



**Republic v Ongili & another (Criminal Case E030 of 2022)
[2024] KEHC 15138 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E030 OF 2022
KW KIARIE, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MARK OTIENO ONGILI 1ST ACCUSED

EMMANUEL LIUDU ONGILI 2ND ACCUSED

JUDGMENT

1. Mark Otieno Ongili and Emmanuel Liudu Ongili are 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 21st day of September 2022, at Kokal village within Oyugis in Rachuonyo South sub-county of Homa Bay County, they unlawfully murdered Joseph Oluoch Ongili.
3. The prosecution contended that the two accused jointly with others, not before the court fatally attacked the deceased over a boundary issue.
4. The accused, on the other hand, contended that they were called out from a house where they were conducting a family meeting and found the deceased lying down with grave injuries. They denied any involvement in his death.
5. The issues for determination are:
 - a. Whether any of 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 incident leading to the incident was in two phases; the first was at about 1 p.m. when there was a quarrel over a tree, and the second was at about 10 p.m. when the deceased is said to have been fatally



- wounded. These facts can be gathered from the evidence of Peris Akinyi Ongere (PW2). She is the deceased's widow and the case's subject. Her evidence was that she found Mark Otieno (accused one) beating the deceased with a stick. Samuel Olela, Michael Odhiambo Javan and Fredrick Otieno joined him. She said she did not see Emmanuel doing anything to the deceased.
7. During cross-examination, she conceded that her statement indicated that the first accused was carrying a machete. This was not the case.
 8. Two issues emerge from the evidence of this witness. The first issue is whether or not the second accused was at the scene. She only talked of him when identifying them in court. The second is her credibility. She contradicted her statement to the police on what the first accused was armed with and the fact that when she went to the police station on the same night, she did not tell the police who was involved in beating her husband.
 9. Bradox Odhiambo (PW3) is the son of the deceased herein. His evidence was that he went to the scene after the fact and learned that the attackers of his father had gone away. However, in a statement to the police, he stated that he saw his father being beaten by Meshack Otieno in the company of Fredrick Otieno, Javan Otieno, Michael Ongili and Samuel Ongili. He also, during cross-examination, claimed that Mark Otieno is also known as Meshack Otieno. Any other evidence on record did not support this issue of the identity of the first accused.
 10. Conjestina Achieng (PW4) introduced material contradictions in the prosecution case. Her evidence was that she could hear a conversation from the house of Mark Otieno (accused one) about twenty-five meters away. This was despite a loud radio which had announced the arrival of Mark Otieno. This is incredible. Her evidence was that when she went to the scene where her father was lying down after he had been beaten, she found his attackers surrounding him. Her brother Bradox (PW3) pleaded with them to leave the deceased, but they chased him away. Bradox did not testify anything to this effect. Unlike her mother, she was emphatic that Mark Otieno (accused one) was carrying a machete.
 11. Whereas in court, she enumerated five people surrounding her father, in her statement to the police, she had three names.
 12. The three prosecution eye-witnesses on whose evidence the prosecution case heavily relied paint a picture of unreliable witnesses. The Court of Appeal in the case of *Ndungu Kimanyi vs Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, raise suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
 13. The accused contended that they were not involved in the fatal injury of the deceased. Their evidence, which was supported by Mary Achieng Otieno (DW3), was that Seraphina called them out while conducting a family meeting. This was when they found the deceased lying down with fatal injuries.
 14. Given the many contradictions in the prosecution case, their defence is logical and convincing. I find that the offence of murder has not been proved against the accused. I acquit each one and set him free unless, if otherwise, lawfully held.

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

KIARIE WAWERU KIARIE



JUDGE

