



**State v Ombija (Criminal Case 13 of 2020)
[2024] KEHC 2974 (KLR) (21 March 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 13 OF 2020
RE ABURILI, J
MARCH 21, 2024**

BETWEEN

STATE PROSECUTION

AND

ABISAYE ODHIAMBO OMBIJA ACCUSED

JUDGMENT

1. The accused person Abisaye Odhiambo Ombijais charged with the of 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 16th April 2020 at West Seme sub-location, Seme sub-county within Kisumu County, jointly with another not before court, the accused person murdered one Charles Otieno Ogotu. The accused person pleaded not guilty to the charge against him and the matter proceeded to trial. The prosecution called five (5) witnesses in support of its case. Placed on his defence, the accused person gave sworn testimony maintaining his innocence.
2. The evidence for the prosecution and the defence is covered below.

The Prosecution's Case

3. PW1, Dr. Ombok Lucy testified and produced a Postmortem Report in respect of a body identified as that of Charles Otieno Ogotu. The postmortem was conducted on the 20th April 2020 by her colleague Dr. Eddy Owuor who had since proceeded for further studies and could not appear in court. PW1 testified that the body was of a naked African male aged 34 years, well-nourished and of 180cm in height. Externally, there was a swollen face with multiple bruises, a swollen black eye, bleeding on the nose, ear and mouth and bruise on the left side of the chest while internally, on the head, there was massive bleeding underneath the skull; skull fracture of about 6cm and bleeding in between the brain. She testified that all other systems were essentially normal.



4. Dr. Ombok testified that as a result of examination, Dr. Eddy found the cause of death to be due to severe head injury secondary to blunt force trauma due to assault and he issued a Death Certificate No. 1557997. She produced the postmortem report as PEX1.
5. PW2 Joan Achieng Ogutu, the deceased's mother testified that on the 16th April 2020 at 7am, one Joan went to her home and informed her to go and collect her son. She testified that someone else also went and knocked on her door and told her that her son was dead so she followed her to the scene where she found her son, the deceased, lying dead. It was her testimony that as it was during the corona pandemic period, she did not witness the postmortem.
6. PW3 Ruth Aoko Ombija, the accused person's mother, testified that on the 15th April 2020, at about 9pm she was in her homestead when she heard screams of people fighting. She testified that she got out and found her son Abisaye and Maurice Ogutu fighting. She testified that Abisaye was telling Maurice Ogutu to go to his home because his mother had said he should go away or be arrested.
7. PW3 testified that she went to Maurice's home and told his mother, PW2, to come and help her remove Maurice from PW3's home but that PW2 refused saying she was tired of Maurice disturbing her. PW3 testified that she then returned home and found Maurice lying down and thought he was resting so she went to sleep and in the morning they found Maurice already dead. It was her testimony that she did not know why the deceased and the accused were fighting.
8. In cross-examination, PW3 stated that when she saw the accused and the deceased, the two were talking in high voices and not fighting. She testified that the accused was telling the deceased to leave and go to his home. She further stated that when she returned, she saw Maurice lying near a farm next to her home and that the accused was in his house. She testified that the deceased was alive.
9. PW4 Nicholas Oguma the Chief of West Seme Location testified that on the 16th April 2020 at 7.30am she received a phone call from the Assistant Chief of West Reru Sub-location to the effect that one Charles Otieno Ogutu was murdered and his body dumped at the gate of Mama Ruth Aoko Ombija.
10. He testified that he called the Officer In-charge of Reru Police Post, Sergeant Samson Onyinge, who asked him to go and pick him up which he did and together, they proceeded to the scene of crime where they found the body of Charles Otieno Ogutu lying on a mattress covered in a blue sheet, 20 metres from the house of Ruth Aoko.
11. It was his testimony that Sergeant Onyinge called the OCS Kombewa who sent PC Abel and Otieno who came in a land cruiser and examined the body. PW4 testified that the deceased's body had blood and bruises with a swollen face and bruises on the back. He testified that they went to the house where the deceased used to sleep with the accused together with Jared Onyango and found clothes scattered in the house as well as evidence of a scuffle. He further testified that they went to the back of the house and saw pieces of broken wood and that both the accused and Jared Onyango were at large.
12. PW4 testified that he handed over the matter to the police who took the body to the morgue in the company of a few relatives. It was his testimony that the accused, deceased and Jared Onyango are neighbours and their homes are adjacent to each other. He testified that he did not know Abisaye physically.
13. PW5 No. 73662 Sergeant Abdalla Mwinyi testified that on the 16th April 2020, he was at the Crime Branch at the station when his boss called him and briefed him of the murder report at Reru. It was his testimony that his boss tasked him to investigate the case and so he joined officers in taking the body to JOOTRH mortuary where he witnessed the mortem.



14. It was his testimony that he opened an investigations file and photographs of the scene were taken. He testified that from statements of witnesses, he found that the deceased had gone to sleep with Jared and Abisaye who were his friends. He testified that Ruth, the accused's mother was at the scene during the scuffle and she went to call the deceased's mother. It was his testimony that he managed to get the accused who was arrested and further that he did not know him before. In cross-examination, PW5 testified that he relied on many statements including that of Ruth, the accused's mother.

The Defence Case

15. The accused gave a sworn testimony and stated that the deceased was his friend and neighbour. He testified that on the 15th April 2020, he woke up early and went to work and returned at 8.30pm in the evening. It was his testimony that Charles Otieno, the deceased, came to sleep as usual and informed him that on that night he did not want to sleep at his, the accused person's house because he had a dispute with his mother who had threatened to have him arrested so he wanted to go and sleep at his home to be arrested from there.
16. It was his testimony that they were talking loudly so the mother to the accused heard them and inquired why they were that loud to which they responded. He testified that his mother told Charles, the deceased, to go and call his mother after which she herself went to call Charles' mother. The accused testified that Charles left and the accused went to sleep. He testified that the following day at 11am, when he was at work, Charles' mother called him and informed him that Charles was dead. He testified that he asked for permission to go home and that the body was taken to the mortuary. The accused testified that he had no disagreement with Charles the deceased and that Charles used to sleep at the home of the accused in the latter's brother's house.
17. In cross-examination, the accused testified that the deceased was his neighbour and that they slept in the same house for 2 months. It was his testimony in cross-examination that the date of the incident was the only day the deceased said he did not want to sleep at the home of the accused. The accused reiterated that he pleaded with the deceased to stay on. The accused denied forcing out the deceased and further that he did not know where the deceased's body was found the following day.
18. The accused further denied that the deceased's body was found in their homestead on a mattress and stated that if anything had happened at his house, his mother would see. The accused denied that his mother came to implore him to stop assaulting the deceased. He denied killing the deceased.

Analysis and Determination

19. I have carefully considered the evidence adduced in this case for the prosecution and the defence case. The issue for determination is whether the prosecution proved all the elements of the offence of murder beyond reasonable doubt, to warrant a conviction. Section 203 of the [Penal Code](#) provides that:
- “ Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”
20. To sustain a conviction for murder, the prosecution has to adduce evidence to establish beyond reasonable doubt that there was proof of death and the cause of that death; that the death was by an unlawful act or omission; that it was the accused who was responsible for unlawfully causing the death in question by an act or omission and finally, that the unlawful killing was with malice aforethought.
21. The first issue for consideration is proof of death. PW2,3,4 and 5 all testified that they saw the deceased's body at the scene of crime. PW2 testified how someone came to call her to go and collect her son,



the deceased whereas PW3 testified how they found the deceased's dead body on the morning of the 16.4.2020. In her testimony, PW1, Dr. Ombok Lucy testified that a postmortem to confirm the cause of death was carried out on the deceased's body by one Dr. Eddy who established that the deceased's cause of death was severe head injury secondary to blunt force trauma due to an assault. Accordingly, it is my opinion that the prosecution has satisfied the elements of death and the cause thereof beyond reasonable doubt.

22. The next question is whether the death of Charles Otieno Ogutu 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 a swollen face with multiple bruises, a bleeding on the lateral right chest and was bleeding from the nose, ears and mouth. The report also revealed that the deceased sustained a frontal scalp haematoma, a 6cm frontal skull fracture and intracranial bleeding which injuries were determined to have been caused due to an assault. It is my finding that such an assault amounted to an unlawful act as there is no evidence that the injuries were self-inflicted or inflicted in absolute self-defence by the deceased's assailant. In the circumstances, I am persuaded beyond reasonable doubt that the deceased person, Charles Otieno Ogutu died out of an unlawful act.
23. The other question is whether it was the accused who unlawfully caused the death of Charles Otieno Ogutu. None of the prosecution witnesses stated that they saw the accused person in the actual act of assaulting the deceased. The prosecution's case was based on circumstantial evidence.
24. In [Abamad Abolfathi Mohammed and Another v Republic](#) [2018] eKLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

25. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“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 Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* 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 the guilt of the Subject; (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.”

26. In this case, none of the prosecution witnesses witnessed the deceased’s unlawful killing. PW3, the accused’s mother testified that on the material night, she heard the accused and deceased arguing loudly as if they were fighting and that she confronted them before proceeding to the deceased’s home to inform the deceased’s mother to come and help her remove the deceased from her home. It was her testimony that when she returned from the deceased’s home, she saw the deceased lying down and thought he was resting and that she only learnt the following day that the deceased had passed on. It was her testimony that when she returned from the deceased’s home, the accused was in his house.
27. PW4 the area Chief testified that on arrival at the scene, they went into the house that the deceased shared with the accused and another person and found signs of a scuffle in the house with clothes scattered all over. He further testified that at the back of the house, there were pieces of broken wood and further that the accused person was at large.
28. In his defense, the accused denied Unlawfully killing the deceased and stated that indeed, him and the deceased were together that night and that they were talking loudly, which noises drew the attention of his mother, PW3 and that after his mother left to go and call the deceased’s mother, the deceased also left.
29. I have considered the evidence of the accused and it is my view that the same is a mere denial. This is because despite the accused’s allegation that after his argument with the deceased he left, his own mother testified that when she initially left the accused arguing with the deceased and proceeded to the deceased’s home and on her return, saw the deceased lying on the ground and thought he was resting. PW4 testified that they found evidence of a scuffle in the house the deceased shared with the accused and further pieces of wood behind the house.
30. There is no reason in my mind why the accused’s own mother could have lied in her testimony that she heard screams of people fighting and that when she got out, she found that it was the accused and the deceased before she proceeded to the home of the deceased to call his mother to come and take away his son. This evidence of PW3 coupled with the evidence of PW4 the area Chief that when he visited the house where the accused and the deceased used to sleep together with another person, he found the items scattered all over and that behind the house were also broken pieces of wood, is corroborative. In my view, the mother to the accused could not have rushed to go and call the mother to the deceased that night if there was nothing to worry about. In addition, from the evidence of PW3, it is evident that the accused was the last person to be seen with the deceased alive while the two were engaged in a scuffle after which the deceased was next seen lying down upon the return of PW3 from calling the mother to the deceased, and the deceased was subsequently discovered to have died.
31. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide an explanation as to what happened. Nonetheless, this does not shift the burden of proving the guilt of the accused person by the prosecution beyond reasonable doubt.
32. In the instant case, I find that the accused was placed at the scene of the crime by PW3 his own mother, PW3 who left the deceased in the company of the accused as she rushed to call the deceased’s mother. It follows that the accused has a duty to give an explanation of what he was doing with the deceased, at the scene, which act involved screams which attracted the attention of PW3 and how the deceased victim met his death.



33. Under Sections 111(1) and 119 of the *Evidence Act*:

“ 111.

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

34. In *Republic v E K K* [2018] eKLR the Court held thus and I agree, concerning the last seen with the deceased doctrine:

“Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of *Moses Jua v The State* [2007] LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:

“Even though the onus of 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 is that where the deceased was last seen with the accused, there is a duty placed 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.”

35. In *Stephen Haruna v The Attorney-General of The Federation* [2010] 1iLAW/CA/A/86/C/2009 cited severally by Kenyan Courts, the Nigerian Court of Appeal held that:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”



36. In Ramreddy Rajesbhanna Reddy & Another v State of Andhra Pradesh, JT 2006 (4) SC 16 the Indian Supreme Court held that:

“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

37. In the present case, and from the evidence of PW3, the mother to the accused, it is the accused who was the last person ‘to be seen’ with the deceased. The deceased was found dead in the homestead of the accused. The accused person was under no duty to adduce and challenge the prosecution’s case but having been the last seen person by PW3, he failed to offer any explanation as to how the deceased met his death. His defence, as I have stated above, was, in my view, not credible and amounted to a mere denial.

38. In the circumstances I am satisfied that the prosecution has proved that it was the accused who committed the unlawful act which caused the deceased’s death.

39. 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.”

40. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. From section 206 (a-e) of the Penal Code, malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case and evidence adduced. The courts in interpreting the provisions of section 206 have stated as such in various judicial pronouncements. 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.

41. I must however mention that PW3 referred to Maurice Ogutu and no question was put to her as to whether Maurice was the same as Charles. However, I am satisfied that the Maurice that PW3 was referring to was one and the same person Charles Otieno Ogutu the deceased, as this is the only person whose mother PW3 went to call that night, after witnessing a scuffle between the accused and the deceased.

42. In the instant case, evidence adduced by the prosecution witness PW1 through production of the post mortem report shows that the aim of the deceased’s attacker was clearly to cause grievous harm. This is



further established by the nature of injuries suffered by the deceased which were severe and identified as follows and which were mostly concentrated on the head, with absolutely no evidence that the accused was also assaulted by the deceased: a swollen face with multiple bruises, a bleeding on the lateral right chest and was bleeding from the nose, ears and mouth. The report also revealed that the deceased sustained a frontal scalp haematoma, a 6cm frontal skull fracture and intracranial bleeding.

43. An attack on one's head is an attack on the life of a person. The attacker had the ultimate intention of eliminating the deceased although the motive is unclear. In *Daniel Muthee v R* 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 a 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*. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

44. In the instant case, the fact that the deceased suffered severe head injury involving fracture of the skull shows how vicious and forceful the assailant was and it matters not that the murder weapon was not found and or produced as an exhibit. In *Ekai v R*, Criminal Appeal No. 115 of 1981 relevant to the present case where it was held that “though the murder weapon had not been produced, the conviction stood on the basis of the post mortem examination which established beyond all reasonable doubt that the fatal injury had been caused by a sharp bladed weapon...”

45. Citing the above Ekai Case, the Court of Appeal in *Gerishon Kubai Mwithia v Republic* [2013] eKLR stated that:

“It is our finding that in the present case, failure to produce the murder weapon was not fatal to the prosecution case.”

46. Motive is also immaterial in proving one's criminal responsibility. That is clear from Section 9(3) of the *Penal Code* which provides that:

“Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility.”

47. In the case of *Joseph Wambirwa Mwanthi v Republic*, Criminal Appeal No 63 of 2005 (CA Nyeri), the Court of Appeal stated that “Generally speaking, motive is not essential to prove a crime.” However, the same court stated in *Lubambula v R* [2003] KLR 683 that:

“Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”

48. In *David Kipkemboi Ngetich v Republic*, Nakuru Cr. Appeal No. 276 of 2006 (CA) the Court of Appeal stated that the relevance of motive is “to contextualize the circumstances in which the offence charged was committed.”



49. In this case, as motive for the unlawful killing of the deceased was not clear from the evidence adduced, this court will not speculate on the same. Only the accused knows why he attacked and unlawfully killed the deceased.
50. In the end, I find and hold that the element of malice aforethought was proved beyond reasonable doubt.
51. Accordingly, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt. I find the accused person Abisaye Odhiambo Ombija Guilty of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly.
52. Sentence shall be pronounced after records and mitigation.
53. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2024

R.E. ABURILI

JUDGE

