



**State v Okoth & another (Criminal Case E014 of 2022)
[2024] KEHC 5413 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E014 OF 2022
DO OGEMBO, J
APRIL 29, 2024**

BETWEEN

STATE PROSECUTION

AND

NAHASHON OUMA OKOTH 1ST ACCUSED

STEVE MOSES OKOTH 2ND ACCUSED

JUDGMENT

1. The two accused Nahashon Ouma Okoth and Steve Moses Okoth have been charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge state that on 3.4.2022 at Ulagai village, Marenyo sub-location within Yala Township in Gem sub-County within Siaya County, they murdered Francis Onyango Ochieng.
2. The accused pleaded not guilty to the charges when presented before the court on 20/4/2022. The case of the accused thereafter proceeded to hearing.
The evidence of the Prosecution was as follows:-
3. PW1, Dr. Bruno Okal, a Medical Officer at Yala Sub-county Hospital, testified that he conducted an autopsy on the body of Francis Onyango Ochieng (deceased) on 11/4/2022. He noted that on examination, the body had fractured radius and ulna of left arm, deep cut wounds on the skull, the nervous system had bleeding into the right cerebral hemisphere. He formed the opinion that the cause of death of the deceased was severe brain injury and cardiac failure due to heamorrhagic shock secondary to assault by a sharp object. This witness duly produced the post mortem form as exhibit (EXH-1).
4. Francis Ongincho Ochieng was PW2 gave evidence that on 3/4/2022 at 3.00 pm, he had been at her in-law's house when he heard screams from a neighbour's homestead.



5. He proceeded to the scene where he found people gathered and was told that Ochieng had been killed next to Okoth's house. The deceased was a son to his brother. He identified the body at the scene. He identified the two accused, son of the late Okoth as amongst those making noise. This witness confirmed that deceased used to have love affairs with Nyaseme, mother of the two accused who did not approve of the relationship. And that before Okoth died, he had warned the deceased to stop having an affair with Nyaseme, a warning he witnessed. That Okoth had died through suicide by drowning in River Yala and accused were annoyed because it was alleged that Okoth committed suicide because of Ochieng having love affairs with Nyaseme. He did not witness who killed the deceased.
6. The 3rd witness Monica Adhiambo recalled that on the said date of 3/4/2022 at about 3.00 pm, she heard one Esther Atieno Okoth calling her to go and help as her children were killing Ochieng from the house. She reported the incident to the village elder. She confirmed that Ochieng the deceased was a boyfriend of Esther, mother of the two accused. Also that it was the love affair which caused the death of Okoth, Esther's husband, and that her sons were against the affair. She however, did not witness the incident.
7. The 4th witness, PW4, was Rose Akoth Maunya, the village elder and whose evidence was that on the material date on 3/4/2022 at about 3.00 pm, PW3 informed her that at the home of Okoth, Francis Ochieng (deceased) was being killed by the children of Okoth. She proceeded to the scene where she found the deceased on the ground. The accused were in their home. That the accused and their brother told her that they were tired of Ochieng and had tried to keep him away, but their mother had been rude to them. She proceeded to inform the Assistant Chief who called the police. She witnessed as the body was carried away and the accused being arrested. That in the process, accused 1 told her he had cut the deceased in anger.
8. PW5, CPL Simon Likoni of DCI, Siaya, a scenes of crimes Officer produced the photographs taken at the scene together with his certificate and memo form (Exh- 1,2 and 3). And PW6, Lorraine Adhiambo a minor aged 12 years and who gave an unsworn evidence, testified that she knows the accused as her cousins. And farther that she does not know what they are charged with nor Esther Atieno Okoth. This witness was declared a hostile witness on the application by the prosecution. Her recorded statement was produced as prosecution exhibit – 4 after a trial within a trial.
9. She otherwise confirmed that she had signed the statement. She denied witnessing this incident.
10. And PW2 PC Kemboi Collins, the investigating officer herein recalled that on 3/4/2022, at about 4.30 pm, with fellow officers, he had visited the scene, where the body lay. He followed the blood drops that led them to the house of Okoth. On searching the house, the witness found a pool of blood in the bedroom. He went on that the two accused confirmed that they had had a fight with the deceased whom they had warned never to go to their home as they believed the deceased had an affair with their mother which affair had led to their father committing suicide. The witness proceeded to recover the murder weapon, a panga (Exh-5). He arrested the two accused and had them charged in court.
11. Upon the close of the prosecution's case, Counsel for the accused made short oral submissions to the effect that none of the witnesses saw the accused attack, assault or murder the deceased and so they were not linked with the death of the deceased. Prosecution did not submit. The court only considered the evidence of the prosecution and the submissions and found that a prima facie case had been established against the two accused who were put to their own defences.
12. Accused1, gave an unsworn defence in which he stated that he knew the deceased Francis Ochieng as a village mate. That on 3/4/2022, he had gone to work and on coming back home, sat at his door when



the police came to their home. He was then arrested without being told the reason and later charged. He denied seeing the deceased on the material day. He called no witness.

13. Accused 2 also gave an unsworn evidence in defence in which he stated that he also knew the deceased as a step father. That on 3/4/2022, he had gone out for work and came back at 6.00 pm. That soon after police officers appeared and arrested him together with his co-accused, his brother. That he was then charged with this case which he denies. He also called no witness.
14. The parties herein have filed written submissions. Counsel for accused submitted that under Section 203 of the *Penal Code*, the Prosecution are bound to prove the following;
 - i. Proof of the fact and cause of death of the deceased.
 - ii. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the ‘actus reus’ of the offender.
 - iii. Proof that the said unlawful act or a forethought which constitutes the “mens rea” of the offence.
15. It was submitted that the fact and cause of death of the deceased is not in dispute as proved by PW1 Dr. Bruno Okal.
16. As to whether the death of the deceased was out of an unlawful act or omission on the part of the accused, it was submitted that none of the prosecution witnesses saw accused attack or kill the deceased. That PW6 disowned her statement.
18. Counsel relied on SAWE –VS. R [2003] KLR 364 where the Court of Appeal held;

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilty. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remain with the prosecution. It is a burden which never shifts to the party accused.”

Counsel further relied on the Court of Appeal decision in Abanga Alias Onyango – VS- R (CR. Appeal No. 32 of 1990 (VR) in which the court set out the following principles:

“It is settled law when a case rests entirely on circumstantial evidence, such evidence must satisfy 3 tests;

- i. The circumstances from which inference of guilt is sought to be drawn must be cogently and firmly established;
 - ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
 - iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”
19. That suspicion alone, no matter how strong, cannot form a basis of inferring guilt which must be proved by evidence.



20. On the issue of proof of the element of malice, aforethought, counsel relied on Section 206 of the Penal Code and the case of R –Vs- Stanley Muthike Tiire [2018] eKLR, that malice aforethought connoted an existences of culpability or moral blameworthy on the part of the accused. It was submitted that the prosecution has failed to prove this.
21. The court was urged to return a verdict of not guilty and acquit the accused of the charges.
22. In the submissions of the Respondent it was submitted that the prosecution duly proved the fact of death of the deceased, that it was caused by the accused who had malice aforethought. The court was nugget to accordingly convict the accused.
23. I have considered the evidence on record, the submission of the parties and the authorities relied on. Section 203 of the Penal Code, describes the offence of murder in the following terms;
- “ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”
24. The above provision prescribes the ingredients of the offence of murder, and which the prosecution is under a duty to prove to be the following:-
- i. Proof of the fact of death of the deceased.
 - ii. Proof that death of the deceased was a direct consequence of an unlawful act or omission.
 - iii. Proof that the said unlawful act or omission was committed with malice aforethought.
 - iv. That accused before the court has been positively identified as the perpetrator of the offence.
25. It is for the prosecution to prove the above elements of the offense. Regarding proof of death of the deceased, several witnesses testified and proved the same including PW2, PW3 and PW4. The evidence of PW1, Doctor Bruno Okal who performed the post mortem on the body of the deceased was further proof of the death of the deceased. The Doctor produced the post mortem form as exhibit and was of the opinion that the cause of death was haemorrhage shock secondary to assault. With this evidence, this court is convinced that the prosecution sufficiently proved this first element of the offence.
26. The 2nd element subject of proof herein is whether the said act of causing the death of the deceased was unlawful. On this the circumstances of this case can give an indication. First, from the evidence of the prosecution, the deceased was attacked with sharp objects. A panga, the murder weapon, was produced in evidence. It was a vicious attack and the deceased obviously did not have any chance of defending himself. And the extent of the injuries suffered attest to this. His left arm was severed or cut off. He also sustained multiple cuts on the head and other parts of the body. I am in the circumstances convinced that the attack on the deceased was unlawful.
27. On whether the attackers had malice aforethought in attacking and murdering the deceased, this court is guided by the provision of Section 206 of the Penal Code which provides;
- “ 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.”

28. In the case of R –Vs- Stanley Muthike Tiire [2018] eKLR, it was held that malice aforethought connected the existence of culpability or moral blameworthy on the part of the perpetrator.

And in Daniel Muthee –Vs- R [2007] KLR, the court held,

“When the Appellant set upon the times and proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (a) of the Penal Code.

29. I get guidance on the above cases. In our instant case, it is obvious the intention of the perpetrators was to kill the deceased. The perpetrators used a sharp object, a panga, to cut the deceased several times. His left hand was severed off. He also sustained several injuries on the head and other parts of the body. The weapon used in the attack, the viciousness of the attack and the fact that the deceased was cut several times point to the inescapable conclusion that in attacking and murdering the deceased, the attacker had malice aforethought. They clearly intended to cause the death of the deceased and had a clear knowledge that their action would indeed cause the death of the deceased. I so find.

30. Having proved the existence of the 3 ingredients of the offence of murder, it is still incumbent upon the prosecution to prove that it was the accused before the court are the persons who attacked and killed the deceased. The prosecution has called a number of witnesses in proving this element. It was evidence of PW2 that he heard screams from a neighbour’s home, the home of Okoth. He rushed to the scene where he found a crowd gathered and the body of the deceased on the ground at the home of Okoth. He also found two accused, sons of Okoth at the home amongst those making the noises. He confirmed that deceased had a love affair with Okoth’s wife, mother of the 2 accused, and that the 2 accused were against the relationship and had warned the deceased against it. The same evidence was corroborated by PW3, Monica Adhiambo who is the one the mother of the accused rushed to help when the accused attacked the deceased. PW4, and PW5 also corroborated the same.

31. There is also the evidence of the minor, PW6, Lorraine Adhiambo, who while in court refracted her statement. The said witness declared hostile but her statement was produced in evidence as Exhibit (Exhibit – 5). I have perused through the statement of the witness. It in fact gives a detail account on how the 2 accused killed the deceased. And lastly, there is the evidence of PC Kemboi Collins, the investigating officer that on visiting the scene, they were able to trace the blood stains from the scene where the body lay to the house of the mother of the accused where the attack on the deceased had started.

32. This court was referred to at least 2 authorities on viability of circumstantial evidence ie Sawe -Vs- R [2003], KLR 364, and Abanga Alias Onyango –vs- R, Criminal Appeal No. 32 of 1990, (supra), whose findings were basically that:

- i. That in circumstantial evidence, the inference of guilty must be incompatible with the innocence of the accused and incapable with the hypotheses than that of the guilt.



- ii. That the circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly established.
 - iii. That circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
 - iv. That 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.
33. The evidence of the prosecution was unchallenged that the deceased had a love affair with the mother of the accused, a relationship the accused detested and had warned the deceased against. And it was common knowledge of the community that the father of the accused had died out of suicide by drowning, a fact which may have formed the intention in the minds of the accused to kill the deceased. The two accused were both found at the scene and they variously agreed to the act.
34. These circumstances put together point to no-one else but the 2 accused as the ones who murdered the deceased.
35. In their defences, the two accused made similar unsworn defences in which they denied the charges. Their defences, to say the least were more denials devoid of any challenge to the specific allegations made against them by the prosecution witnesses. I sincerely do not find any merit in the defences of the 2 accused and I dismiss the same.
36. In criminal cases, it is incumbent upon the prosecution to prove the guilt of the accused and the standard is that of proof beyond any reasonable doubt Miller -vs- Ministry of Pensions [1947] Zaiier 372). In this case, I am convinced that the prosecution has discharged this burden and proved the case against both accused beyond any reasonable doubt.
37. I accordingly hereby convict both accused 1 and 2 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code as charged.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF APRIL, 2024.

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D.O. OGEMBO

JUDGE

29/4/2024

Court

Judgement read out in Open Court in presence of Accused, Ms. Ndeda for the Accused and Ms. Mumu for the State.

D.O. OGEMBO

JUDGE

29/4/2024

Ms. Mumu

We do not have their records. They may be treated as first offenders.

Ms. Ndeda



We are ready with Mitigation. We would like the court to consider the aspect of provocation. The accused were forced to witness the deceased ruining the relationship between their parents leading to the death of their father. And even after this, the deceased continued the relationship with their mother. Before this date, they had never attacked or injured the deceased.

Court ought to consider that they were provoked when they got the deceased and their mother in their father's house. They are first offenders. They are married with children who even are in court together with their mothers. We pray for leniency.

COURT

In view of the mitigation, court to obtain probation officer's pre-sentence cum victim impact assessment report before sentence.

Mention on 13/5/2024.

D.O. OGEMBO

JUDGE

29/4/2024

