



**Republic v Ogutu & another (Criminal Case 10 of 2019)
[2022] KEHC 16679 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16679 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 10 OF 2019
KW KIARIE, J
DECEMBER 20, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

LAWRENCE OTIENO OGUTU 1ST ACCUSED

WYCLIFF OTIENO OYUGA 2ND ACCUSED

JUDGMENT

1. Lawrence Otieno Ogutu and Wycliff Otieno Oyuga are charged with two counts of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the offences are that on the night of 2nd and 3rd day of April, 2019 at Kogil village, Kanam “B” location in Kendu Bay sub county of Homa Bay county, jointly with others not before court, murdered George Owino Odada and Benard Otieno Ochola.
3. Just like flash floods, the fury of a mob is uncontrollable. On the material night, a good number of Kanam village residents descended on the homes of the two deceased persons the subject of this case and killed them in a very gruesome manner.
4. George Owino Odada was killed and his body thrown in his house which had been set ablaze. No reason was given as to why the mob killed him.
5. Just like George Owino Odada, Benard Otieno Ochola was removed from his house and beaten badly. He was then taken back to his house that was burning. This is where he died. It was alleged that he had killed one Ajowi and that he was having an illicit affair with the wife of the first accused.
6. In his defence the first accused pleaded an alibi. The second accused contended that though he was at the home of Odada, he only assisted in saving the children and putting out the fire.



7. The issues for determination are:
 - a. Whether the first accused was at the scenes of the offences;
 - b. Whether the second accused was a good Samaritan or a culprit; and
 - c. Whether the prosecution proved its case to the required standards.
8. One of the horrendous scenes was at the home of George Owino Odada. This is what happened according to the prosecution witnesses. Elizabeth Auma Odada (PW2) testified that while she was asleep, she was woken up by the shattering of her window panes. Their house was set on fire using petrol and they were ordered to get out. Her deceased husband got out through the window. She, together with her children, also went out through the window. She only recognized Mzee Ajeyo by his voice for it was him who was ordering them out. She identified Mzee Ajeyo as the second accused. She further testified that the second accused assisted her and her children to get out of the burning house. She heard him call other people to assist her and the children. She put out the fire burning their house with the assistance of their children. At that time, her husband had run to the homestead William Odidi, their neighbour.
9. Elizabeth Auma Odada (PW2) went on to testify that her husband was killed after he was removed from the home of Odidi. She watched the incident of killing of her husband from a hideout behind a house. She saw a mob of between twenty and thirty people beat her husband to death. These people were surrounding her husband as they beat him.
10. In her testimony, Elizabeth Auma Odada (PW2) testified that it was a dark night yet she testified to have recognized some two people who were not before court. During cross examination, she said that she saw the first accused in her home as he beat her husband.
11. Whenever an identification or recognition is disputed, if circumstances are not favourable for positive identification, then care must be taken to ensure that there is no miscarriage of justice. Lord Widgery CJ in the celebrated case in identification and recognition of *R. vs. Turnbull and Others* [1976] 3 All ER 549 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.
12. In her evidence, PW2 said it was a dark night. She was about sixty meters from where her husband was beaten to death. He was surrounded by between twenty and thirty people. I make a finding that she was not in a position to identify the person she said was the first accused among the assailants or any other person for that matter.



13. From the evidence of this witness, the role of the second accused was to rescue her and her children. This was the gist of her daughter's (PW3's) evidence. She added that after rescuing them, Mzee Ajeyo (accused 2) ran towards the beach. The second accused contention was to the same effect except that he did not testify of running towards the beach.
14. The second scene was at the home of Benard Otieno Ochola. The incident was at about 9 p.m. according to the evidence of Christine Anyango (PW1). Her evidence was that some people forced their door open and attacked them. She managed to run to her father in-law's house. When she returned to her house, she found a group of more than ten people beating her husband. From the group, she managed to recognize four people with the help of the light from the fire of her burning house. One of the people she recognized was the first accused. She went on to testify that the first accused suspected her deceased husband to have killed Ajowi, his fellow clansman. He was also suspecting the deceased to have had an affair with his wife. During cross examination she said that the first accused was among the people who took her husband back to the burning house.
15. When this witness returned to her burning house, she found her husband surrounded by about fourteen people who included the first accused, Ben Ayieko, Ben Ang'wen and Shem Ago. Her evidence was that the people she did not recognize were about ten. After less than one minute of her return, she asked them why they were beating her husband. They beat her and she ran back to her father in-law's house.
16. Though she testified that the first accused cut her on the head, the prosecutor did not elicit from her evidence at what juncture this happened. This could have helped the court to appreciate whether at this point she could have identified her assailant.
17. Due to the prevailing circumstances, unless this evidence was corroborated by some other material evidence, it would be unsafe to make a finding that she identified the first accused. This evidence could have been corroborated by that of her father in-law, PW4.
18. David Ochola (PW4) testified that the incident at her son's house was at 12.30 a.m. When he was woken up by screams he went out. He however could not move closer for there were about thirty people at the gate and there was a fence of barbed wire and euphorbia. He said he was able to identify Lawi Ogutu, whom he said was the first accused in the dock.
19. The purported identification by this witness cannot be relied upon. He was unable to identify the first accused from the witness box which is about eight paces from the dock. He only did so after being allowed to move closer. He did so when he was about two paces from the first accused. For him to allege that he was able to identify this accused from a distance of about fifteen paces, with a fence in between and the prevailing circumstances at the time is not convincing; this was not possible.
20. Another issue that the prosecution did not resolve was the time of the incident. Was it at 9 p.m. or was it at 12.30 a.m.? Whereas there was no doubt as to the incident occurrence, it was not clarified why there was evidence that contradicted as to the time of the incident.
21. 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:
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, the alibi defence of the first accused in respect of count one has not been displaced by the evidence on record. He was not implicated by any evidence in respect of count two.

22. The defence of the second accused was not only supported by his witness Hillary Oluga (DW5) but also by the evidence of PW2 and that of PW3.
23. I therefore find that the prosecution has failed to prove any of the counts against any of the two accused persons. I accordingly acquit each one of them of the offence of murder on both counts. Each is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2022.

KIARIE WAWERU KIARIE

JUDGE

