



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Opiyo (Criminal Case 35 of 2018)
[2022] KEHC 14449 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 35 OF 2018**

KW KIARIE, J

OCTOBER 27, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

NASIR HAMISI OPIYO ACCUSED

JUDGMENT

1. Nasir Hamisi Opiyo is 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 September 2, 2018, at Kendu Bay Township in Rachuonyo North Sub County of Homa Bay County, murdered Wickliff Otieno Agao.
3. The deceased was found on the road with serious injuries and was taken to hospital where he succumbed to the injuries while undergoing treatment. The accused was connected to his death on allegations that he beat the deceased after accusing him of attempted theft.
4. Nasir Hamisi Opiyo, the accused, in his defence pleaded an alibi.
5. The issues for determination are:
 - a. Whether the accused caused the death of the deceased or not;
 - b. Whether his alibi was displaced or not; and
 - c. Whether the offence of murder was proved.
6. Two witnesses linked the accused to the death of the deceased herein. The first one is Kennedy Odhiambo (PW2). He testified that that the accused raised an alarm that the deceased was a thief but did not witness him beat the deceased. However, when he was declared hostile, he claimed that after the accused found the deceased in his barber shop he raised an alarm and participated in beating



him. During cross examination by the defence counsel, he changed and claimed that he did not know who beat the deceased. He again changed during reexamination and testified that the accused beat the deceased.

7. What is the place of a hostile witness? How is such evidence to be rated? In the case of *Batala vs Uganda [1974] EA 402* the court 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.

The evidence of a hostile witness can only be given credence if it is corroborated by some other independent evidence.'

8. The second evidence that linked the accused to the death of the deceased is that of Flora Aoko Omondi (PW3). She said when she was attracted by an alarm raised over a thief, she went and found the accused in his barber shop and the person alleged to be a thief. Present was also a watchman called Kennedy (PW2) and were joined by a motor cyclist who had a passenger. She did not witness the deceased being beaten.
9. 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 on the issue of alibi:

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.

In the instant case, I find that the evidence of Flora Aoko Omondi (PW3) has displaced the alibi of the accused and find that he was present at his barber shop where the deceased was arrested for allegedly being a thief.

10. Other than the accused being at the scene, there was Kennedy Odhiambo (PW2) and two other people who went to the scene on a motor bike. The statement of Kennedy Odhiambo (PW2) had indicated that the deceased was beaten by the motor cycle riders. He later indicated that the accused was also involved in beating the deceased but kept changing at will. 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.'



It is unsafe to rely on the evidence of this witness.

11. I therefore find that the prosecution has failed to prove its case against the accused to the required standards. I accordingly acquit the accused of the offence of murder and set him free unless if otherwise lawfully held.

Delivered and signed at Homa Bay this 27th day of October, 2022

KIARIE WAWERU KIARIE

JUDGE

