



**Republic v Ajuma & another (Criminal Case E003 of 2020)
[2022] KEHC 11176 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 11176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E003 OF 2020**

**KW KIARIE, J
JUNE 22, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

WYCLIFFE AJUMA 1ST ACCUSED

STEPHEN ODHIAMBO 2ND ACCUSED

JUDGMENT

1. Wycliffe Ajuma and Stephen Odhiambo 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 night of 15th and 16th day of September, 2020, at Andingo Korwa village, in Ndhiwa Sub County of Homa Bay County, murdered Jennifer Adoyo Nyando.
3. Some men attacked the home of Sofia (PW2) at night and when her mother raised an alarm, the deceased went from her house to find out what was the issue. She met with the fleeing attackers who fatally wounded her. Sofia testified that she recognized the two accused persons.
4. Each accused pleaded an alibi.
5. The issues for determination are:
 - a. Whether the purported recognition of the accused persons was free from error;
 - b. Whether any or both accused were involved in the death of the deceased; and
 - c. Whether the offence of murder has been proved against any one of them.
6. Each accused in his defence pleaded an alibi. Each of one them gave own account at the time of the offence. In the case of [Kiarie v 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.

I am aware that throughout the proceedings, the burden remains on the prosecution. I will therefore endeavour to find whether the prosecution discharged this burden.

7. Sofia Atieno Agenga (PW2) is a sixteen years old girl, at the time she testified on July 21, 2021. Her evidence was that she was sleeping with her mother in the outer room when she was roused from sleep at about 2 a.m. by a bang on their door. The intruders forced it open and entered in with very bright spotlights.
8. When the intruders entered their house, they started beating her. She raised an alarm and Ajuma called her by name and told her to keep quiet. She said that she recognized the attackers from the light of the spotlights they had.
9. The incident took place at night and the only source of lighting was the spotlights the intruders had. This therefore requires careful evaluation of evidence in order to ascertain if the purported recognition was free from error. I will bear in mind the direction by Lord Widgery CJ in the celebrated case in identification and recognition where in *R. vs. Turnbull and others* [1976] 3 All ER 549 he stated as follows:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

...

Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

10. According to the evidence of Sofia Atieno Ageng'a (PW2) after she was roused from sleep by the loud bang on their door, she found the intruders in the house. When she raised an alarm they started to beat her. Certainly this was not favourable for any visual recognition. It was not possible in the circumstances to recognize any of the intruders who had directed their spotlights at her mother. It explains why her mother said she did not recognize anybody.
11. Although this witness did not testify to have recognized any of the intruders with their voices, one would have expected her and mother to do so for in her evidence she testified to have known the people she purported to have recognized for a long time. She did not say so. This buttresses my finding that the circumstances were not favourable for a positive recognition.
12. Other than the sixteen years old girl, her mother was in the same room with her. Calvince Ochieng Onyango (PW1) testified that the girl's mother informed him that she did not recognize anybody.
13. From the foregoing analysis of the evidence on record, I find that the evidence adduced by the prosecution does not displace the alibi defence of the accused. I therefore find that the prosecution has



not proved its case against both accused persons. I accordingly acquit each one of them of the offence of murder and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

