



**State v Okongo alias Samuel Juma Ogonda (Criminal Case  
9 of 2020) [2024] KEHC 3674 (KLR) (27 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3674 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE 9 OF 2020  
RE ABURILI, J  
MARCH 27, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**SAMUEL JUMA OKONGO ALIAS SAMUEL JUMA OGONDA ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person Samuel Juma Okongo alia Samuel Juma Ogonda is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63 Laws of Kenya. The particulars of the offence are that on the 11<sup>th</sup> day of March 2020 at Obumba sub-location, Muhoroni Sub-county within Kisumu County, the accused murdered one Gradus Otieno Akongo.
2. The accused person pleaded not guilty to the Information dated 9<sup>th</sup> April, 2020 and the case proceeded to full trial. The prosecution called a total of five (5) witnesses in support of its case which is summarised herein below. Placed on his defence, the accused gave sworn testimony maintaining his plea of not guilty.

**The Prosecution's Case**

3. PW1 Thomas Akongo, the deceased's brother testified that on the 11<sup>th</sup> March 2020 at about 3pm the witness was tending to his cows when he witnessed a scuffle between the accused and the deceased and so he screamed to attract a crowd to come and help separate the two. He testified that the deceased's son, one Martin Otieno came and helped separate the fight but that the accused and the deceased continued fighting until the police arrived.



4. PW1 testified that after the fight, the accused's clothes were bloody and that he saw the accused holding a panga when he was fighting with the deceased which panga he saw the accused use to cut the deceased. He stated that he did not know why the deceased and the accused were fighting.
5. In cross-examination, PW1 reiterated his testimony in chief and stated that he told the DCI that the deceased and accused had fought over a lady, Mercy Adhiambo, who was having an affair with the deceased. In re-examination, PW1 reiterated that he had testified on what he had seen.
6. PW2 Martin Otieno Okongo testified that the deceased was his uncle and that on the 11th March 2020 at 3pm, he heard screams at the rice farm and heard the voice of PW1 who was saying that people were killing each other. It was his testimony that he ran to the scene where he saw the deceased lying down while the accused who was carrying a sword started running away and got into a sugarcane plantation. He testified that he tried to stop them as two weeks earlier, the accused and the deceased had disagreed. It was his testimony that the accused cut the deceased despite Julius trying to prevent him after which the accused ran into the sugarcane.
7. PW2 testified that at the scene, he called on neighbours who came and that they found the deceased lying in a pool of blood with cuts on the hands and legs lying in water and that when he called out to the deceased, the deceased responded by saying that Juma had killed him. He testified that they turned the deceased who convulsed before losing consciousness.
8. It was his further testimony that they could not take the deceased to hospital as he was in critical near death condition and that by the time the Chief arrived at the scene, the deceased had already passed on. PW2 testified that the deceased and accused were first cousins and that two weeks earlier, the accused had been saying that he had found the deceased committing adultery with the accused person's wife in a sugarcane plantation.
9. PW2 further testified that he also spoke to the accused who had walked around with a sword saying that he was going to kill the deceased for seducing his wife and that jail was meant for men. PW2 clarified that he was not present during the fight and that he only went to the scene when he got attracted by PW1's screams.
10. In cross-examination, PW2 stated that the accused had informed him that he would do something to the deceased but that he did not report the accused's statements to the Chief.
11. PW3 Jocinta Akongo testified that the deceased was her husband and that he died on the 11<sup>th</sup> March 2020. She testified that she identified the deceased's body prior to the postmortem. In cross-examination, she testified that the accused was her brother in law and that she had heard that the accused's wife was having a love affair with the deceased. She testified that prior to the incident, the accused and deceased were friends.
12. PW4 Dr. Benard Oduor Owino testified that he carried out the postmortem on the body of Gradus Otieno Akongo on 16<sup>th</sup> March 2020 and prepared a report which he produced as PEX1. He stated that on examination, he found the body with multiple cut wounds. On the left wrist, the deceased had a deep cut wound that severed 2 major bones whereas on the left elbow, the deceased had a deep cut wound severing the elbow. Dr. Owino testified that on the left knee, the deceased had a deep wound on the lateral side while the right hand was completely chopped and only held by the skin. He further testified that on the scalp, the deceased had a 6cm shallow wound that was not penetrating.
13. Dr. Owino testified that from his examination, he formed the opinion that the cause of death was excessive bleeding sustained from multiple cut wounds from an assault.



14. In cross-examination, Dr. Owino testified that the deceased's body was already embalmed when he examined it and so he could not calculate the number of days the deceased had been dead.
15. PW5 No. 83947 Corporal Jeremiah Musango testified that he investigated the case following instructions from the DCIO given on the 11<sup>th</sup> March 2020. It was his testimony that on arrival at the scene, they found the deceased's body lying at the edge of a rice paddock in a farrow with multiple injuries, a cut on the head, both arms and left leg at the knee. He testified that the accused person was not at the scene.
16. It was his testimony that after carrying out investigations, he established from an eye witness, PW1 who saw the accused attack the deceased then retreat into the sugarcane plantation after PW1 raised an alarm and members of the public appeared. He testified that despite searching, they did not get the murder weapon and that the accused resurfaced on the 12<sup>th</sup> March upon which the area Chief called the police. He further testified that he established that the accused and the deceased had differences prior to the date of the incident as the deceased allegedly had an illicit affair with the accused person's wife.
17. In cross-examination, PW5 testified that from investigations, the deceased was attacked from a higher ground and that only PW1 saw what happened. He further testified that PW1 informed him that it was the accused who confronted the deceased. PW5 testified that they did not recover the murder weapon but that it was a sharp object as was evident from the deep cut wounds sustained by the deceased.

### **The Defence Case**

18. The accused person gave a sworn testimony that on the 3<sup>rd</sup> March 2020, he found the deceased who was his cousin, lying down with the accused person's wife and having sex in a sugarcane plantation behind the accused person's house. He testified that on seeing, he ran back to his house after the deceased slapped him with a panga and that he reported the matter to the village elder.
19. It was his testimony that following the incident, he sent his wife to her home and she returned on the 8<sup>th</sup> March 2020 after which they continued living peacefully. He testified that on the 11<sup>th</sup> March 2020, he left his home at 9.30am and went to plough till 3pm when he went to relieve his wife of duties of taking care of the cattle.
20. The accused testified that on his way home, he met the deceased who blocked his way and questioned him as to why he was defaming him by saying that he had an illicit affair with the accused person's wife. It was the accused's testimony that the deceased was armed with a club and panga and that the deceased hit the accused who fell down but that he managed to get away and went and informed another village elder and subsequently, they went and reported the incident to the Police Post. The accused denied fighting with the deceased.
21. In cross-examination, the accused stated that he had no disagreements with PW1 or PW2. He reiterated that the deceased assaulted him. He admitted that he had not given the names of the village elder and Chief to whom he had reported the matter.
22. In re-examination, the accused testified that he was assaulted by the deceased on the 3<sup>rd</sup> March 2020 which he reported to the village elder and the Chief and further that on the 11<sup>th</sup> March 2020, the accused was walking when the deceased hit him with a rungu and he fell down.



### **Submissions by Counsel for the accused**

23. Ms Lukasile Counsel for the accused filed written submissions urging this court to acquit the accused person for reasons that the prosecution had not proved all the ingredients of the offence of murder against him beyond reasonable doubt.
24. It was submitted that none of all the Prosecution witnesses who testified were able to tell who, between the Accused and the deceased, attacked the other first. That only one eye witness admitted to having seen the two engage in a fight but could not tell whether it is the deceased or the accused who struck the other first.
25. It was submitted that from the accused person's testimony, he was heading home when he was attacked by the deceased and that when he tried to ask what the problem was, the deceased accused him of walking around and spreading rumours that the deceased and the accused wife were having an illicit affair.
26. According to counsel, the prosecution tried to impute motive on the accused person by stating that the accused and the deceased were not in good terms as the deceased had been found sleeping with the Accused person's wife, which, according to her, was not true.
27. She submitted that the accused stated in his testimony that the issue of infidelity had been resolved and that even the accused person had gone to his wife's place to pick his wife on 7/3/2020 and that they lived well prior to the alleged murder.
28. She maintained that the prosecution had not discharged the burden of proof as envisaged under section 107 of the *Evidence Act* Cap 80 Laws of Kenya.
29. Counsel further urged this court to look into the conduct of the accused before the incident and after the incident, which, in her view, pointed to the fact that the accused person did not have any motive to kill the deceased. She reiterated the accused person's testimony that after the deceased attacked him, he ran to the area Chief who escorted him to the Police Station. She emphasised that the accused did not try to conceal the happenings or escape.
30. It was submitted that even though the prosecution has established that the death occurred and the cause of death, the prosecution failed to prove malice aforethought on the part of the accused.
31. In the alternative, counsel urged this Court to find the accused guilty of a lesser charge of manslaughter.

### **Analysis and Determination**

32. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused person's counsel. The issue for determination is whether the prosecution proved all the elements of murder, which proof is beyond reasonable doubt.
33. The accused person faces a charge of murder contrary to section 203 of the *Penal Code*. That section defines murder as follows:

“ Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”
34. The prosecution has to adduce evidence to establish beyond reasonable doubt that death occurred, the cause thereof and that the said death was unlawfully caused. Further, that it was the accused person who unlawfully killed the deceased and finally, that the accused had malice aforethought when



he unlawfully killed the deceased and with malice aforethought. Malice aforethought is the last but the most important of all the elements of murder without which, the charge of murder cannot be sustained. Malice aforethought must be proved beyond reasonable doubt.

35. The circumstances which constitutes malice aforethought are described under Section 206 of the [Penal Code](#) as follows:

“206. 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.”

36. Dis the prosecution proof that death occurred? In support of this element, PW1, PW2, and PW5 all testified that they saw the deceased’s body at the scene. PW3, the deceased’s wife testified that she identified the deceased’s body to the doctor prior to the postmortem being carried out. PW4, Dr. Owino carried out an autopsy on the body of the deceased and opined that the cause of death was excessive bleeding sustained from multiple cut wounds from an assault. An autopsy can only be undertaken on the dead. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that there was death and the cause thereof established.

37. The next question is whether the death of Gradus Otieno Akongo was caused by an unlawful act or omission. Article 26 (1) of the [Constitution](#) guarantees every person the right to life. The postmortem report revealed that the deceased sustained multiple cut wounds such as on the left wrist which had deep cut wound that severed 2 major bones whereas on the left elbow, the deceased had a deep cut wound severing the elbow; that on the left knee, the deceased had a deep wound on the lateral side while the right hand was completely chopped and only held by the skin and further that on the scalp, the deceased had a 6cm shallow wound that was not penetrating. All these injuries in my view, if caused by an individual, amounted to an unlawful act as no-one has the right to deprive another of their life. In the circumstances, I am persuaded beyond reasonable doubt that the deceased person, Gradus Otieno Akongo died out of an unlawful act.

38. The other question is whether it was the accused who unlawfully caused the deceased person’s death. PW1 testified that he saw the accused and the deceased fight and that the accused was armed with a panga which he used to cut the deceased. It was his testimony that when he raised an alarm, the accused ran into a sugarcane plantation. PW2 corroborated PW1’s testimony and further stated that he was aware of differences between the deceased and the accused and that prior to that incident, the accused was walking around armed with a sword and had informed PW2 that he was going to kill the deceased



for seducing his wife and that jail was meant for men. This testimony from the prosecution witnesses remained uncontroverted even in cross examination.

39. Additionally, PW4 testified that injuries sustained by the deceased were likely caused by a sharp object which is consistent with the testimonies of PW1 and PW2 all who testified seeing the accused armed with a panga which, according to PW1, was used by the accused to cut the deceased.
40. Both PW1 and PW2 testified that when the accused realized that the public had been alerted to the incident, he ran into the sugarcane plantation and this was consistent with the testimony of PW5, the investigating officer who testified that they did not find the accused at the scene but rather, that he surrendered himself to the Chief the following day.
41. Contrasted against the testimony presented by the prosecution was the accused's testimony that the deceased attacked him with a club while he was walking upon which the accused fell down then he left and reported the matter to the area Chief.
42. I have considered the evidence adduced herein. In my view, all the evidence adduced by the prosecution point to the accused person as the killer of the deceased. Despite the denial by the accused, I find no reason to doubt the testimonies presented by the prosecution witnesses PW1 and PW2 which testimonies corroborated each other. These two witnesses were at the scene and saw the accused and the deceased fight. PW1 was emphatic that he saw the two fight and that despite his intervention to separate the two, they continued fighting. That the accused had a panga during the fight and that the accused use the panga to cut the deceased. The injuries sustained by the deceased, according to the postmortem report, are consistent with the cuts using a sharp object such as a panga which, though not recovered, non-recovery of a murder weapon is not fatal to the prosecution's case.
43. Further, PW2 testified that when he reached the scene and found the deceased fighting for his life, the deceased informed him that "Juma" had killed him. This testimony remained unchallenged in cross-examination.
44. As to whether the statement made to PW2 amounted to a dying declaration, Section 33 (a) of the *Evidence Act* (Cap 80) provides that:
  33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... are themselves admissible in the following cases—
    - (a) Relating to cause of death 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. 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 proceeding in which the cause of his death comes into question..."
45. The principles governing dying declarations were considered by the Court of Appeal in the case of *Philip Nzaka Watu v Republic* [2016] eKLR. The court held that:

"Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not



expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in *Choge v. Republic* (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

46. Those principles were reiterated in the cases of *Charles Njonjo Gituro v Republic* [2019] eKLR; and in the case of *Moses Wanjala Ngaira v Republic* [2019] eKLR where it was held inter alia:

- “19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from *Choge v Republic* [1985] KLR 1, citing the predecessor of this Court in *Pius Jasanga s/o Akumu R* (1954) 21 EACA 331:

“In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (*Republic v Muyovya bin Msuma* (1939) 6 EACA 128. See also *Republic v Premanda* (1925) 52 Cal 987.)

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from



the 7th Edition of Field on Evidence has repeatedly been cited with approval:

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed...The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (*Ramazani bin Mirandu* (1934) 1 EACA 107; *R v Okulu s/o Eloku* (1938) 5 EACA 39; *R v Muyovya bin Msuma* (*supra*). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (*ibid*).

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (*R v Eligu s/o Odel and another* (1943) 10 EACA 9; *Re Guruswani* [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in *R v Eligu s/o Odel and Epongu s/o Ewunyu* (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (*R v Said Abdulla* (1945) 12 EACA 67; *R v Mgundulwa s/o Jalo* (1946) 13 EACA 169, 171).”

See also *R v Eligu s/o Odel* (1943) 10 EACA 90, *Okethi Okalo v Republic* [1965] EA 555, *Aluta v Republic* [1985] KLR 543, and *Kihara v Republic* [1986] KLR 473.

20. The law in this area is clearly articulated in the case of *Nelson Julius Karanja Irungu v Republic* [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel’s contention that the deceased’s statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in



imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence.”

47. In this case, the statement by the deceased to PW2 related to the events that eventually led to his death and I am therefore satisfied that it amounted to a dying declaration. I found PW2 to be a credible and trustworthy witness as there is no reason for him to lie against the accused.
48. In the circumstances, I am satisfied beyond reasonable doubt that it was the accused person herein who unlawfully killed the deceased.
49. On whether the accused had malice aforethought when he unlawfully killed the deceased, under section 206 of the *Penal Code*, 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
  - (c) an intention 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.”
50. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the *Penal Code*. What can be deduced from section 206 (a-e) is that, malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the *locus classicus* case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can 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.
51. In the instant case, evidence adduced by the prosecution shows that the accused person had a beef with the deceased and the accused person himself did testify that on the previous occasion, he found the deceased having sex with the accused person’s wife in a sugar cane plantation which prompted the accused to send away his wife for close to a week. The prosecution witnesses testified how they saw the accused and the deceased fight before the deceased was killed and the accused on his part testified that it was the deceased who attacked him. PW3 the deceased’s wife testified that she had information that her husband was having an illicit affair with the accused person’s wife.
52. Although the weapon used to unlawfully kill the deceased was a panga which was never recovered, non recovery or non production of a murder weapon is not fatal to the prosecution’s case.
53. From the evidence on record, it is not clear whether it was the accused or the deceased who was in possession of the said panga prior to the accused person using the said panga to assault the deceased at the time and whether the accused could have snatched the panga from the deceased after what PW1 described to have been a long fight between the two and used it to cut the deceased.



54. The injuries suffered by the deceased were quite severe as per the postmortem report.
55. Dr. Owino testified that he concluded that the cause of deceased's death was excessive bleeding sustained from multiple cut wounds from an assault.
56. Although PW2 testified that the accused had told him that he would kill the deceased for sleeping with his wife and that jail were meant for men, there is no reason why the witness did not report this threat to the administration, noting that the witness and the accused and the deceased were all relatives.
57. In the end, I find and hold that the prosecution has not proved malice aforethought on the part of the accused person beyond reasonable doubt to sustain a conviction for the offence of murder as charged.
58. Having so found, I return a verdict of not guilty for the offence of murder. However, as all the other elements of the offence of unlawful killing are present, I invoke the provisions of section 179 of the *Criminal Procedure Code* and find the accused person herein Samuel Juma Okongo alias Samuel Juma Ogonda Guilty of the lesser offence of Manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.
59. Accordingly, the accused person herein Samuel Juma Akongo alia Samuel Juma Ogonda is hereby found guilty of the offence of manslaughter and convicted of the said offence.
60. Sentence shall be pronounced after records, mitigation, a presentence report and a victim impact statement is filed by the Probation Officer.
61. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF MARCH, 2024**

**R.E. ABURILI**

**JUDGE**

