



State v Ouma (Criminal Case E029 of 2021) [2024] KEHC 7733 (KLR) (28 June 2024) (Judgment)

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E029 OF 2021**

RE ABURILI, J

JUNE 28, 2024

BETWEEN

STATE PROSECUTION

AND

FREDRICK JUMA OUMA ACCUSED

JUDGMENT

1. The accused person Fredrick Juma Ouma 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 as per Information for murder dated 22nd October, 2021 are that on the 28th day of February 2021 at about 2200Hrs at Nyampusi Market, Nanga beach area in South Central Seme sub-location, Seme sub-county, within Kisumu County, the accused murdered Peter Nyawara Ayieye.
2. The accused person pleaded not guilty to the Information for murder and the case against him proceeded to full trial. The prosecution called a total of six (7) witnesses in support of its case which is summarised herein below.

The Prosecution’s Case

3. PW1 Kennedy Otieno testified that on the 28th February 2021 at 9pm, he was outside the grinding meal whilst speaking on phone. He testified that there was moonlight and that his neighbour Walter approached him. It was his testimony that he saw a person on the road approaching him and on reaching them, PW1 was able to see that it was ‘Ahang’ who inquired as to which was Kirika’s house to which Walter pointed out to him.
4. It was PW1’s testimony that ‘Ahang’ was carrying a panga in his right hand and that he went to Kirika’s house and found it was closed/locked and he tried knocking then left and walked towards the road. PW1 testified that as he was still on his phone, he suddenly saw fire at the road and asked Walter if he too was seeing the fire but Walter did not respond. He testified that the fire continued to burn and on informing Walter, he said that someone could be burning waste. He testified that they decided to



- approach the fire and on nearing it, discovered that 'Ahang' was the one burning but that when 'Ahang' saw them, he chased them using the panga and they ran to Nanga school then 'Ahang' gave up.
5. PW1 testified that they then slowly started returning towards 'Ahang' whilst hiding and saw him pulling something from the fire and taking it under a culvert. He testified that they were about 20 metres from him and that after placing the thing that he was pulling from the fire under the culvert, 'Ahang' started walking away. It was his testimony that on a closer look, they saw that it was Peter who had been burnt in the fire and being overwhelmed with emotions, PW1 called Brian Ochieng who came and accompanied him to the scene and later to the village elder to inform him of what they had seen.
 6. It was PW1's testimony that together with the village elder and the Assistant Chief, they took Peter to Kombewa Hospital and the next day, the doctors told them to go and report to the Kombewa Police Station after which he rushed back to see Peter in hospital with Brian and left Brian to take care of him and went home. He testified that he later learnt that Peter had died.
 7. PW1 identified 'Ahang' as the accused herein and testified that he knew him as they hailed from the same village. He reiterated that the scene was lit by the bright moon.
 8. In cross-examination, PW1 reiterated that Ahang was carrying a panga which he used to hit Kirika's house while knocking. He testified that they saw fire burning but did not know who had lit it; that when Ahang initially approached them, they did not see him with Petrol or a matchbox but that as they approached the fire, they could not tell if he was burning waste but when he saw them approach him, he sprung at them and chased them with a panga. He testified that they did not see any rubbish waste being burnt.
 9. PW2 Brian Ochieng testified that on the 28th February 2021 at about 10pm while he was asleep in his house, he heard knocks on his door and on getting out, he saw Walter and Kennedy who informed him that somebody who appeared to be his Uncle Peter had been burnt at the Lolwe –Nanga Beach road.
 10. It was his testimony that he proceeded with them to the scene and confirmed that it was his uncle and that the clothes that he wore were burnt and stuck on his body and on talking to him, his uncle informed him that he was feeling pain in the chest. He testified that he called the local administration to come and witness what had happened and that later, with the help of Kennedy and Walter, they placed his uncle on the motorcycle and took him to Kombewa Hospital where on arrival, he was given medical attention.
 11. It was his testimony that by evening, the doctor said he was not seeing any signs of improvement so they were told to transfer him to Jaramogi Hospital in Kisumu whereupon on arrival, he was admitted into a ward. He testified that he went home and on his return the following day, he found that his uncle had died.
 12. PW3 George Ogwen Awiti testified that on the 28th February 2021 at 11pm, he was woken up by Walter, Brian and Ken who told him to accompany them to Nyampusi to witness something and further that they explained to him what had happened. It was his testimony that on arrival at the scene, he found a person who had been burnt, was wounded and dragged into a culvert at the road and on examination, they established that he was still alive. PW3 testified that he recognized the person as Peter Nyawara and so they organized for him to be taken to hospital but that four days later, he received a report that Peter had died at Jaramogi. In cross-examination, he stated that Peter could not talk.
 13. PW4 No. 65349 Sergeant Chris Mumia formerly of Kombewa Police station testified that he was the investigating officer in this case and that on the 1st March 2021, he was at the Police Station at Kombewa when an incident was reported. He testified that they visited the scene and found that an elderly man had been murdered and his body dragged off the road and burnt. He testified that the body had cuts



- and that he took the body to the mortuary and recorded statements from volunteer witnesses who went to the Police Station.
14. It was his testimony that the suspect had disappeared but was arrested 9 months later and taken to the Police Station by the Assistant Chief and members of the public. He testified that he compiled the file and preferred a charge of murder. PW4 testified that the accused went by the names 'Young' and that he got his official name by which he was charged. He identified the accused person as the one who was arrested and taken to the Police Station and further stated that he had not known him before the arrest.
 15. In cross-examination, PW4 testified that he found the deceased's body on the roadside and that it had burns and cuts and that he took the body to the mortuary. It was his testimony that the body was at Nanga village and that witnesses recorded statements after he took the body to the mortuary.
 16. PW5 Dr. Robert Otieno Omollo testified that he carried out a post-mortem on 18th March 2021 at Jaramogi Oginga Odinga Mortuary on the body of Peter Nyawara Ayieye which body was identified by the police. He testified that the body was of a male African naked, age about 60-66, good nutrition, good physique of height 178cm. He further testified that the body was decomposed with obvious cuts on hands and chest, 20% of chest and 10% of other parts of the body burnt.
 17. Dr. Omollo testified that externally, it was a severely pale body whilst internally, in the Respiratory system he found a deep cut wound on the chest and rib fractures and 20% burns on the chest and additional 10% inhalation burns. He testified that the cardiovascular, digestive and genito urinary systems were essentially normal. He testified that on the head and neck, there were open burn wounds and multiple cut wounds on the head and neck. He further testified that the Nervous system, spinal cord and spine were normal.
 18. Dr. Omollo testified that he found the cause of death to be cardiopulmonary arrest due to severe burn wounds and severe hemorrhage due to multiple cut wounds. He then issued a Death Certificate No. 1461677, signed the Report and dated it. He produced it as P. Exhibit 1.
 19. PW6 No. 235215 CIP Abel Onyapidi, a gazetted Scenes of Crime Personnel Officer vide Gazette Notice No. 5548 of 30th June 2015 testified that he was stationed in Kisumu Scenes of Crime as in-charge but was currently at Emali Training College. It was his testimony that on the 22nd January 2024 at 1505 hours he was in the Kisumu Crime Investigations office when he received a memo marked 'D' from No. 240168 IP Wilberforce Buluma of Kombewa Police station requesting him to process the memory card and prepare photographic print outs which he did and returned the memory card to the Investigating officer.
 20. He testified that photograph 1 is of a dead body taken at the morgue showing serious injuries on the neck and left side, Photograph 2 shows a dead body with extensive injuries on the right side from the neck to the hip, Photograph 3 shows serious burnt injuries from the neck, shoulders upto the hip area and the 4th photograph shows the body with serious burns on the entire back.
 21. He produced the photographs as exhibits P. Exhibit 4 a, b, c and d, the certificate dated 22nd January 2024 as P. Exhibit 2 and the exhibit memo as P. Exhibit 3.
 22. In cross-examination, he clarified that he was not the one who took the photographs but that the same were taken by the investigating officer from a mortuary.

The Defence Case

23. Placed on his defence, the accused person gave a sworn testimony denying the charge of murder. He testified that on 28th February 2021, he woke up early at 6am and left for work, as a fisherman, and



- returned at 1pm when he did his home chores until 5pm. It was his testimony that he visited his workmate Kirika at 6.30pm and that he met many people including; Bonke, Paul and Mike. He testified that he spoke to Mike and asked him to direct him to Kirika's house as he did not know the home but that on entering Kirika's homestead he did not find Kirika and that there was a padlock on the door.
24. He testified that he left and returned home and whilst following the road, he met two people. It was his testimony that he had taken some alcohol and that it was 8.00pm. The accused testified that he slept until 6am and left for work and returned at 1pm.
 25. It was his testimony that 3 people went and told him that he had been one of the people who passed by where Peter Nyawara had been killed which he denied and they left him alone. He testified that police arrested him as he was returning from work, 8 months later. He testified that he knew Peter Nyawara but that he did not kill him, that the witnesses told the court lies. He testified that he only spoke to PW1 inquiring as to where Kirika's house was.
 26. In cross-examination, the accused testified that he was also known as 'Ahang' and 'Young' by his friends. He testified that on the 28th February 2021 in the evening, he was on the road and that he met Kennedy and also Walter Omondi Otieno. He testified that he had no issues with the prosecution witnesses. The accused admitted that he had a panga when he went to Kirika's house as they use a panga when fishing to cut nets. He testified that he knew the deceased who was a drunkard and who could sleep out and that he went home after failing to find Kirika. The accused reiterated that he did not kill the deceased.

Analysis and Determination

27. I have carefully considered the evidence adduced in this case for and against the accused person. 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.”
28. The prosecution has to adduce evidence to establish beyond reasonable doubt that there was death, its cause, that the death was unlawfully cause, that it was the accused wo caused the unlawful death and finally, that the unlawful killing was with malice aforethought. Malice aforethought is a very essential ingredient of the offence of murder.
29. The deceased's death is not in doubt and was confirmed vide the testimonies of all the prosecution witnesses. PW5, Dr. Omollo testified that the deceased's death and its cause was further proved by the post-mortem report by Dr. Omollo which was produced as PEx.1 in which Dr. Omollo formed the opinion that the cause of death was cardiopulmonary arrest due to severe burn wounds and severe haemorrhage from multiple cut wounds secondary to assault.
30. As to whether the deceased's death 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 deep cut wound on the chest and rib fractures; 20% burns on the chest and the back side and additional 10% inhalation burns, open burn wounds and multiple cut wounds on the head and neck which injuries as seen by the court from the photographic evidence produced as exhibits, 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. Further, there is no evidence of self-defence and neither is there evidence that the injuries involving burns and deep cuts were self-inflicted, considering the circumstances under which the deceased was found in a culvert on the road. I am thus persuaded beyond reasonable doubt that the deceased person died out of an unlawful act.



31. As to whether it was the accused person who unlawfully caused the deceased person's death, PW1 testified that he saw the accused burn the deceased and drag his body to a culvert. He testified that deceased was armed with a panga and indeed examination of the deceased's body by PW5 Dr. Omollo revealed that not only had the deceased sustained serious burns but also had several cut wounds on his head, neck and chest. PW2 also testified that he saw cut wounds on the deceased's head.
32. PW1 also testified that initially, when they approached the accused, he chased them away with a panga. Why would an innocent man chase away people who were curious to see what was happening at the scene? It must also not be forgotten that the Investigating Officer, PW4 testified that the accused was arrested after 9 months as he had fled after this incident.
33. In his defence, the accused denied committing the offence and stated that he had carried a panga when going to see Kirika as they used the panga while fishing to cut nets. However, this is the same person who had earlier stated that on that particular day, he had returned home from fishing at 1pm and had been carrying out his home chores. Why then would he still be carrying a panga? Was he going fishing at Kirika's home? The answer to all these questions is that the accused carried the panga that evening for an ulterior motive. I am satisfied that the recognition of the accused by was not doubtful, considering the accused in his defence admitted that indeed he had seen PW1 and Walter when the accused went to ask them of the house of Kirika.
34. I warn myself of the dangers of relying on evidence of a single identifying witness and find that although Walter was not called as a witness as he was said to be facing another murder case, I find no prejudice was caused to the accused and I find the evidence adduced by PW1 to be credible on how he saw the accused with a panga at the scene where the deceased was found burnt. The accused confirmed that he had no issues with PW1 and the prosecution witnesses. I am persuaded beyond reasonable doubt, by the evidence on record that it was the accused person who was seen burning the deceased and pulling him into the culvert and even chase PW1 and Walter when they moved closer to view what was happening. His defence before this court was a mere denial. I am satisfied that the prosecution has proved beyond reasonable doubt that it was the accused who committed the unlawful act which caused the deceased's death. Although the murder weapon was not recovered, the accused person who fled after the incident was only arrested nine months later. he had the opportunity to dispose of the weapon used.
35. Finally, as to whether the accused had malice aforethought when he unlawfully killed the deceased, 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. What can be deduced from section 206 (a-d), 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.
37. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased’s attacker was clearly to cause grievous harm. This act of cutting and burning the deceased point at an individual intent on eliminating his victim. The conduct of the accused person chasing away PW1 from the scene, using a panga and escaping after the incident only to resurface nine months later all point to his guilt conscience. I find that malice aforethought was proved beyond reasonable doubt.
38. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt.
39. Accordingly, I find the accused person Fredrick Juma Ouma Guilty of the offence of murder as charged contrary to section 203 of the *Penal Code*. I convict him accordingly. Sentence will be pronounced after records and mitigation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

