



**Republic v Odera (Criminal Case E020 of 2021)  
[2024] KEHC 8079 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8079 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E020 OF 2021  
MS SHARIFF, J  
JUNE 28, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PETER OMONDI ODERA ..... ACCUSED**

**RULING**

1. The accused person Peter Omondi Odera faces a charge of murder contrary to Section 203 as read with 204 of the *Penal Code*. The particulars of the offence are that on 15 – 16<sup>th</sup> April 2021 at Jimo East sub-location within Kisumu County, he murdered one George Odongo Ochiengo.
2. On 1<sup>st</sup> July 2021 the accused took plea and denied the information read to him whereafter the case was set down for hearing and the prosecution called 9 witnesses.
3. PW1 one David Yogo Okelo testified that on the night of 14.4.2021 between 10pm and midnight he was woken up by screams. He then called his son Emmanuel Ochieng and they then went out to establish the source of the screams. At the scene they found the accused person standing over someone who was laying down unconscious. His face was covered in blood. Upon inquiring from the accused as to the identity of that person, the accused revealed that that person was a thief whom he had caught while stealing vegetables. Counsel for the accused opted not to cross-examine this witness.
4. PW2 Jonathan Otieno Odipo was a neighbour of the accused and a responder who was also woken up by screams emanating from the general direction of the river. He stated that upon arriving at the scene he found the accused, Mr. Yoga and the latter’s son Ochieng and someone else who was laying down unconscious. Upon directing his spot light to that person he recognized him to be Odongo. When he inquired of what had transpired from the accused, the latter informed him that Odongo had perpetually been stealing his kales and that he had hit him with a rungu when he caught him in the



- act of stealing his kales. This witness later recorded the statement with the DCI and he made a dock identification of the accused.
5. PW3 Irene Atieno Odongo a widow of the deceased stated that she was woken up at 2 am by Odhiambo Chiengo, Ben Awili and Fisto who inquired of the whereabouts of her husband and she told them that he had gone to a funeral whereupon these visitors informed her that something had happened to her husband and they then left but came back with the news that her husband was dead. In the morning at 5am she went to the scene and confirmed that her husband had died. She later attended the postmortem examination.
  6. PW4 Okello Olande was yet another responder who was drawn to the scene by the screams. He said that he went to the scene in the company of Gaji and Vincent. At the scene they found David Yogo, his son Ochieng, Jonathan, Odiko, Otieno and Peter Odera. He stated that the latter was standing on one side and someone was lying down unconscious besides him. This witness stated that the accused was furiously ranting that he could not be the one working and someone else goes to reap the fruits of his labour. That on two different occasions after the event the accused instructed PW4 to state, when asked by anyone, that the deceased had been a victim of mob attack. This witness stated that he had known the accused for a long time but he did not know whom the deceased was, given that it was Gaji who had gone near and shone a spot light to the deceased.
  7. PW5 Corporal Patrick Marete stated that on 16.4.2021 at 3 am the DCI Nyakach called him and instructed him to accompany him to a scene of crime pursuant to information received from OCS Pap Onditi Police Station one Chief Inspector Awuor to the effect that a kale thief had been caught stealing in a farm at Shore Pamba and had been beaten to death.
  8. It was the testimony of PW5 that he accompanied the DCI to the crime scene and found 15 people who had torches and crude weapons. The body of the deceased was lying down on a maize plantation which was located approximately 100 meters from the farm with kales. A manilla sack which was ¾ full of kales was besides the unconscious person. Members of the public disclosed that that person was one Goerge Odongo Chiengo a resident of a rental house in Shore Pamba, married with 4 children and his wife was a vegetable vendor with a kiosk in Shore Pamba. This witness also learnt that the accused, Peter Omondi Odera, had a kales farm along river Asawo. The accused told this witness that on the material night he had gone to keep vigil over his farm due to recurrent theft and the deceased had arrived at midnight with a manilla sack and started harvesting kales and upon his departure the accused followed him and attacked him with a club. This witness took photographs of the scene and the body of deceased and recovered a blood stained club from the accused person. On cross examination PW5 stated that whereas the 15 men had crude weapons he only recovered the club that the accused had. Further that he did not place the accused under arrest immediately.
  9. PW6 Dr. Agwanda Amfilled a medical officer and superintendent of Nyakach Sub-County Hospital stated that he had performed a post mortem examination on the body of George Odongo Ochiengo on 5/5/2021, 19 days after his demise. The body had severe multiple injuries on the head and limbs and he opined that the cause of death was due to excessive haemorrhagic shock due to excessive bleeding from deep cut wounds secondary to assault compounded by subdural haematoma. This witness stated that he took samples of finger and toe nails for DNA testing. He produced the post mortem report Ref. 1731396 dated 5.5.2021 as P. exhibit No 1.
  10. On cross examination this witness stated that the injuries were consistent with the use of a sharp object and that there could have been several assailants.
  11. PW7 No 100608 PC Stephen Musyoki from DCI Nyakach was the Investigating Officer. He testified that on 17/4/2021 he was assigned investigation duties involving a murder that had occurred on the



night of 15<sup>th</sup> – 16<sup>th</sup> April, 2021 at Jimo East Sub-location Kipala area. Upon conducting investigations he established that on the material night the accused who had been experiencing habitual theft of his kales at his farm he went to keep vigil while armed with a machete and a club. On the other hand he found out that the deceased had left his house at 21.30 hours on the pretext of going to attend a burial preparation in the neighbourhood but instead took a manilla sack and went to steal kales in a farm belonging to the accused. The former was caught in the act of stealing by the accused who then assaulted him with the panga and club by inflicting cuts and blows until he died.

12. This witness stated that he discovered that David Yogo, his son Emmanuel Ochieng, Guy Juma Hempstone and Jonathan Ondikohad responded to the screams emanating from the scene. He further stated that one Corporal Marete who had visited the scene before him handed over a club to him and he then prepared an exhibit memo. He then submitted the club and finger and toe nails to the Government Chemist for DNA testing but the results were still pending at the time of his testimony. He produced the exhibit memo as P. exhibit No 2.
13. Upon cross-examination PW7 conceded that Corporal Marete had not recovered any sharp object from the accused. Further that as the Investigating Officer he was not told by Corporal Marete that the members of the public found at the scene had crude objects. He conceded that there was no scientific evidence to link the accused to the deceased person.
14. PW8 one Godwin Amak Nanjana a government analyst told the court that P.C. Stephen Musyoka of DCI Nyakach presented him with a police exhibit memo form on 2.6.2021 and requested him to conduct DNA examination on two exhibits namely a mallet marked as Exhibit (A) and finder & toe nails cuttings marked as Exhibit B. It was his testimony that Exhibit A was moderately stained and upon conducting the DNA test he established that the DNA profile generated from Exhibit 'A' matched that generated from Exhibit B. He produced the exhibit memo and the government analyst report as P. exhibits No 2 and 3 respectively.
15. PW9 Goerge Kenedy Odhiambo a neighbour of the accused stated that on 15.4.2021 at midnight a neighbour, Martin Dade woke him up through a telephone call and inquired from him as to whether he was aware of what was happening outside. Upon getting outside his house he heard some noise and he then dressed up and went to the direction of the farms, where the noise was emanating from. At the scene he found a crowd had gathered. Someone directed a spot light to the ground and he saw a person laying down and a sack of kales was besides him. He was informed that the person on the ground was Odongo and upon taking a closer look he also recognized him as Odongo. On cross examination this witness stated that he had carried a torch and a rungu. Members of the public who were at the scene had knives, pangas and torches.
16. The issue for determination at this stage is whether the prosecution has established a prima facie case against the accused person to warrant his being put on his defence.
17. Section 306 (1) of the *Criminal Procedure Code* provides as follows:-

“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”
18. Both the prosecution and the defence filed their respective submissions.



19. The prosecution maintains that the evidence tendered by its witnesses has proved that the deceased died due to haemorrhagic shock due to excessive blood loss secondary to deep cut wounds sustained during an assault compounded by subdural haematoma; per the evidence of PW6 Dr. Agwanda Amfilled.
20. The prosecution maintains that the evidence PW1 – PW4, PW9 tends to prove that the accused person was the perpetrator of the assault that led to the death of the deceased and that the accused had expressed his disgust and anger towards the deceased who he said was reaping where he never sowed. It is posited that the accused had malice aforethought when he attacked the deceased as evident from severity of the injuries and his own utterances to these witnesses. Further that the evidence of PW8 tends to prove that the club recovered from the accused was stained with the blood of the deceased as per the government analyst report produced as P. exhibit No 3. The prosecution thus submits that it has established a prima facie case of murder as against the accused as envisaged under Sections 203 and 206 of the Penal Code given that, it submits the evidence adduced to has met the tripartite ingredients of murder namely:-
- a) The accused caused the death of the deceased.
  - b) The act or omission that caused the death was unlawful.
  - c) The act or omission that caused the death was done with malice aforethought (intended and premeditated).
21. On its part, the defence submits that the prosecution has failed to discharge its burden of proof for reasons that PW5 Corporal Marete failed to have the accused record a confession statement. Further that whereas PW6 Dr. Agwanda had stated that the deceased was assaulted with both sharp and blunt objects, no sharp object was recovered from the accused. Lastly that PW6 had indicated that there was a possible of multiple assailants. Reliance has been placed on the case of *Festus Mukati Murawa v R* (2013) eKLR wherein the Court of Appeal quoted with approval the English case of *Woolmington v DPP* (1935) AC 462 thus:
- “Throughout the web 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 the qualification involving the defence of insanity and 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.”
22. The cases of *Rananjali Trambakal Bhatt v R* (1957) EA 332 and *R v Lifchus* (1997) 3 SCR 32 have also been cited to support the position that the presumption of innocence of the accused subsists throughout the trial until such a time as the prosecution tenders enough evidence to satisfy a trier of facts, of the guilt of the accused beyond any reasonable doubt.
23. It is submitted that the prosecution’s case is based on mere suspicion.
24. I have analysed the evidence of PW1 David Yogo who was the first responder to the screams and who went to the scene in the company of his son Emmanuel Ochieng and I find that this witness stated that the accused person had told him that the person laying on the ground unconscious while covered in blood was a thief who he had caught red handed stealing his vegetables.



25. The evidence of PW2, PW3, PW4 and PW9 was corroborative that the accused had informed them that he had kept vigil on his vegetables (kales) farm after he had noticed that someone had been stealing his crop and on the material night the deceased had showed up at midnight with a manilla sack and harvest ¾ sack kales whereafter the accused attacked him with a club and a machete.
26. PW5 Corporal Marete who visited the scene with the DCI in charge Nyakach recovered a blood stained club from the accused and he also found the manilla sack which was loaded with kales. PW6 Dr. Agwanda Amfilled who conducted the postmortem indicated that the deceased had extensive severe multiple injuries. I do agree with the prosecution that the severity of the injuries predisposes a premeditated preparation to inflict the severe of injuries that would ensure that the thief does not live to steal again. This constitutes malice afore thought.
27. PW8 evidence of DNA profiling of the bloodstained club recovered by PW5 from the accused against the finger and nails cutting of the deceased clearly constitutes scientific evidence that brings nexus between the deceased and the accused.
28. In light of the above analysis I am guided by the definition of what constitutes a *prima facie* case as rendered in the case of *Republic v Ibrahim Owl* (2013) eKLR thus:-
- “Prima facie is a Latin work defined by *Blacks Law Dictionary* 9<sup>th</sup> edition as “sufficient to establish a fact or raise a presumption unless disproved or rebutted...”.
29. In the case of *May v Oisullivai* (1955) 92 CLR 654 the English court rendered itself on what constitutes a *prima facie* case thus:
- “When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands, he could lawfully be convicted. This is a really question of law.”
30. The test that a trial court has to measure the evidence against was set out in the case of *R v Galbraith* (1981) WLR 1039;
- “(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
- (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence:
- (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
- (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses’ reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to



the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”

31. On the balance I do find that the accused person cannot be availed the benefit of Section 306 (1) of the *Criminal Procedure Code* as I am satisfied that the prosecution has established a *prima facie* case against the accused person and I thus call upon him to answer to this case.

**DELIVERED, SIGNED AND DATED AT KISUMU THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

**M. S. SHARIFF**

**JUDGE**

