



**Republic v Abong'o (Criminal Case 8 of 2020)
[2024] KEHC 15139 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 8 OF 2020
KW KIARIE, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNETH NYAMBOK ABONG'O ACCUSED

JUDGMENT

1. Kenneth Nyambok Abong'o is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the night of the 20th and the 21st day of October 2019, at Ndiru village of Homa Bay County, he unlawfully murdered John Odhiambo Nyambok.
3. The deceased was taking chang'aa in the home of Min Omena. The prosecution adduced evidence that when he was going home, the accused, who was also in the home, followed him and beat him using his fists. Min Omena accommodated him overnight and facilitated his going to the hospital the following day.
4. Kenneth Nyambok Abong'o, the accused, contended in his defence that he did not meet the deceased on the material day. He pleaded an alibi.
5. The issues for determination are:
 - a. Whether the accused was involved in the death of the deceased; and
 - b. Whether the offence of murder was proved against any or all the accused.



6. The accused pleaded an alibi. When an accused raises an alibi defence, they do not bear the burden of proving the truth. This was stated in the case of *Kiarie v Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

7. In this case, I will analyze the evidence to determine whether the prosecution's evidence disproved the accused's defence.
8. Gorretty Adhiambo (PW1) is also known as Min Omena. She was a dealer in chang'aa. Her evidence was that the accused found the deceased in her home and hit him on the forehead with a fist. When the deceased left, the accused also left. When she went to take out a sheep, she saw the accused beating the deceased using his hands. She went and took him inside her house. He had no visible injuries. She accommodated him overnight.
9. The accused contended that he had not met the deceased for three years and expressly denied ever meeting him on the material night.
10. The prosecution evidence adduced by Gorretty Adhiambo (PW1) has many loose ends. If the offence was committed on the night of the 20th and the 21st day of October 2019 as charged, one is left wondering why PW1 was taking a sheep out at night. Ordinarily, animals are taken to a shelter for an overnight stay. Secondly, she did not explain how she witnessed the incident at night without the help of any source of light. The other interesting issue that was not explained is why she accommodated him overnight without alerting his family. Her evidence was clear that he had no visible injuries.
11. It is doubtful if she is a reliable witness. Is it possible that she may have implicated the accused to shift the blame elsewhere? This could have been answered had the investigating officer investigated to ensure the loose ends I have pointed out were adequately addressed.
12. Elijah Moi Nyambok (PW3) testified that when the deceased was taken home by a boda-boda rider, he said that Kennedy had killed him. Section 33 (a) of the *Evidence Act* states:

when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

13. Several court decisions have addressed dying declarations and how this evidence is to be applied. The Court of Appeal in the case of *Michael Kuria Kabiri v Republic* Criminal Appeal No.45 of 1991 (NRB) observed,

There is no doubt that the appellant's conviction by the superior court was dependent on the deceased's statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in *Pius Jasunga s/o Akumu v Regina* [1954] 21 EACA 331. In that case, the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, it is, generally speaking, very unsafe to base a conviction solely on the dying



declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. In *Migezo Mibinga v Uganda* [1965] EA 71, the same Court pointed out that:

It is not always appreciated that the probative force of a statement as to the cause of his death by a person since deceased is not enhanced by its being made in the presence of the accused unless by his conduct, demeanor, etc., the accused has acknowledged its truth. Consequently, it is advisable that a trial judge should expressly state whether he is satisfied or not that there was such acknowledgement.

14. Is Kennedy the same person as Kenneth? If so, which Kennedy the deceased may have referred to was unclear, considering that only one name was used. Even if we assume the deceased was referring to the accused, he did not explain why he said so. This evidence has very little weight.
15. The accused called his wife as a witness, supporting his claim that he was selling chang'aa to his customers on the material night. There is evidence on record that tends to corroborate the fact that he was a chang'aa dealer, just like Min Omena (PW1). These two had their homes burnt by the members of the public after the death of the deceased, who is the subject of this case.
16. From the preceding analysis of the evidence on record, I find that the prosecution has failed to prove the offence of murder against the accused person to the required standards. I accordingly acquit him of the offence and set him at liberty unless, if otherwise, lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF NOVEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

