aa; that Ooko (deceased) left about 7:30p.m and the Accused left her house after about 30 minutes; that about 10:00 p.m Eric (PW7) went to inform her that Ooko had been killed but she chased him thinking he was drunk. At 6:00a.m of next day she heard screams and went to the murder scene but the body had already been removed. She was arrested and detained to help in investigations and so was Aseno (accused).
- 7 PW4 George Otieno Amimo is the owner of the bar at Mapera. He recalled that on 1/7/2022 about 6:00p.m he was at the bar and there were many customers. He recalled that among those present were Felix Magungu (PW2) Tobias Aseno (Accused), Paul Okello; that Aseno came first and Ooko (deceased) came later; that both Ooko and Aseno left the bar and he has no idea why they left. He stayed in the bar till 11:00a.m. when he left and slept only to be woken up at 2:00a.m by his brother Omondi who said there was noise at Mapera Centre. They went to the Centre and found Ooko had been killed. The body was about 80 metres from his bar. He denied that the deceased caused any disturbance at the bar. He denied that there was trail of blood from his bar to the deceased's body. He denied that Aseno ever came back to the bar after he left with deceased.
- 8 PW4, Doctor Ian Omuom, of Migori Referral Hospital performed post mortem on the deceased and produced the post mortem report. He found that the deceased had sustained a cut on the back of the head, which penetrated the skull with a 8cm skull fracture; cut wound on the left side of the head, abrasions to the right cheek and right hand. He formed the opinion that the cause of death was severe head injury following an assault.
- 9 PW6 Cpl Livingstone Katui, of DCI Migori scenes of crime proceeded to Mapera Centre after a murder report and found the body of a male near the road. The body had injuries to the head and a big blood stained stone was nearby. He also visited the bar where the deceased allegedly drunk before his death. He found drops of blood on the veranda of the bar and the road and trail led to the deceased's body. He took photographs of the body and the scene, the murrum road and veranda of the bar. He followed a trail of blood stains from the bar to where the body was, about 100 metres from the bar. The photographs and certificate were produced as PEX 2 and 3.
- 10 PW7 Eric Otieno Ochola, a resident of Mapera recalled that on 1/7/2022 at about 6:00p.m, he went to George Amimo's (PW4) bar. He drunk till 8:15p.m and left. When near an Mpesa shop where there were security lights, he heard noise of 'tu' and 'Po'. He saw two people, one lying down in the trench and next to him stood another; that the person standing lifted a big stone and hit the one on the ground; that the stone fell in the trench and the person tried to get it again but PW7 called him



- by name, Aseno Ochola, whom he knew. PW7 told him that he had seen him and would not leave him alive. He questioned Aseno what the person had done to him and Aseno then took a small stone and threw at PW7 screamed and Aseno ran away. On his way home, he informed the people who were taking changaa at his in laws place. (PW2) on about what he saw Aseno do. Next day, he learnt that it is Paul Ooko who was killed. He identified the stone that was found at the scene as what was used to hit the deceased.
- 11 PW8 PC Boniface Ngariwas the investigating officer, having taken over from late Cpl Robert Kitembe. On 1/7/2022, he accompanied Cpl Kitembe to a murder scene at Mapera. They saw a crowd around the body of Paul Ooko which was besides the road and a big blood stained stone next to the body. He noted injuries to the deceased's head. They moved the body to the mortuary and on 2/7/2022 the investigation officer received information that two suspects had been arrested, Eric Otieno and Tobias AseNo From the investigations, they established that the appellant had been taking changaa at PW3's home and later moved to George's bar (PW4) and later the accused removed the deceased from the bar because he was noisy / rowdy and that accused returned to the bar soon after without the deceased. PW8 identified the exhibits that had been produced which included photographs (DEX No 2) showing blood stains at the scene where the body was found and veranda of George's bar which was about 70 - 100 metres from the scene where the body was found.
- 12 In his sworn defence, the accused admitted that on 1/7/2022, he first went to take chang'aa then ended up at George's (PW4) bar and the deceased was also there; that the deceased started dancing and making noise and that Goerge (PW4) told him to stop; that George told somebody to take the deceased outside although he tried to stop the deceased; that George then turned to him and told him to go drink elsewhere that the person pushed the deceased out and that they were forced to leave; that he left for his home and does not know where the deceased went after they were removed from the bar. He denied having removed the deceased from the bar in order to kill the deceased and that he never saw Eric (PW7) in the bar that night.
- 13 DW2 Beatrice Ambuso Kisatuthe wife of the accused stated that on 1/7/2023, her husband was home till 6:00p.m and left to go to take alcohol. DW2 did not know where the Accused went and she next saw him at 9:00p.m. He slept till next day when he went to the farm after which he was arrested by police.
- 14 Miss Okota, Accused's counsel in her submissions identified three issues:-
1. Whether PW7's evidence has any probative value;
  2. Whether the prosecution evidence was credible as to found a conviction and hence whether there is sufficient evidence to prove that Accused killed the deceased.
  3. On whether malice aforethought was proved.
- 15 Counsel submitted that none of the witnesses gave a believable account as to the cause of death; that the accused had no reason to kill the deceased; that the prosecution evidence is marred with doubts and uncertainties that it should be resolved in favour of the Accused.
- 16 The prosecution counsel also filed submissions and relied on the evidence of PW7 who witnessed the accused attack deceased and who knew both the Accused and deceased well; that he gave a description of the Accused and the lighting at the scene. Counsel relied on the decision of *Abdallah Bin Wendo & another v Republic* (1950) EACA 166 where the court held that where the court relies on evidence of identification at night in difficult circumstances, the evidence must be watertight; that the only issue is whether it is the accused who caused the deceased's death; that PW7 gave a graphic account of how he first saw the accused standing over the deceased and how accused was dressed in line with the case



of *Turnbull (1976) v Republic* (1976) ALL ER 549; that PW7 was in close proximity of the Accused and knew him before.

17 Counsel also relied on the decision of *Anjononi v Republic* (1980) KLR 59. Counsel also submitted that the accused person was the last person to be seen with the deceased and that the deceased was found dead soon after leaving the bar; that the accused placed himself at the scene in his defence. Counsel relied on the decision of *Republic v E.K.K* 2018 eKLR in which the court dealt with the issue of accused being the last person to be seen with the deceased. Counsel urged that both the direct evidence and circumstantial evidence confirms that the Accused was the assailant. Counsel argued that malice aforethought and the other ingredients required to prove a charge of murder had been established and the court should return a verdict of guilty.

18 This being a charge of murder, the prosecution has the duty to prove its case beyond reasonable doubt. The legal burden of 'beyond reasonable' doubt was aptly captured in the decision in *Woolimington v DPP* (1935) AC 462 at page 481, where Viscount Sankey L. C. stated:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

19 Further in the case of *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

The three ingredients that need to be proved in a charge of murder are:-

1. Proof of death of the deceased;
2. Proof that the accused caused the death by an unlawful act or omission;
3. Proof that the accused possessed malice aforethought.

### **Proof of death:**

20 The fact of the deceased’s death is not in dispute. As per the testimonies of PW1, PW2, PW4 and PW7 and confirmed by the accused, the deceased was found dead by the roadside soon after he left George’s bar (PW4) where he had been taking alcohol. The deceased’s head been injured. The Doctor who performed the post mortem (PW5) found the deceased to have sustained a cut at the back of the head 10 cm long with smooth edges which penetrated the skull by 8cm; A cut wound 8cm long on left side of the head and abrasions on the right cheeks and hand; that the head injury penetrated the brain.



PW5 formed the opinion that the cause of death was severe head injury due to assault. PW5's findings were corroborated by PW1, PW2, PW3, PW4 and PW7. The deceased's death was not from natural causes but caused by somebody who inflicted serious injuries to the head.

### **Whether Accused caused death**

- 21 The undisputed fact is that the Accused and deceased were friends and that on the fateful day they had been taking changa'a at PW3's house before they proceeded to George's bar (PW4).
- 22 Although PW4 denied that the deceased made noise, danced and was rowdy, in his bar, there is overwhelming evidence from PW2 and PW6 the investigation officer and even the accused stated that it is PW4 who asked that the deceased be removed from the bar because of his behaviour. The point of departure from the Accused's evidence, is whether, it is accused who removed the deceased from the bar. Whether Accused removed the deceased from the bar or not he did admit that they left the bar with deceased together . He is therefore the last person seen with deceased before deceased's demise.
- 23 Only PW7 claimed to have seen the accused assault the deceased. According to PW7, it was about 8:15 p.m when he left PW4's bar that he saw the accused standing over somebody who was lying on the ground. According to PW7 there was security light from a nearby kiosk and street light. PW7 went on to describe how the accused was dressed in a blue trouser, grey jumper. He even went on to say how he saw Accused lift a big stone and hit the person on the ground with it that he called out the accused by name and asked what the person had done to him but that Accused went ahead to throw the stone. The accused denies having been at the scene being or dressed as described by PW7.
- 24 When relying on evidence of a single identifying witness under unfavourable conditions, the court must take such evidence with great care due to the possibility of error even where people knew or other. In *Anjononi and Others v Republic (1976 – 1980) KLR 1566*, the Court of Appeal held that when it comes to identification, the recognition of an assailant is more satisfactory than the identification of a stranger because it depends upon some personal knowledge of the assailant. In fact, PW3 confirmed that about 10:00 p.m PW7 went to her home telling them that the deceased had been killed but she chased him away thinking he was drunk. In the instant case, apart from PW7's testimony we have uncontroverted evidence to the effect that it is Accused who removed the deceased from the bar or left with deceased, and soon thereafter, the deceased was found dead about 100 metres from PW4's bar. Though the Accused denied having taken deceased out of the bar, but that they left together, needs to explain what happened to the deceased. PW2 was adamant that Accused is the one who removed the deceased from the bar after PW4 complained that he was rowdy. The accused admits that indeed the deceased was rowdy and that PW4 asked that deceased be removed they left the bar together. PW4 did not tell the whole truth, I believe he was trying to protect himself when he denied that the deceased was rowdy and he asked that he be removed. In this case the last person to be seen with deceased was Accused. In *Republic v E. K. K.* (2018) eKLR, the Court of Appeal said:-

“ Even though the onus proof in Criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases in that where the deceased was last seen with the accused, there is a duty place on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

- 25 Under Section 111 (2) of the *Evidence Act*, though the accused does not bear any burden to prove his innocence, yet the law requires him to give a plausible explanation of what happened to the deceased



after he took him out of the bar or when they walked out together because these are facts peculiarly within his knowledge. Accused did not offer any explanation but made a bare denial in his defence.

26 The evidence against Accused is partly direct and partly circumstantial. For the court to found a conviction based on circumstantial evidence, it must be satisfied that the inculpatory facts are inconsistent with the innocence of the Accused and incapable of explanation on any other hypothesis other than that of guilty. The court relies on the decision of *Sawe v Republic* (2003) KLR page 264. Though PW3 did not allude to it, PW2 who went to the scene first, said they followed a trail of blood from the deceased's body to PW3's bar. PW6 the scenes of crime officer and the investigating officer (PW8) who came to the scene later testified to the fact of seeing a trail of blood from PW4's bar upto the deceased's body. Photographs of the scene were produced in evidence PEX 2 which shows that there was blood trail from PW3's bar to wherever deceased lay. Though the blood at the bar veranda and trail was not subjected to analysis to establish whose it was, this court believes and the blood from the bar upto the deceased's body lay must have been his. This leads to the conclusion that the deceased may have been first injured at the veranda of the bar before he was attacked again with a stone where his body lay. I am satisfied that both the direct and circumstantial evidence point at the accused as the assailant and that it is accused who inflicted fatal injuries on the deceased.

#### **Whether Accused had malice aforethought.**

27 Malice aforethought is defined in Section 2006 of *Penal Code* as:-

- a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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”.

28 As to what constitutes malice aforethought, the Court of East Africa in the case of *Tubere s/o Ochen v Republic* (1945) EALA 63, said:-

“In determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”

29 In the instant case, a huge stone was used to crush the deceased's head, By inflicting injuries to the head which caused fractures, they were to ensure that the deceased did not survive.

30 After analysing all the evidence on record, this court is satisfied that with malice aforethought, the accused attacked and injured the deceased. Accused's defence is hollow. DW2 was not in a position to know where Accused went or what he did before returning home that night. I find the Accused guilty of the offence of murder as charged and he is convicted accordingly.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**R. WENDOH**

**JUDGE**



In presence of; -

Mr. Oimbo for the state

Appellant Present

Ms. Emma –Court Assistant

