



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Aloo (Criminal Case E046 of 2021)
[2022] KEHC 14450 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E046 OF 2021
KW KIARIE, J
OCTOBER 26, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID OMONDI ALOO ALIAS BOSS ACCUSED

JUDGMENT

1. David Omondi Aloo *alias* boss, 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 night of May 20th & 21st, 2020 at Oridi Trading Centre, Ndhiwa sub county of Homa Bay county, jointly with others not before court murdered Joseph Ouma Obote.
3. The prosecution presented two versions of how the deceased met his death. According to the evidence of Elijah Otieno Abuto (PW1), while he was being ferried by the deceased on a boda-boda the accused and two others confronted them and took the deceased away. One of the trio said they were going to kill the deceased. Later, the deceased was found dead.
4. The second version was that the deceased was placed inside the kiosk of the accused from where he was beaten. The accused was one of those beating him.
5. David Omondi Aloo alias Boss, the accused contended that the deceased was found on an electricity pole and after he was ordered to descend and he complied, Yambo beat him. He denied any involvement in beating the deceased.
6. The issues for determination are:
 - a. Whether any of the accused participated in beating the deceased or not; and



- b. Whether the offence of murder was established.
7. The evidence of Geoffrey Ouma Ondiek (PW2) is that when he was going home from drinking alcohol, the deceased stopped to ferry him on his motor cycle. Before he could embark, some three people emerged from a bush wielding machetes. He was pushed down and he fell into some mud. The other two went and held the deceased. He recognized the accused for he told him not to follow them while Geto said they were going to kill the deceased whom they went away with. One of the three went with the motor cycle of the deceased. He went on to say that he recognized the accused from his voice. He (PW2) went and reported to chief Elijah Abuto (PW1). He also went and reported to the same chief that his life was in danger after the accused warned him twice not to report. This was on 24th & May 25, 2020.
8. Elijah Otieno Abuto (PW1) the chief north Kanyikela location testified that he received a report concerning this matter on May 22, 2020 from a watchman called Moti who reported to him that Joseph Ouma Obote (the deceased herein) was locked in the kiosk of the accused.
9. The evidence of this witness introduces serious doubts in the evidence of Geoffrey Ouma Ondiek (PW2). Even if it had not, this evidence would have required corroboration considering that it was a dark night and he was very drunk. The court of Appeal in the case of *Simeon Mbelle v Republic* [1982] IKAR 578. The court said:

In relation to the identification by voice, one it would obviously be necessary to ensure: -

- (a) That it was the accused person's voice;
- (b) That the witness was familiar with it and they recognized it and
- (c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

The circumstances under which he said the recognition was made were not favourable for any positive recognition.

10. John Nyagunda Yambo (PW3) is a watchman at Oridi secondary school. At about 10 pm he was on duty with his co-worker, Erick Ochieng. The latter called him to go to the gate where he was. He found him with the accused and Ouma (the deceased herein). The accused was holding the deceased and a machete. The trio walked towards Oridi Centre and he remained at the school. Later Erick called him to go to the Centre. When he went there, he found Ouma inside the kiosk of the accused and the accused was beating him on the thighs using the flat side of the machete. The accused alleged that the deceased had stolen from him. The following morning at about 5 am Erick Ochieng his workmate returned to the school and told him that they took the deceased to his home.
11. During cross examination, this witness conceded that in his statement to the police he had indicated that he had accompanied the trio to Oridi Centre. He admitted that this was the true position. His statement indicated that he helped to push the deceased inside the kiosk of the accused. He equally admitted that he was arrested and released after nine days.
12. The evidence of John Nyagunda Yambo (PW3) appears to be self-serving. He testified that twice his colleague Erick Ochieng called him to go where the deceased was but curiously, he did not testify why he was being called to go to the gate and to Oridi Trading Centre. It appears he deliberately withheld some material information which he conceded during cross examination. The Court of Appeal in the case of *Ndungu Kimanyi v 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 find it unsafe to rely on the evidence of this witness without corroboration by some other material evidence.

13. When the post mortem was conducted, the cause of the death was established to be severe head injuries.
14. The accused in his defence contended that after the deceased was found on an electricity pole, he slid and fell down after he was ordered to descend. Yambo (PW3) got hold of him and asked him to name the other thieves in his company.
15. Lance Evans Oduogo (DW2) testified to the same effect as the accused. He added that Yambo started to harass the deceased after he fell down.
16. The defence of the accused is persuasive. It explains the reason why Yambo (PW3) was arrested and placed in police custody for nine days.
17. I therefore find that the prosecution has not proved the offence of murder against any of the accused person. I accordingly acquit him of the offence of murder and set him at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF OCTOBER, 2022.

KIARIE WAWERU KIARIE

JUDGE

