



**Republic v Aroko & 3 others (Criminal Case 18 of 2014)  
[2023] KEHC 1075 (KLR) (Crim) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1075 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE 18 OF 2014  
J WAKIAGA, J  
FEBRUARY 20, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JACOB ODHIAMBO AROKO ..... 1<sup>ST</sup> ACCUSED**

**KELVIN OCHIENG ODIKRE ..... 2<sup>ND</sup> ACCUSED**

**WYCLIFFE ODHIAMBO OWUOR ..... 3<sup>RD</sup> ACCUSED**

**GEORGE OPIYO ODIKRE ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused persons were charged with the offence of murder, contrary to section 203 as read with section 204 of the penal code, the particulars of which were, that on the 23<sup>rd</sup> day of January 2014 at Bidii Area near Kayole Police Station, they jointly murdered John Owich Odikre.
2. Of significance to this judgement, the deceased was a brother to the 2<sup>nd</sup> and 4<sup>th</sup> accused and a cousin to 1<sup>st</sup> accused and a friend to the 3<sup>rd</sup> accused person.
3. They first appeared in court on the 11<sup>th</sup> February 2014 before R. Korir J, when their plea was deferred to the 25<sup>th</sup> of February, when a plea of not guilty was entered for all of them and the court was notified by Mr. Odero, then their Advocate on record that the 2<sup>nd</sup> Accused was a minor aged 17 years at the time, and the record shows that the court ordered that he be remanded at the Juvenile prison.
4. Thereafter, the matter was mentioned severally before the Judge and the then Presiding Judge for reasons stated on the face of the record until the 1<sup>st</sup> day of February 2016, when their trial commenced



before the Korir J who heard and recorded the evidence of PW1 and PW2, before proceeding on transfer.

5. On the 20<sup>th</sup> day of July 2017, the matter was placed before me and having complied with the provisions of section 200 of the Criminal Procedure Code proceeded to hear and record the evidence of eleven prosecution witnesses between the said date and 20<sup>th</sup> may 2020 when the accused persons were put on their defence and on the 26<sup>th</sup> July 2022 when the Accused persons tendered their defence.
6. Of significance for the purposes of this cause, the trial court was in the month of November 2021 transferred out of this station and Mr. Odero Advocate for the Accused persons was called by his maker, hence the defence was conducted by Ms Odero. During the period of their trial, the accused persons were in remand custody.
7. I have taken the liberty of setting out the history of this cause, as I always do, for judicial accountable and to explain the possible reasons for the delay in concluding this matter.

### **Prosecution Case**

8. To prove its case against the accused person, PW1 Pricilla Wangechi Kamau, testified that she was the wife of the deceased and that they had two children and that at the time when they got married, the deceased was living with the 2<sup>nd</sup> Accused, who was his step brother, she did not know 2<sup>nd</sup> and the 3<sup>rd</sup> accused whom she came to know after the incidence. It was her evidence that in the year 2013, they moved up country, where she met the 4<sup>th</sup> accused, in whose home the deceased built his Simba as the tradition dictated, their father having died.
9. It was her evidence that the deceased had told her that his relationship with the 4<sup>th</sup> accused was not good, having quarrelled over property, but that he had a good relationship with the 2<sup>nd</sup> accused. The deceased and the 4<sup>th</sup> accused had quarrelled over cattle and thereafter the deceased moved out of the 4<sup>th</sup> accused compound and built somewhere else and when he went to ask for farm land, which he had leased out, he directed him to the lower side of the land which had never been tilled before and then gave him another portion near their house but stopped him from tilling it.
10. The deceased then reported the matter to the area chief who talked with the 4<sup>th</sup> accused and they agreed on the date for the meeting but the 4<sup>th</sup> accused failed to turn up for the meeting and when the assistant chief followed up the next day, the 4<sup>th</sup> accused said he did not as the land to be sub divided but the chief decided to proceed with the subdivision in the absence of the 4<sup>th</sup> accused who had stormed out. The 4<sup>th</sup> accused later on threatened to finish the deceased which he reported to the chief, who later on called for a reconciliation meeting.
11. It was her further evidence that the 4<sup>th</sup> accused continued to issue threats to kill the deceased who reported to the police before leaving home for Nairobi on the 31<sup>st</sup> December 2013 until 23<sup>rd</sup> January 2014 when she got a report that the same had an accident before she was told that he had been killed, she then reported to the Chief before travelling to Nairobi, where she found the body at the city mortuary with a stabbed wound on the stomach.
12. In cross examination, she stated that the 4<sup>th</sup> accused left home immediately he had the news of the death of the deceased and that she heard that he had sent to the other accused person a sum of Kenya shillings twenty thousand for execution of the mission.
13. PW2 Joseph Ochieng Ndege, the area chief stated that he knew the accused persons, apart from the 3<sup>rd</sup> accused, all who came from his area of jurisdiction and that their father was an Inspector of Administration



- Police. He confirmed that there was a time the deceased went to his office in the year 2013, to lodge a complaint against the 4<sup>th</sup> accused on the division of their father's estate and that he later on initiated the subdivision of the land, through their clan Chairman but they could not reach an amicable settlement as the 4<sup>th</sup> accused was not will to allow subdivision of the land and having heard both of them , he initiated the sub division through their clan elder in the absence of the 4<sup>th</sup> accused as per the tradition where the land is subdivided into houses of the wives, which did not please the 4<sup>th</sup> accused .
14. The decease later complained to him that the 4<sup>th</sup> accused had interfered with the bacons and he later learnt from the family members that he had threatened to deal with the deceased should he continue to pursue the subdivision and he advised him to report to the local police post, leading to the arrest of the 4<sup>th</sup> accused, who was thereafter released upon the family intervention. The diseased later on left for Nairobi, where he was until his death.
  15. Following the death and the arrest of the 2<sup>nd</sup> accused, there arose tension in the village, the 4<sup>th</sup> accused then left the village for Kisumu and was suspected to had ran away having sold some of his property.
  16. PW3 PC Joseph Kipsang scene of crime officer, visited the scene at Bidii Area of Kayole where he found the body of the deceased lying on the ground with injuries on his neck caused by a sharp object. Besides the body, there was a techno mobile phone. He processed the scene by taking photographs, which he produced together the certificate thereon.
  17. PW4 Susan Kamore a Nurse at Susamed Medical Clinic, stated that she was I her house on the 23<sup>rd</sup> January 2013 when she received a call from the night nurse with the information that there was a person lying at the door of the clinic, she rushed to the scene and found many people thereat, viewing the body of a young man who had a sharp cut on the neck and his mobile phone next to it. She reported to the police, who came and took away the body.
  18. PW5 Dr. Johansen Oduor conducted post-mortem examination on the body of the deceased who was found lying by the road side. He had physical injury on the neck and as a result of his examination he formed an opinion that the cause of death was exsanguination due to slash wound on the neck and that it was difficult to establish how long the deceased had been dead.
  19. PW6 PC Meidikis Sammy Wandai, stated that on the 2<sup>nd</sup> day of September 2013 while stationed at Othoro Police Post, he received a deportee called John Owich in the company of Rose Auma and the village elder Kasmul Onyango on the issue of the sub-division on of the land and the threats issued to him by the 4<sup>th</sup> accused, which he recorded o the OB 8/2/9/2013. He then advised the reportee to meet the assistant chief. On 3<sup>rd</sup> September 2013, the deportee came back to the post and recorded his statement. He later learnt from the area assistant Chief, that the 4<sup>th</sup> accused had been arrested but pleaded for forgiveness and was released.
  20. On the 24<sup>th</sup> January 2014 Police Officers from Kayole accompanied by Rose Ouma, came to the post and informed him that the reportee John Owich had been killed in Nairobi, they then returned on 30<sup>th</sup> January 2014, when they were given the OB extract and three statements that they ha recorded and his statement which he recorded. In cross examination, he confirmed that the disputed land had been subdivided in the absence of the 4<sup>th</sup> accused and when he came back, he started to up root the boundary bacons and that the officers from Kayole wanted to know whether any report on the same had been made at the post following the death of the deceased.
  21. PW7 ASP John Wainaina recorded an alleged confessor which the court found inadmissible.



22. PW8 Corp. Dominic Mbatha stated that he proceeded to the scene and took the body of the deceased to the mortuary. It was his evidence that the deceased was making mandazi in the area with some of the accused persons having been brought to the area by one Joshua Osele who talked to the boys at a funeral meeting and established that Jacob Odhiambo had planned the murder with the other boys and based on that they arrested two of the accused persons and the 3<sup>rd</sup> accused was later on arrested by members of the public and while under interrogation, he conformed that he had planned the murder of the deceased on three other occasions but failed. He then proceeded to Oyugis where he confirmed that there was a dispute between the deceased and the 4<sup>th</sup> accused on the subdivision of the family land and report on the same made to the local police.
23. In cross examination, he stated that Jacob Odhiambo was brought to the scene by his brother Joshua Osele and that the 4<sup>th</sup> accused sent money to Kelvin Ochieng from Kisumu for the purposes of executing the plan who was not present at the clan meeting on the disputed subdivision and that the accused persons were arrested before they killed the second person who was their grandmother.
24. PW9 Joshua Osele Aroko stated that the deceased and the accused persons were his cousins and that their father had two wives with the accused persons belonging to the first wife while the deceased belonged to the second wife. At the time of his death, the deceased had taken his wife to their rural home where the 4<sup>th</sup> accused was living at. On the 23<sup>rd</sup> he had left Nairobi for Kisumu and when he got to Nakuru, he received a call from one Elijah Otieno who called him from the village to inquire whether he had heard of the death of the deceased. He told him that he had been with the deceased the previous night. He then received another call from Amos Otieno who was living with them in Kayole who confirmed the death.
25. When he returned to Nairobi the following day, there was a funeral meeting, where he heard that it was the accused persons who had killed the deceased, he received information from one Brian Otieno that two of the accused persons had passed through his place and had a knife with them but did not tell him where they were going, on the 25<sup>th</sup> January he proceeded to where they were living but did not find the 1<sup>st</sup> accused, when he asked the 2<sup>nd</sup> accused if he knew how the deceased had died, he did not respond and the 3<sup>rd</sup> accused told him that they knew of what happened when he asked them to confess and that the 2<sup>nd</sup> accused was to give the 3<sup>rd</sup> accused money, which was sent by the 4<sup>th</sup> accused for the said purpose and that the actual person who killed the deceased was known as "JEMO" who had since disappeared.
26. He then decided to give this information to his father who advised him to report to the police which he did leading to the arrest of the accused persons, whom he identified at the police station and that the 3<sup>rd</sup> accused confessed to him that the motive of the killing was the land dispute. In cross examination, he stated that he got the information from Kennedy Ouma Ogunde and Brian Otieno and that the 3<sup>rd</sup> accused confessed to him that he was with the 1<sup>st</sup>, 2<sup>nd</sup> accused persons and Jemo who killed the deceased and that the 4<sup>th</sup> accused had paid the money to facilitate it.
27. PW10 Rose Auma Omolostated that after the death of the two wives of the accused persons and the deceased father, the 4<sup>th</sup> accused remained in the home and that in the year 2013 following a dispute over the subdivision of the land the deceased reported the matter to the police and that when a meeting thereon was convened, the 4<sup>th</sup> accused did not attend but the elders proceeded to put the bacons which the 4<sup>th</sup> accused later uprooted and said that he was going to finish the deceased and will then come for her, which threat they reported to the police upon which he was arrested, they then agreed that he would replace the bacons and was released.



28. The deceased then left the village for Nairobi on 1<sup>st</sup> of January 2014 leaving his wife in the village only to learn of his death on the 23<sup>rd</sup> of January. It was her evidence that following the death of the deceased mother, her friends took him up together with his siblings and he only returned home as an adult before coming to work in Nairobi.
29. In cross examination she stated that the 4<sup>th</sup> accused had earlier refused to subdivide the land to the deceased and when the chief and the elders came for the exercise he disappeared and when she later insisted that the 4<sup>th</sup> accused should give the land that belonged to the deceased mother to him, he told her that once he was done with the deceased he would come for her, causing her to make a report to the police. It was her evidence that the deceased died soon after the 4<sup>th</sup> accused issued threats to him, which understood to mean that he was going to kill him.
30. PW11 Kasmuel Onyango Ogeto, the clan elder stated that the father of the deceased and the accused persons had two wives, with the accused persons belonging to the first wife's house while the deceased belonged to the second wife, where he was the only son. He confirmed having been instructed by the chief to help in the demarcation of the boundaries between the 4<sup>th</sup> accused and the deceased and that during the said exercise the 4<sup>th</sup> accused pointed at Rose Auma and told her that once he had finished (sic) the deceased he would go for her. He stated that they proceeded to subdivide the land in his absence which did not please him.
31. The following day, the 4<sup>th</sup> accused removed the bacons and was reported to the police who arrested him, upon which they entered into an agreement that he would restore the bacons and was released, and he disappeared from the village. It was his evidence that the deceased came to the village in December and on the 23<sup>rd</sup> January, he received the news of his death and they suspected the 4<sup>th</sup> accused to had masterminded the killing over the disputed subdivision, as he soon disappeared from the village.
32. PW12 Seth Otieno Omwaro, received the information of the death and called one Brian Otieno, who informed him that they suspected that his step brothers had been involved in the killing. He was later on informed that the police had arrested the first three accused persons, who mentioned the 4<sup>th</sup> accused as their financier. He confirmed that the deceased had informed him of the threats issued to him by the 4<sup>th</sup> accused. He stated that the 1<sup>st</sup> accused was suspected by Brian to had been involved, since on the night of the murder, he did not sleep at the place where he was living.
33. PW13 Brian Otieno Obuyate testified under a warrant of arrest and stated that he knew all the accused person who were his cousins save for the 3<sup>rd</sup> accused who he came to know in the month of December 2013. He stated that he was living with the 2<sup>nd</sup> accused in the same house and that on the 18<sup>th</sup> of January, he left together with the first accused who had with him a new kitchen knife and that on the material night he did not sleep in the house, only to be informed in the morning of the death of the deceased and when he met the 2<sup>nd</sup> accused on the way to make report to the police, he declined to accompany them.
34. It was his further evidence that the 1<sup>st</sup> accused was also missing from his house and that during the period of the funeral arrangements, the 2<sup>nd</sup> accused did not cooperate with them and relocated from Kayole to kibira. In cross examination, he stated that when the accused persons were arrested, they said that once they are done with the police, they would kill him. He confirmed that the 1<sup>st</sup> accused had a new kitchen knife which he refused to give him. He stated that when the three accused persons were arrested, they said that it was the 4<sup>th</sup> accused who sent them money to execute the plot and that during that period the 2<sup>nd</sup> accused could not stay near them.



## Defence Case

35. DW1 Jacob Odhiambo Arokogave a sworn statement in his defence and stated that on 24<sup>th</sup> January 2014, he left his house at Kayole at 6.00am for his place of work, where he found the padlock broken and some of his tools of trade missing. He then received a call from pw13 who asked him whether he had received the information on the death of the deceased, whom he last saw in 2010 October. He stated in cross examination that he did not have any grudge with the deceased, he denied that there was a dispute between the deceased and his brothers. He confirmed that he bought a new knife on 10<sup>th</sup> January 2014.
36. DW2 Kevin Ocheing Odikre stated that he was an artist with lady Maureen and that on 23<sup>rd</sup> January 2014, he was on duty at Kenya cinema bar up to 6.00am when he went back to the estate and was with PW13 at 7.00am when he was called and told of the death of the deceased and went and found his body.
37. DW3 Wicyff Ouma Odhiambostarted that he did not know the deceased but knew the first accused as a neighbour and that it was a must to go to the scene
38. DW4 George Opiyo Odikre stated that he used to live with the deceased up to 2009 when he came to Nairobi and that the same had built a house in his compound until he married, he denied the existence of land dispute between them though the deceased went to the chief and insisted on a meeting before going back to Nairobi from the village.
39. He denied having sent money to the 2<sup>nd</sup> accused. In cross examination he stated that his father had bought for the mother of the deceased land and that is why he did not subdivide land to her and that the deceased at that time now wanted to build a home and that he used to fight his wife so he told him to move out of his compound.

## Submission

40. At the close of the defence case the state opted not to make submissions. on behalf of the accused persons it was submitted that the case was purely based on circumstantial evidence and that malice aforethought was not established.

## Determination

41. The fact and the cause of the death of the deceased was not disputed throughout the course of this trial, all the prosecution witnesses and the accused persons confirmed that indeed the deceased died on the night of the 23<sup>rd</sup> January 2014, with the cause of death being proved by the evidence of Pw5 Dr Johansen Oduor to be exsanguination as a result of severe injuries caused by a sharp object. It is therefore my finding and I hold that the death of the deceased was proved to be unnatural beyond reasonable doubt.
42. The only disputed issue is whether the said death was caused by the accused persons, with malice aforethought, put differently is whether the prosecution proved the other elements of the offence against the accused persons.
43. This case was purely based on circumstantial evidence as there was no eye witness who saw the accused persons cause the death and as submitted by the defence, on a case such as this , the court of appeal in the case of *Sammy v republic* [2022]KECA being an appeal against a judgement of this court had this to say on circumstantial evidence ,(a) that the exculpatory facts must be incompatible with the innocence of the accused person,(b) must be incapable of explanation upon any other than that of guilt of the accused ,(C) there must be no other existing circumstances weakening or destroying the



inference and (d) every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.

44. The court further referred to *Simon Musoke v Republic* [1958] EA and stated that even where the court is satisfied that the above threshold has been met, the court is enjoined to exercise caution and to make sure that there are no other existing circumstances which would destroy or weaken the inference.
45. In this case, the undisputed facts are that the 2<sup>nd</sup> and 4<sup>th</sup> accused persons were step brothers of the deceased. The 1<sup>st</sup> accused was their first cousin while the 3<sup>rd</sup> accused was their neighbour. The fact that there was a land dispute in the village between the 4<sup>th</sup> accused and the deceased was also proved through the evidence of PW1PW2, PW3, Pw10 and PW13. It is also clear from the evidence tendered before me that the 4<sup>th</sup> accused was not happy with the turn of events in the village where the deceased was given land by the villagers and for which he had issued some threats to the same.
46. What is disputed is whether the same actualized the said threats leading to the death of the deceased which then forms the basis of the circumstantial evidence linking the accused persons to the murder herein,
47. To link the 4<sup>th</sup> accused to the offence, it was the prosecution case that the same had sent some money to the 2<sup>nd</sup> accused for the purposes of the plot but the prosecution made no attempt to prove this line of theory either through the production of the mpesa link or any other documentary evidence and at the close of the prosecution case, this theory rained hanging on the rope of hearsay evidence which is so weak an evidence to sustain a conviction on a murder charge.
48. The other circumstantial evidence tendered by the prosecution, was the conduct of the 4<sup>th</sup> and the 2<sup>nd</sup> accused persons, that the 4<sup>th</sup> accused went missing from the village soon after the death of the deceased and that the 2<sup>nd</sup> Accused did not sleep in the house where he was staying on the fateful night. The accused persons as required by law gave plausible explanation which was not dislodged by the prosecution and at the end of the case, the allegations against the same remained mere suspicion which as has been stated over and over again, however strong cannot form the basis of a conviction.
49. The 2<sup>nd</sup> accused explained that he was an artist with the late Benga star Lady Maureen and on the fateful night was playing at Kenya cinema, which alibi defence the prosecution made no attempt to dislodge, while the main suspect in this plot the 4<sup>th</sup> accused also offered explanation on why he had left the village, which remained plausible at the close of the defence case.
50. The court having dis allowed the admission of the confession statement herein, it therefore follows that there was a very strong suspicion that the 4<sup>th</sup> accused who was not happy with the deceased claiming what he considered his rightful share of the inheritance might have organised for his elimination, there was the mention of one JEMO who is alleged to had been the actual person who killed the deceased whose whereabouts the prosecution made no attempt to explained and the mere fact that the first accused was seen with a new knife cannot be used to link him with the offence herein.
51. Further save for the fact that the 4<sup>th</sup> accused had issued the threats to finish the deceased together with PW10 whom he considered his supporter, there was no evidence tendered to prove that the accused persons had formed a common intention to eliminate the deceased as the only evidence tendered by the prosecution, was that it was the 4<sup>th</sup> accused who was not happy with the deceased and wanted him dead but there is no evidence that all the accused persons had formed a common intention which they executed and whether they acted on the said common intention as the prosecution failed to lead evidence to join this link in the chain of the circumstances.



52. At the close of the prosecution case and having considered the defence put by the accused persons, whereas there remains a very strong suspicion, of the involvement of the accused persons, in causing death of the deceased, mere suspicion cannot be a basis for conviction. It therefore follows that the prosecution failed to prove its case against the accused persons beyond reasonable doubt and therefore find the same not guilty. I hereby quash the charges and order that the Accused persons be set free forth with unless otherwise lawfully held.
53. Before penning off, I must thank Ms Odero, for taking over the conduct of this matter following the death of her father and enabling the court to conclude the same. I also wish to warn the 2<sup>nd</sup> and 4<sup>th</sup> Accused persons, that if they were involved in the death of their brother, which the weak prosecution evidence points to, then like Cain and Abel, his blood will rich the throne room of God who will avenge for what the court being a court of law has failed to do.

**DATED, SIGNED AND DELIVERD AT NAIROBI THIS 20<sup>th</sup> DAY OF FEBRUARY 2023.**

**J. WAKIAGA**

**JUDGE**

**In the presence of;**

