



**Republic v Omunga & 2 others (Criminal Case 27 of 2019)
[2022] KEHC 3099 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 27 OF 2019**

**KW KIARIE, J
JUNE 23, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

GEOFFREY CHACHA OMUNGA 1ST ACCUSED

FREDRICK OJUANG' OTIENO 2ND ACCUSED

JOSEPH OKINYI SAKA 3RD ACCUSED

JUDGMENT

1. Geoffrey Chacha Omunga, Fredrick Ojuang' Otieno and Joseph Okinyi Saka 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 25th day of August, 2019, at Rangwe sub location, Suba South Sub County of Homa Bay County, murdered Stella Maris Owino.
3. Stella Maris Owino, the deceased herein, was residing at Rangwe Beach. She was trading in chang'aa. On the fateful morning, a neighbor heard her groaning and alerted other people. Those who responded found her lying on a mattress and her pair of knickers were on one side of her leg. She was bleeding from the hand and had a swollen chest. She was taken to hospital but did not recover.
4. Geoffrey Chacha Omunga (1st accused) was linked to the offence by a handset he was alleged to have had and which was said to be that of the deceased.
5. The second and the third accused were linked to the offence by suspicion.
6. Each accused denied any involvement in the offence. The second and the third accused pleaded an alibi.
7. The issues for determination are:



- a) Whether the *alibi* defence of the second and the third accused was displaced or not;
 - b) Whether any of the accused caused the death of the deceased or not; and
 - c) Whether the offence of murder was proved.
8. Fredrick Ojuang' Otieno (2nd accused) contended that he was arrested on 22nd August, 2019 and that on 25th August, 2019 he was still in cells. Joseph Okinyi Saka (3rd accused) also pleaded an alibi. He said he was at home and went to the Centre at about 8 a.m. where he found a crowd gathered. In the case of *Kiarie vs. Republic* [1984] KLR the Court of Appeal held:

An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

9. The prosecution did not adduce any evidence against these two accused persons to displace their alibi. I accordingly find that the prosecution has not proved their case against the two. I accordingly acquit each one of them of the offence of murder.
10. Jacinter Adhiambo Odhiambo (PW2) testified that Geoffrey Chacha (1st accused) went to her hotel at about 7 a.m. and was very drunk. He was in company of another who was not known to her. They ordered food. At one point, the accused fell asleep and when Kennedy went to her hotel, he recognized the handset this accused had as that one of the deceased. He therefore called the beach chairman who and the police found the 1st accused still asleep. He was arrested with the Itel handset.
11. The evidence of Kennedy Ochieng Musa (PW3) was that it was Jacinter who called him to her hotel and informed him of the handset the accused had. When he went there, he found the accused with an Itel handset which he knew to belong to the deceased. He asked the accused about the handset though he did not testify as to the response of the accused. He called the beach chairman who went and arrested the accused. He never testified of calling the police. During cross examination he said he could not tell if the accused was drunk or not.
12. PC Erick Kilonzo Musyoka (PW5) testified that he arrested the accused and two others from the office of the beach chairman.
13. In his defence the accused contended that the phone was inside the hotel but on a different table from where he was seated.
14. These two were material witnesses in this case. Their evidence was contradictory and the prosecution did not attempt to reconcile the same. 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, or raise a 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.

I therefore find that it is unsafe to rely on the evidence of these two witnesses.

15. If we assume that the prosecution had established to the required standards that the 1st accused was found in possession of the deceased's handset, there was a gaping lacuna. The prosecution failed to conduct very crucial investigations to establish whether the handset in question belonged to the



deceased as claimed by some witnesses. This could have been done by way of obtaining data from the service provider, matching the serial number, information in the phone, other significant features only known to the owner, among others. In the case of *James Mwenda Njeru vs. Republic* [2011] eKLR the court held thus:

“Proper identification could have been on basis of the serial number with proof for instance that the complainant has a receipt for the phone bearing that number. It could also may have been acceptable proof of ownership of the complainant demonstrated he had the pin number for the phone which could be used to operate it or by other proof showing some unique identifying feature to distinguish the phone as the complainant’s property. No such cogent proof of identification was given in the circumstances the identification fell short of the required proof.”

16. Without such evidence either from the network provider or a purchase receipt, this court is unable to conclude that it belonged to the deceased. The prosecution did not therefore adduce sufficient evidence on which a conviction can be founded. I therefore acquit the accused of the offence of murder and set him at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

