



**Republic v Owino (Criminal Case E021 of 2022)  
[2024] KEHC 4191 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4191 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL CASE E021 OF 2022  
RPV WENDOH, J  
APRIL 29, 2024**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**COLLINS OTIENO OWINO ..... ACCUSED**

**JUDGMENT**

1. By the information dated 17/11/2022 the accused Collins Otieno Owino was charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the charge are that on 28/10/2022 at Kasere Village, Sub -location, North East Kamagambo Location Rongo Sub County, murdered PAO.
3. The Accused denied the charge and the case proceeded to hearing with the prosecution calling a total of eleven (11) witnesses. The accused was called upon to defend himself and he testified on Oath.
4. PW1 BAB, is a child aged seven (7) years and after a voire dire examination, the court found him unfit to give evidence on oath. He gave unsworn evidence and was subjected to cross examination. He recalled that the mother, the deceased, had introduced him to the Accused, Otieno; that on the fateful day, the accused took them to a maize plantation, him, the younger sister, the mother (deceased) and that they had been transported there on a motor cycle; that they slept on blankets in the maize farm and that it is accused who said they go to sleep in the maize farm instead of the house; that before they went to sleep in the maize, they used to live with Accused in the same house at Magina. He stated that towards morning, his mother (deceased) called him and it is then he saw Accused strangling the mother; that the Accused carried the mother further inside the maize farm when she was no longer talking; that accused then told them that their mother was lost and took them near their grandmother’s home, showed them the home and left them.



5. PW3 RA, aged about ten (10) years; recalled that on 29/10/2022 she was passing near a maize farm when she saw somebody's head, and naked body, she went to tell her friend PA PW2 also aged ten (10) years. Both of them went to where PW3 had seen the body. After PW2 saw the body, she informed her mother who on seeing the body and informed people. Police were called to the scene. Later both of them recorded their statements with the police.
6. PW4 SAO, P's (PW2's) mother was at home on 29/10/2022 about 2:00p.m when she learnt from PW3 that she had seen a naked body in the maize farm. She went to the scene with others, saw the naked body of a lady who had only a brassier on and they called the Chief who in turn called the police. PW4 did not identify the body. PW5 Jenipher Auma saw the deceased's body in the maize farm.
7. PW6 Charles Ouma Onono, is the Assistant Chief of North East Kamagambo Location. He was informed of the dead body having been seen in a maize farm. He went to the scene found the naked body of a lady with only a brassier and reported to Kamagambo police station. There was also a lesa and cap a few meters from the body, a jacket, trouser and sleepers (crops) a bit further off near a culvert he identified the items in court. PW6 said that the deceased person was unknown in the area.
8. PW7 TOO, was the deceased's husband for nine (9) years and they had two children. He left the deceased at their home and went to work in Mombasa. He visited home in May 2023 when the deceased informed him that the mother had visitors and she needed to be present. He allowed her to go on a Friday to Siaya and was to return home on Sunday but she did not return. He went to her home next Thursday but found that she never went there. He reported to the Chief; and called the deceased's sister to come for the children whom she had left behind. The deceased's sister informed him in November 2022, that the deceased had gone and taken the children and that she was with a man she called her husband by name Otieno; that the deceased claimed to be taking the children to school but after about two (2) weeks, PW7 learnt that the children had been returned by Otieno to their grandmother. PW7 went to P's home and on enquiring about P's whereabouts, the children (his) informed him that Otieno had strangled their mother. He later got information that a body had been recovered in Rongo police station and were referred to Migori mortuary where he identified the deceased's body. PW7 identified the accused as his close friend and comes from Siaya near his home. He denied knowing of accused and P having a relationship.
9. PW8 Mercy Kemunto, a children's officer from Rongo Children's office told this court that on 4/11/2022, the OCS Kamagambo Police Station called to inform her that they had a child who needed counselling because he had witnessed a murder incident. He found the child, B was with his grandparents and police, removed the child to another room, made him comfortable because he was crying. B later revealed that his step father had quarreled with the mother; that in the evening, the step father said he was taking them to their aunt. They boarded a motor cycle to Rongo and it was late. They went to a nearby maize farm where they slept. In the morning he heard the mother calling him told him that she was being strangled; that he was threatened when he tried to look and later saw the step father carrying the mother on the shoulder and came back to tell them that their mother had disappeared. She recorded a statement and the children was released back to the grandmother.
10. PW9 Dr. Evans Omondi performed post mortem on the deceased's body on 4/11/2022. He found that the deceased had a small bruise on the forehead, huge spiral marks on the neck; 2cms thick which were continuous upto the back; the blood vessels of the neck, face and scalp were swollen. Internally, the doctor found that the trachea had collapsed and spinal column was dislocated at C3 and C4. He formed the opinion that the cause of death was asphyxia secondary to strangulation.
11. PW10 PC (W) Deborah David, got a report of murder on 29/10/2022, proceeded to the scene with other officers; she took photographs of the deceased's body lying in a maize farm. The body was naked



save for a brassier. She took the body to the mortuary. Next day, a person by the name Collins went to the police station alleging that he was looking for his missing wife, PA; that they had had a disagreement the previous day on 29<sup>th</sup> in Magina in Ndiwa. She interrogated the accused (Collins), recorded his statement and advised him to go to see the body at the Migori Referral Hospital and return to Rongo Police Station but he never returned. Later at 8:00p.m he received a call from Ndiwa police station that Collins had reported there that his life was in danger because of suspicion that he had killed his wife. PW10 collected Collins from Ndiwa police station next day. PW10 showed the pictures she had taken to the child BA. PW10 also interrogated the deceased's PW10 produced as exhibits items recovered at and near the scene, Cap (PEX2), Crocs (PEX3), Black trouser (PEX 5) and lesa (PEX No. 6).

12. PW11 CPL Livingstone Katui, of DCI Migori scenes of crime, received 5 coloured photographs from PW10 PC Woman Deboral for certification. He stamped them and produced them in court as exhibits.
13. When called upon to defend himself, the accused testified on oath that the deceased was his wife; that they lived at Magina in Homa Bay; that she started complaining that she did not like the place; that the deceased left sometimes in September, 2022 saying she was going to look for a job and left the children behind; that he called her at 4:00p.m and she claimed to be on her way back but she did not arrive and he called her next morning and he called the elder brother to find out the deceased's whereabouts; that S the other sister S but she told him not to disturb her. He slept in Siaya and went back to Magina next day. He went back to look and some cyclist asked alleged that he killed his wife and they started to assault hi and it is then police from Ndiwa arrested him without telling him why. The accused denied having been with the deceased, B and A on a motorcycle on 28/10/2020 but admitted having lived with them.

No submissions were made by either counsel.

14. This being a charge of murder, contrary to Section 203 of the Penal Code, it is the duty of the prosecution to prove that charge beyond reasonable doubt. The legal burden of beyond reasonable was ably disclosed in *Woolmington v DPP* (1935) AC 462 pp 481 where the court said:-

“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.”

15. The above authority therefore establishes that proof beyond reasonable doubt is not proof beyond an iota of doubt.
16. In the instant case, the prosecution has to prove beyond reasonable doubt the following ingredients:-
  1. Proof of death of the deceased;
  2. Proof that the, Accused caused the death through an unlawful act or omission;
  3. Proof that the accused possessed malice aforethought.



17. The undisputed facts are that prior to the deceased's death, she was living with the Accused as husband and wife. It is also a fact that though they hailed from Siaya they were residing in Magina, Ndhiwa in Homa Bay with the deceased's children.
18. Although the Accused claimed to have been a husband to the deceased, he did not say how long they had been married. PW7 Taunas was specific that he had been married to the deceased for nine (9) years and they had two children. Accused does not claim to that the children B and A. I find that the said children were not accused's. Even after the deceased's death he took them back to the deceased's parents.

**Proof of death:**

19. PW9 Dr. Omondi examined the body of the deceased and found that she had died of asphyxia. PW1, PW2, PW3, PW4, PW5 and saw the deceased's body in a maize farm. PW7 the deceased's husband and the investigating officer PW8, did see the deceased body at the mortuary. There is no doubt that the deceased died. PW9's findings corroborate PW1's testimony that the mother was strangled and that she cried out to PW1 that she was being strangled. The deceased did not therefore die of natural causes.

**Who caused the unlawful act or omission leading to the death?**

20. The court has only got the testimony of PW1 that towards morning, while in the maize farm her mother called him and that she saw the accused strangle the mother and carry her away from where they had slept. PW1 repeated this narration to the children's officer, PW8. PW4 also stated that he learnt of the deceased's death from deceased's children. PW1's evidence being unsworn cannot be relied upon alone without corroboration. Corroborative evidence can either be direct or circumstantial. Circumstantial evidence has been described to be the best evidence. In the case of *R v Taylor* (1928) 21 CR. App 20 the court said as follows of circumstantial evidence:

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 of evidence to say that it is circumstantial.”

21. For a court to rely on circumstantial evidence, the said evidence must meet the test set in *Abang'a alias Onyango v R Cr. App. No 32 of 1990*, where the court said:-

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 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.

22. I have earlier stated that I believe PW1's evidence, the same having been corroborated by PW7 and PW8. I believe the evidence of PW1 that the deceased was last seen alive with the deceased on the maize farm in the fateful night. It is from the farm that the accused took PW1 with the sister to the grandparents in Siaya. The question that lingers in my mind is what happened to the deceased in the



maize farm. In this instance Section 111 (1) of the Evidence Act imposes an evidential burden on the accused, as the last person to be seen with the deceased alive, to explain what could have happened. In the absence of failure to offer any plausible explanation certain facts in line with Section 119 of the Evidence Act the court will presume that he caused the death. The two sections provided as follows:-

Section 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 prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.

Provided further that the person accused shall be entitled to be discharged 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.

Section 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.

23. In his defence, the accused denied having been with the deceased on the night of the murder but PW1 maintained that they were together in the maize farm whereby towards morning, the mother called him out and he then saw accused carrying the mother away. Later the accused claimed that the deceased had gotten lost and he never saw the mother again. It is only the Accused who knows what happened to the deceased and he should have explained what happened to the deceased. The same is not acceptable.
24. The totality of the prosecution case is that the accused eloped with the deceased who was a wife to his friend, PW7. It is not clear but the two seem to have quarreled and God knows why they went to sleep in the maize farm instead of the house. The accused had it all planned, as he lured the deceased into the death trap in the maize farm. He then set out to cover his path by going to check at Rongo Police Station if the body had been recovered. This court is satisfied that the evidence on record both direct and circumstantial points at none other than accused as the murderer.

### **Malice aforethought**

25. Section 206 of the Penal Code provides what malice aforethought comprises. It reads as follows: -
  - 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”.



26. In the case of *Rex v, Tubere s/o Ochen* (1945) EACA 63, the East African Court of Appeal defined malice aforethought as:-

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.”

28. In this case, the act of strangling the deceased was deliberate and was meant to cause her grievous harm or death. It did cause her death, a painful death. In my view malice aforethought was proved to the required standard. In the end, I find accused guilty of the murder of PA contrary to Section 203 of the Penal Code and I convict him accordingly.

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

**R. WENDOH**

**JUDGE**

In presence of; -

Ms. Kogos for the state

Mr. Otieno for Accused

Ms. Emma –Court Assistant

