



REPUBLIC OF KENYA



**Republic v Bodi (Criminal Case E001 of 2022)
[2022] KEHC 16540 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E001 OF 2022
KW KIARIE, J
DECEMBER 20, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNEDY ONYANGO BODI ALIAS MZEE ACCUSED

JUDGMENT

1. Kennedy Onyango Bodi alias Mzee 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 December 2, 2021 at Kakach village, Kotieno Konuong'a sub location, Rachuonyo South sub county of Homa Bay county, murdered John Odhiambo.
3. Prior to the death of the deceased herein, there was a disagreement over a phone that the son of the deceased was holding in "lien" for his radio taken by one 'mzee'. The deceased had pushed the accused outside his house after informing them that he was going to resolve the issue on the following day. The two were refusing to leave.
4. According to the evidence on record, the deceased not only pushed the accused out, but also slapped him. The accused vowed that he was going to kill him. He went and returned with some relatives. It was during this second trip that the accused is alleged to have beaten the deceased with some sticks, causing him injuries to which he later succumbed.
5. In his defence the accused contended that after he was slapped by the deceased and forcefully removed from the house, he went home and did not return there.
6. The issues for determination are:
 - a) Whether the accused was involved in the beating of the deceased or not;



- b) Whether the accused caused the death of the deceased or not; and
 - c) Whether the offence of murder was proved.
7. 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 v Republic [2014] eKLR* the Court of Appeal rendered itself thus:

"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".

8. The accused contended that when the deceased found him in his home where he had gone to ask for his nephew's handset, the deceased slapped him and pushed him out of the house. He went home and did not return to the home of the deceased.

9. Grace Atieno Gunga (PW2) testified that after the accused had been slapped and pushed out, he went and returned with his mother and siblings. He was carrying three sticks. The accused announced that he was going to kill her husband for he had beaten him. The evidence of Brian Omondi Odhiambo (PW4) was that the accused returned with two sticks. Unlike his mother PW2, who testified that the accused was accompanied by his mother, wife and sister in-law during the second trip to their home, his testimony was that he was not in company of anybody. This is a very material contradiction. 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."

10. If I were to overlook the contradiction I have pointed out, then the evidence against the accused is circumstantial. This is because of what had earlier transpired over the issue of a handset. In the case of *Mohamed & 3 Others v Republic [2005] 1KLR 722* Osiemo judge explained what circumstantial evidence is as follows:

"Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved."

11. The evidence of Grace Atieno Gunga (PW2) is self-contradictory. Her evidence was that she went out after she heard her husband who was outside exclaim that Kennedy, the accused had beaten him. When she went out, she did not find the accused. However, she later testified that she saw the accused go to her home while armed with three sticks. When she told them to go away, the accused announced that he was going to kill her husband for beating him. She went on to say that she was able to see him with the assistance of her phone's torch.



12. Brian Omondi Odhiambo (PW4) said when the accused went to their home with two sticks, he went away. He did not testify that his mother asked them to go away and also did not testify that he heard the accused say that he was going to kill the deceased, during the second trip to their home.
13. PW3 is a minor. Her evidence was equally contradictory. She testified that her father found her in the kitchen. He sat on a jerry can and groaned. She however later testified to have seen the accused who beat her father with a stick. This was a dark night and although she testified that her father had a D-light lamp, this does not flow with her earlier evidence.
14. The circumstantial evidence against the accused is not sufficient, especially with the many contradictions in the prosecution case, to make a finding that the accused was the one who inflicted the fatal injuries to the deceased. What we are left with is mere suspicion owing to the circumstances before the fatal injuries. 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."
15. From the foregoing analysis of the evidence on record, I find that the prosecution has failed to prove their case to the required standards. I accordingly 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 20TH DAY OF DECEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

