



**Republic v Ouma (Criminal Case E007 of 2024)
[2024] KEHC 15062 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E007 OF 2024
KW KIARIE, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

BRIAN OKOTH OUMA ACCUSED

JUDGMENT

1. Brian Okoth Ouma is charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence in count one is that on the 15th day of January 2024, along Oyugis-Gamba road, at Nuoye area, Kowidi location in Rachuonyo South sub-county of Homa Bay County, he unlawfully murdered Clinton Odiwuor Owich.
3. The prosecution case is that three people accosted the deceased and two others. The accused fatally stabbed the deceased.
4. Brian Okoth Ouma, the accused, contended he acted in self-defence.
5. The issues for determination are:
 - a. Whether the accused acted in self-defence; and
 - b. Whether the offence of murder was proved against any or all the accused.
6. Joseph Okello Oluoch (PW2) and Godfrey Odhiambo Ochieng left a bar in Oyugis at 1 a.m., where they had gone to watch a football match. According to PW2's evidence, they were on a motorcycle whose rider was Clinton Odiwuor Owich, the deceased herein. When they reached the Guu Trading Centre, they met three people who stopped them. One of them had a machete. He ran away when this person wanted to cut him. Geoffrey followed him, crying, saying he had been cut. When they returned



to the scene, they found Clinton having been stabbed in the neck and his motorcycle deflated. He did not identify the person who stabbed the deceased.

7. The accused was arrested after a person nicknamed “Fathe” implicated him in the fatal stabbing. The sword that was recovered from the house of the accused had bloodstains. It was subjected to a DNA examination. The DNA generated matched that of the deceased herein.
8. Brian Okoth Ouma, the accused, does not deny to have stabbed the deceased. He, however, gave a different account of the incident. He testified that he boarded Frankline’s motorcycle. Shortly after, another motorcyclist with a passenger stopped in front of them. The two disembarked, and the pillion passenger was armed with a machete. They asked Frankline to step aside. The man wielding the machete cut him on the finger, and he fell. He was joined by the other one, and a struggle with them ensued. Since he had a knife, he pierced one of them.
9. These are two conflicting versions.
10. Section 17 of the Penal Code, Cap 63 provides that:

Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

11. The Court of Appeal in the case of Ahmed Mohammed Omar & 5 others v Republic [2014] eKLR agreed with the principles on the issue as laid down by the Privy Council in PALMER v R [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in R v McINNES, 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:

It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ...Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal, or it is disproved, in which case, as a defence, it is rejected. In a homicide case, the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If, in any case, the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.

12. When there are two competing versions, the onus is on the prosecution to prove that the accused’s version is not an accurate restatement of facts. In the instant case, some material witnesses who could have shed light on what may have transpired were not called. One such witness is “Fathe”, whom Bernard Otieno (PW6) said was involved in a brawl with the deceased. The other is Frankline, whom the accused informed the police was ferrying him on his motorcycle when they were attacked. The Court of Appeal for Eastern Africa in the case of Bukunya vs Uganda [1972] EA 549 (Lutta Ag. Vice President) held:



The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

13. The accused has raised a plausible defence. The failure to call the two material witnesses without any explanation is fatal to the prosecution case. Therefore, I find that the prosecution has failed to prove the offence of murder against the accused. I accordingly acquit him of the offence and set him free unless otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE

