



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Opiyo & another (Criminal Case 43 of 2018)  
[2023] KEHC 2304 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2304 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL CASE 43 OF 2018  
KW KIARIE, J  
MARCH 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SHEM ODOYO OPIYO ..... 1<sup>ST</sup> ACCUSED**

**SANDRA ACHIENG ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Shem Odoyo Opiyo and Sandra Achieng are charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars are that on November 21, 2018 at Maguje village, Kanyach Kachar location in Homa Bay Sub County of Homa Bay County jointly with others not before court, they murdered Erick Ochieng Opiyo.
3. When the body of the deceased herein was recovered, the two accused were implicated in the murder. The first accused was the brother of the deceased while the second accused was the deceased's wife.
4. Each accused denied any involvement in the murder of the deceased. The second accused pleaded an alibi.
5. The issues for determination are:
  - a. Whether there is any evidence that link one or both accused to the offence;
  - b. Whether any or both accused was involved in the murder of the deceased; and
  - c. Whether the offence of murder was proved.



6. The prosecution did not adduce any direct evidence against any of the accused the evidence that was tendered was circumstantial against both accused. In the case of *Mohamed & 3 Others vs 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, I will seek to establish whether the evidence so tendered is incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of their guilt.

7. The evidence that the prosecution relied upon against Shem Oduyo Opiyo (accused one) is the evidence from government analyst report. According to the evidence of Corporal Ondieki Mogaka (PW6), they recovered a pair of stained trousers and a pair of black pair of trousers outside the house of accused one while two stained vests and a jacket were recovered from inside his house.
8. The government analyst report was produced as prosecution exhibit 13. According to this report, there were three vests. Two sleeveless white vests had blood stains that belonged to unknown person. Another white vest with a yellow lining had DNA profile matching that of the deceased.
9. There was no conclusive DNA profile that was generated from the leather jacket and from a black pair of trousers. This is the pair of trousers recovered outside the house of the first accused.
10. It is clear therefore that there was no DNA profile generated from the items recovered from outside or inside the house of the first accused which could link him to the offence. I accordingly acquit him of the offence of murder and set him free unless if otherwise lawfully held.
11. 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 vs 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.
12. In my analysis of the evidence against the second accused, I will bear in mind that she does not have the burden to prove her alibi.
13. Sandra Achieng, the second accused testified that in the month of November 2018 she was sent to her parents' home to collect her children. She delayed and returned on November 21, 2018. She found many people at their home. She was arrested and implicated in the offence.
14. Her contention was however contradicted by the evidence of Mary Adhiambo Odhawa (PW7). This witness testified that at about 6.30 am on the November 21, 2018 she found the second accused at River Agulo where she was washing clothes. The accused asked her if she had seen the deceased for some people had called him the previous night to go for a disco. Later the two walked towards their homes together and parted ways when the accused entered into her gate.
15. This evidence displaced the alibi defence of the second accused.



16. There is no direct evidence that link this accused to the offence; she is linked by circumstantial evidence. In the case of *Mohamed & 3 Others vs 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 case of *Republic vs Kipkering Arap Koskei & another* 16 EACA 135, the Court of had earlier held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

I will therefore be guided by these two cases to find if there is sufficient evidence against this accused.

17. When the body of the deceased was recovered, evidence on record is that there were telltale signs that indicated he was killed elsewhere before it was abandoned where it was found. This was confirmed by a lot of blood in his house including on the curtains and the beddings. Perhaps in a bid to cover up, this is why the mattress was set ablaze.
18. The logical conclusion to make is that the deceased was killed in his house. This must have been executed by more than one person.
19. It would appear that the second accused was trying to invent an explanation of the whereabouts of the deceased when she informed Mary Adhiambo Odhawa (PW7) that the previous night he had gone to a disco and never returned. When she returned to her house with the clothes she had gone to wash, it appears she momentarily disappeared and resurfaced when she met police officers at her home.
20. The inculpatory evidence against this accused is incompatible with her innocence, and incapable of explanation upon any other reasonable hypothesis than that of her guilt.
21. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In *Black's Law dictionary, 10<sup>th</sup> Edition* malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called 'abandoned and malignant heart'), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) An intent to commit a felony;



- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
22. The evidence on record indicated that the murder of the deceased was well planned and executed by more than one person. I find that malice aforethought has been established. I therefore, find that the prosecution has proved the offence of murder against the accused. I accordingly find her guilty of the offence and convict her.

**DELIVERED AND SIGNED AT HOMA BAY THIS 27<sup>TH</sup> DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

