



**Republic v Ogutu & 3 others (Criminal Case 28 of 2020)  
[2022] KEHC 12094 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12094 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL CASE 28 OF 2020**

**KW KIARIE, J  
JULY 26, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**KEVIN SIMON OGUTU ..... 1<sup>ST</sup> ACCUSED**

**PHILIP OGUTU ODHIAMBO ..... 2<sup>ND</sup> ACCUSED**

**DANIEL OCHOLLA OGOMBA ..... 3<sup>RD</sup> ACCUSED**

**PAUL ODHIAMBO AYIEKO ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. Kevin Simon Ogutu, Philip Ogutu Odhiambo, Daniel Ocholla Ogomba and Paul Odhiambo Ayieko 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 11<sup>th</sup> day of July, 2020, in Lake Victoria waters near Sena Beach in Mbita Sub County of Homa Bay County, murdered George Ooko Okoth alias Amina.
3. The crew of “Eunness Dani” boat accused the crew of “Leo Guardia” boat of stealing of their fishing lamp and attacked them. The prosecution contends that in the course of the attack, the deceased herein fell into Lake Victoria and drowned. The accused who were crew members of “Eunness Dani” boat were accused of being responsible for his death.
4. In their defence, the accused contended that the crew of “Leo Guardia” boat stole their battery and when they attempted to steal the second one, they accosted them. They entered into “Leo Guardia” boat and recovered their stolen battery. When they were in the process of tying the culprits is when the latter informed them that a member of their crew had fallen into the lake. They therefore each denied any involvement in the death of the deceased.



5. The issues for determination are:
  - a) Whether any of the accused caused the death of the deceased or not; and
  - b) Whether the offence of murder was proved.
6. Joshua Otieno Maseno (PW1) was the only crew member of “Leo Guardia” boat who was called by the prosecution to testify. His evidence was that he was hit on the leg and woke up from sleep. He was then asked to stretch his hands. He complied and he was tied. He then asked Vincent, his colleague where George was. Vincent told him that George had been beaten and he fell into the lake. This witness was not an eye witness. Vincent and Silas who were crew members of “Leo Guardia” were not called as witnesses. No explanation was tendered as to why these two material witnesses were not called.
7. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.
8. The medical evidence by Dr. Stephen Omondi Obunga (PW4) was that the deceased sustained a crushed skull. His opinion was that the cause of death was asphyxia due to brain injury secondary to blunt impact trauma and drowning in large water mass.
9. Had the prosecution called Silas and Vincent to testify, the court would have had evidence on which to conclude who may have caused the head injury. At best the evidence of Joshua Otieno Maseno (PW1) was hearsay. It cannot form the basis of a finding against the accused persons.
10. I am left with evidence of suspicion against each accused. The Court of Appeal in the case of *Sawe v Republic* [2003] KLR 354, the Court of appeal held as follows:

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

I therefore find that the evidence on record did not go beyond suspicion.
11. The offence of murder was therefore not proved against any of the accused persons. I accordingly acquit each of the offence of murder and set him at liberty unless if otherwise lawfully held.

**DELIVERED AND SIGNED AT HOMA BAY THIS 26<sup>TH</sup> DAY OF JULY, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**

