



**Republic v Ooko (Criminal Case 30 of 2019)
[2023] KEHC 2463 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 30 OF 2019**

**KW KIARIE, J
MARCH 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ERICK OTIENO OOKO ACCUSED

JUDGMENT

1. Erick Otieno Ooko is charged with two counts of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars in count one are that at unknown time between October 21, 2019 and the October 26, 2019, at Seka “B” village in Mbita sub county of Homa Bay county jointly with another, murdered Rihana Nafula Okelo.
3. In count two the particulars are that at unknown time between October 21, 2019 and the October 26, 2019, at Seka “B” village in Mbita sub county of Homa Bay County jointly with another, murdered Everlyn Aoko.
4. It was contended by the prosecution that after the accused impregnated Rihana Nafula Okelo and she had given birth to a baby girl, he murdered the two so that the defilement case against him pending in court could collapse.
5. The accused denied any involvement in the murder of the two and pleaded an alibi.
6. The issues for determination are:
 - a. Whether the accused was involved in the murder of one or both the deceased; and
 - b. Whether the offence of murder was proved.



7. Whenever an accused person pleads an alibi, the onus is on the prosecution to prove falsity of it. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR the Court of Appeal rendered itself thus:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of *alibi* lies on the prosecution; see *Karanja v R*, [1983] KLR 501 ... this court held that in a proper case, a trial court may, in testing a defence of *alibi* and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of *alibi* at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

8. In my analysis of the evidence against the accused, I will bear in mind that he does not have the burden to prove his alibi.
9. Nevas Auma Odera (PW2) is a sister-in-law of the accused. She gave two versions of evidence and was declared a hostile witness. In *Batala v Uganda* [1974] EA 402 the Court of Appeal at page 405 said:

"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight."

This witness had stated that the accused had informed her that he was present during the murder for he had hired the people who committed the offence. She however changed and said that the police forced her to record what appeared in her statement. This evidence unless corroborated in some material aspects, cannot be relied upon.

10. Upon my perusal of the evidence on record, I do not find any evidence that corroborate the evidence of Nevas Auma Odera (PW2).
11. Mary Akinyi Okuom (PW8) testified that the accused who was a boda-boda rider went to her premises and rented a single room at Kshs 2,200/= per month. He was later joined by a woman and a child with whom they were living together. She knew the woman as Mama Everlyne. There was no attempt by the prosecution to establish whether this woman she knew as Mama Everlyne was the deceased adult in this case. This evidence as it is, does not assist the court in any way. It remains in the realm of speculation.
12. There was evidence that the accused and Rihana had a relationship which persisted even after the birth of her daughter. The evidence of George Otieno Ooko (PW1) was that there was an allegation in July 2019 that the accused was staying with Rihana. This was confirmed by the evidence of a pair of female shoes that was found in the house of the accused. Rihana's DNA was picked from them.
13. The accused contended that between 21st and October 26, 2019 he was in Kisumu. This was contradicted by the evidence of his brother, George Otieno Ooko (PW1) who testified that on October 21, 2019 he went home and appeared disturbed. He also said that on October 26, 2019 the accused informed him that his wife was sick in Kisumu. This therefore displaced the alibi defence of the accused.
14. The prosecution adduced circumstantial evidence on which it was relied to connect the accused to the two deaths. In the case of *Mohamed & 3 others v Republic* [2005] 1KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

"Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence



of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved."

In the instant case the prosecution left so many loose ends to an extent that the evidence against the accused amounts to nothing more than suspicion. The Court of Appeal in the case of *Sawe v Republic* [2003] KLR 354, held as follows:

"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

15. The upshot of the foregoing analysis of the evidence on record is that the prosecution has failed to prove its case against the accused person. I accordingly acquit him of the offence of murder and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

