



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Alego (Criminal Case 2 of 2019)  
[2025] KEHC 2692 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2692 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE 2 OF 2019  
MS SHARIFF, J  
MARCH 3, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BASIL OWINO ALEGO ..... ACCUSED**

**JUDGMENT**

1. The Accused herein Basil Owino Alego has been charged with an offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars are that on the 29<sup>th</sup> of December 2018, at Nyamaroka village, Tamu area in Muhoroni Sub- County within Kisumu County, he murdered Oscar Odhiambo Alego.
2. The Prosecution called four (4) witnesses in support of its case which was as follows: -
3. PW1 James Agumba Weda testified that he hails from Tamu location, has been a friend of the Accused person for 5 years and he owns a bar called Nyamore Inn at the town center. According to him, on 29th December 2018 at about 6.30 p.m. while taking stock at his business premises, his friend, the Accused person herein, came into his bar. He told the Court that the Accused person beckoned for him from outside his bar and he noticed he looked disturbed. He proceeded to where the Accused person stood and the Accused person told him that Oscar, his brother, was dead. He knew the deceased herein as he was also his friend. The Accused person told him that he found the body of the deceased lying outside their family home. He asked him to call one Maureen Ojoga. This witness testified that he duly complied the request of the accused and talking to Maureen Ojoga, the latter requested him to go to the residence of the accused and confirm whether the information received from the Accused person was indeed true.
4. This witness and the accused then proceeded to the home of the Accused person and on opening the door he saw the deceased lying on the floor, in the living room and no one else was around. He noticed



that the deceased was still alive as he was breathing but when they attempted to call him he did not respond. The Accused person then directed that they leave the house and the accused locked the house. He left for Tamu Centre enroute Muhoroni to get a taxi with a view of taking the deceased to the hospital. At 9.00p.m. he proceeded to the house of the Accused person with his friend, Fred, and they found people wailing. He established that the deceased had died and he was still lying in the family house.

5. PW2 Stephen Oyieyo Ochoro testified that he is a motorbike rider based in Muhoroni area. According to him, the Accused person is his neighbor and the deceased herein was his brother and a close friend of his. On 29<sup>th</sup> December 2018, while at home the wife of the deceased called him informing him that the deceased was very sick. She requested that he visits her home and check on his condition. On arriving at the deceased's house, he found a crowd wailing and he saw the body of the deceased lying on the floor in family house. He observed that there was a black spot on his chest and he was wearing a vest. The police and area chief were summoned and the body of the deceased was taken from the scene. The Accused person was apprehended.
6. PW3 Janet Sali Nyando testified that she is a shopkeeper and the deceased herein was her husband. According to her, she used to work and stay in Kisumu and the deceased used to stay alone. On 29<sup>th</sup> December 2018, at about 1.00 p.m. the Accused person called her notifying her that some difference had arisen between him and the deceased. Thereafter, she tried to reach out to the deceased over the phone to no avail. At around 6.30 p.m. her sister called her and told her that the Accused had informed her that the deceased was very sick and that she had sent a driver to go and carry the deceased but on arrival the taxi driver found that the doors to the house had been locked and there was no one in the compound. This witness stated that she quickly reached out to PW2 requesting him to check on the deceased only for him to call her back saying he found a crowd of people wailing at her home. He later informed her that her husband is dead. She called her son and relayed the sad news to him. She travelled home and upon arrival, at about 11.00 p.m. she found the body of the deceased in the house of the Accused person. She observed that the body was bruised on the legs, had injuries on the shoulder and chest. She told the Court that prior to her travelling from Kisumu she had notified the area chief and on arrival she found him and the police at the home. The body of the deceased was retrieved and taken to Ahero Sub-County Hospital.
7. PW4 Dr. Dickson Mchana Mwaludindi testified that he is a consultant pathologist at Kakamega County and he covers the larger western region in forensic pathology services. According to him, he was in Court to present the autopsy report in respect to the deceased herein. On 2<sup>nd</sup> January 2019, at Ahero Sub-County Hospital mortuary he conducted a post-mortem examination on the body of the deceased in the presence of two witnesses. He observed inter alia; he had disseminated contusions on his right shoulder, front right and left, on the front of the lower abdomen on both mid thighs on the front and both forearms. He termed the injuries as defence injuries and there was no evidence that the deceased had been sick. On interior examination he observed puncture of both sides of his chest, right side the ribs fractured from 2<sup>nd</sup> -10<sup>th</sup> and the left side the ribs fractured the 2<sup>nd</sup>-8<sup>th</sup>. He observed that the sternum was also fractured across. He noted that the cause of death was respiratory failure due to blunt force trauma following assault. He produced the post-mortem report in Court as P Exhibit 1.
8. On cross-examination, he told the Court that based on the documents availed, the date of death was 30<sup>th</sup> December 2018 and time of death was indicated at 4.00 p.m.
9. After close of the Prosecution's case, the Court found that the Accused person herein had a case to answer. He was placed on his defense.



10. DW1 Basil Owino Alego gave his unsworn testimony on 30<sup>th</sup> May 2024. According to him, the deceased herein was his elder brother and a drunkard. On 29<sup>th</sup> December 2018, early morning he greeted him and left. He left for work and only returned home at 6.00 p.m. He told the Court that he stays at his mother's house while the deceased resided in his own abode and none of their wives stayed with them. He told the Court when he got back home he found the deceased lying down at the door and he thought he was drunk as it was a norm for him to leave early morning to go drinking and return in the night drunk. He called him out but the deceased only looked at him with a tired look but did not respond. He told the Court that he got confused and proceeded to put him in the house. He told the Court that he had no airtime to call for help and the nearest place he could secure help was about 30 minutes' walk and it was getting dark. He proceeded to the town center to get a rider and met with PW1 who assisted him with his phone to enable him call for a rider. While in the company of PW1, Anastacia and the rider, they rushed back home when it was approaching 7.00 p.m. They found the deceased alive and he had every intention of taking him to the hospital but the he rider stated that it was not possible for him to carry the deceased in his then physical state and he suggested that the accused should get a motor vehicle. That he then requested Anastacia and Amimo to remain with the deceased as he rushed to Muhoroni to get a motor vehicle but they all declined refused due to insecurity. He then called the wife of the deceased one Janet Sally Nyando (PW3) and proceeded with the rider to Muhoroni where he got a taxi driver but because of insecurity and bad roads the taxi driver intimated that he could not get to Tamu. He had no option but to head back home and on arrival, the rider and himself found the deceased alive while taking his last breath. He did not know of what transpired next as when he regained consciousness at 8.15 p.m and he saw the area chief, police officers and a crowd. He was interrogated and he explained everything as it occurred. The DCI arrived to collect the body of the deceased and he was requested to accompany them. He knew he was just going to record his statement and head back home but he was apprehended. He insisted that he saw no injuries when he found the deceased.

### **Analysis and Determination**

11. After close of the defence case, parties were directed to file and exchange submissions. Both parties complied with the Court directives. I have considered the evidence of the prosecution and the defence plus the rival submissions of their counsels and the issue for determination is whether the prosecution has proved the charge of murder against the accused person beyond any reasonable doubt.
12. Section 203 and 204 of the *Penal Code* under which the accused persons are charged provide for the offence of murder and the punishment therefor. They require that the Prosecution must prove beyond reasonable doubt that the accused persons by an unlawful act or omission caused the death of the deceased through malice aforethought.
13. The sections read as follows:
  - “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
  204. Any person who is convicted of murder shall be sentenced to death.”
14. The postmortem form PEXH.1 filled by PW4, Dr. Dickson Mchana Mwaludindi, on 2<sup>nd</sup> January 2019, reveals that the deceased died of respiratory failure due to blunt force trauma following assault. He produced the post-mortem report. I find that the Prosecution proved this ingredient of the offence beyond reasonable doubt.



15. None of the Prosecution witnesses who testified stated that he/she saw Accused person killing the deceased. In short there was no eye witness to the commission of the offence. As a matter of fact, the body of Oscar is just being identified by the Prosecution witness and nothing more. From the evidence on record, the testimonies of the Prosecution witnesses do not address how Oscar died, who killed him or the circumstances that led to his death. The accused has narrated how he found the accused person lying down by the door of their mother's house, where he was speechless and the efforts that the accused took to endeavor to take the deceased to hospital. The accused had maintained that the deceased was a drunkard who would ordinarily go to drink from morning to evening. The circumstances that surround the death of Oscar are still a mystery up to date, no iota of evidence has been adduced by the prosecution to show how the deceased sustained the injuries that led to his death.
16. The prosecution has not proved that the accused had the requisite motive of killing the deceased person who happens to be his own brother.
17. With respect to the investigating officer never being called to testify in Court in this case. The Court of Appeal in *Harward Shikanga Alias Kadogo & Another v. Republic* [2008] eKLR expressed itself as follows:

“But Mr. Onalo appeared to have been contending that merely because the investigating officer had not been called, the prosecution's case had not been probed as required by law. That submission is now frequently made in the courts and it shows that for some unexplained reason or reasons investigating officers are often not called to testify...We can also only hope that the prosecuting authorities in the country will stop the emerging practice of not calling investigating officers to testify and there may well be circumstances in which such a failure may well be fatal to the conviction.”
18. The investigation file was never availed in Court and the reasons to charge the accused persons remain a mystery. In this case the effect of the failure by the investigating officer to testify is that the evidence crucial to the case was never exhibited. This omission on the part of the prosecution must attract an adverse inference: that the evidence of the investigating officer would have aided the defence case. See *Bukenya & Others v Uganda* (2021)UGA 20.
19. With respect to the failure to call the arresting officer, the Court of Appeal in *Francis Mwaura Mwangi v Republic* [2010] eKLR expressed itself inter alia as follows:

“In this appeal, the witnesses said they knew the appellant well and immediately gave his nickname “Blackie” to the police. Yet it took the police nearly four months to arrest him and no explanation at all was forthcoming as to why that was so. The officer who arrested him did not come to explain how he had connected him with the name “Blackie” and why it had taken him so long to arrest him. We are not to be understood to be saying that in each and every case, the arresting officer must come and testify. Each situation must be considered and determined on its own circumstances. The appellant said he was merely arrested in a police swoop and he did not know why he had been arrested. He denied being involved in the robberies and the prosecution was under a duty to leave no loose ends which can lead to reasonable doubt being raised. Neither the trial Magistrate in his brief judgment, nor the two learned Judges on first appeal, dealt with any of these issues.”
20. As to the circumstances that informed the decision of the police to arrest the Accused person remains a mystery. The Accused person stated that when the DCI requested that he accompanies them, it was for him to record his statement but he was apprehended and presented before Court. In short, there were



no investigations done to determine who exactly caused the unlawful death of the deceased herein. The evidence on record remains one of suspicion that it is Accused who committed the offence. A conviction for murder cannot be premised on such evidence.

21. In the case of *Mary Wanjiru Guchiva v Republic* Criminal Appeal No. 17 of 1998 the Court held as follows:-

“....However strong, suspicious is cannot proved by evidence. Before a court of law convict an accused person of an offence, it ought to be satisfied that the evidence against him is over swelling and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life....”

22. In the case of *JOO v Republic* (2015) eKLR the court of appeal held as follows:-

“....It is not lost to this court that the offence which the Appellant faced was such a serious one had ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This court holds the view that it is better to acquit ten guilty persons than to convict one innocent person...”

23. Before a Court of law finds an Accused guilty of an offence, it must be satisfied that the offence has been proved beyond any reasonable doubt. What amounts to reasonable doubt was settled in by Lord Denning in *Miller v Ministry of Pensions* (1947) 2 ALL ER 372 where he stated:-

“..... That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect community if it admitted fancily possibilities to deflect the course of justice. If the evidence is so showing against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case if proved beyond reasonable doubt but nothing short of that will suffice...”

24. On the balance, after considering all the evidence I do find that the prosecution has failed to prove it’s case on the required standard of beyond any reasonable doubt. I therefore, find the Accused person Basil Owino Alego not guilty of the offence of murder and acquit him under Section 215 of the *Criminal Procedure Code*. I direct the Accused Basil Owino Alego to be set at liberty unless otherwise lawfully detained.

25. The bond presented by the accused person to be released to him forthwith.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 3<sup>RD</sup> DAY OF MARCH 2025.**

**M.S.SHARIFF**

**JUDGE**

In the presence of:

Accused

Ms Muema for State



Kombwayo for Accused Person  
David/ Diana/ Juma Court Assistants

