



**Republic v Otieno (Criminal Case E001 of 2021)  
[2024] KEHC 2296 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2296 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL CASE E001 OF 2021  
RPV WENDOH, J  
MARCH 4, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GEORGE OMONDI OTIENO ALIAS AKAL ..... ACCUSED**

**JUDGMENT**

1. By the information dated 9/1/2021, George Omondi Otieno alias Akal was charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the charge are that on 6/9/2020 at about 10:30a.m at Kinene, North Sakwa Location, Awendo Sub County in Migori County, murdered Daniel Onyango Dache.
3. The accused denied the charge and the case proceeded to full trial with the prosecution calling a total of seven (7) witnesses while the accused gave unsworn evidence in his defence and called one other witness.
4. The defence counsel in the matter is Mr. Owino while the case was prosecuted by several prosecution counsel ending with Mr. Kaino.
5. PW1 Darius Amolo, aged 13 years, underwent a voire dire examination after which the court found that he was fit to give sworn evidence. He recalled that on 6/9/2020, he was with his father, the deceased, removing charcoal from where they had burnt it in their farm, when he saw the accused who is a cousin, emerge from a sugarcane plantation while naked and was armed with a panga. PW1 informed his father who was bending over the charcoal. They started running with accused in hot pursuit saying “Baba Vicky today I will kill you.” His father fell and accused caught up with, the deceased and cut him on the forehead; that the accused turned and ran off as PW1 and his father started shouting for help; that the accused came back and stopped the deceased with a panga which the deceased blocked . By then people had started coming and the accused ran off. The deceased was later taken to Kisii Hospital where he died.



6. PW1 further told the court that he is aware that deceased and accused's father are half-brothers, same father different mothers and they had a dispute over land and that where the deceased cut the tree to burn charcoal is part of the disputed land and they had court cases which were finalised.
7. PW2 Beatrice Atieno Onyango is the wife of the deceased. She recalled 6/9/2020 when digging in the farm about 10:00a.m when she heard screams coming from near the river where her husband had gone to work. She went towards the directions of the screams and met Accused coming from that direction, while naked, carrying a panga which was blood stained. On seeing her, the Accused entered the sugarcane farm. On reaching where screams were, she found her husband lying down, covered in blood. She arranged to have the deceased taken to Kisii Hospital where he died the same evening at 5:00p. PW2 later attended the post mortem where she identified the body of the deceased to the Doctor. PW2 admitted that there was a land dispute between Accused family and deceased.
8. PW3 Dominic Muge Okong'o is a cousin to the deceased while Accused is his nephew. On 6/9/2020 about 11:00a.m, he was in his home when he was called to go help take the deceased to hospital. He found the deceased near the river and had cut wounds on the head within the brain oozing and his wife and son were at the scene. He helped take deceased to hospital at Kisii where he died the same day at 5:00p.m He reported to the police station; accused went into hiding and was arrested two weeks later. He admitted that there existed a land dispute but that the Accused had been given the land due to him. But he wanted more.
9. PW4 Lucas Otieno Ochola is a nephew to the deceased and cousin to Accused. He was called by PW2 and asked to get a vehicle to take the deceased to hospital. He did so. He observed that deceased had injuries to the head. He took him to Kisii Hospital where he died about 5:00p.m
10. PW5 Dickson Otieno Onyango a son to the deceased. He recalled that at one time when tilling the land with his father, the accused had threatened to harm the deceased; that on 6/9/2020, he was called by his sister and informed that Accused assaulted the father. He found the deceased at Kisii Hospital, dead. He was aware of the land dispute between Accused and deceased.
11. PW6 Dr. Brian Ochieng Ayara, a pathologist at Kisii Hospital performed post mortem on the deceased on 18/9/2020. He found that the deceased had a deep cut wound on the right side of the head 17cm long by which caused an open fracture of the skull. Internally, there were lacerations to the brain with bleeding in the brain. PW6 formed the opinion that the cause of death was head injury due to penetrating force trauma due to assault as well as haemorrhage due to deep cut wound.
12. PW7 PC Mathew Tum of DCI Awendo recalled that on 7/9/2020, he got information of a report having been made of a murder committed on 6/9/2020. He proceeded to the scene of the murder at Kanyasereda, saw blood at the scene, searched for murder weapon but did not get. He proceeded to Kisii Hospital mortuary where the deceased's body was lying. Post mortem was done after a week. He saw a bandaged head. He recorded witnesses statements and drew a sketch plan which he produced in evidence as PEX 2. He gathered that there was a land dispute between the deceased and Accused's family; that accused disappeared after the incident and was later arrested by the Chief and members of Public.
13. Accused in his unsworn evidence raised an *alibi* defence to the effect that he left home on 5/9/2020, a Saturday for his place of work where he works with a machine that crushes gold. He worked from 6/9/2020 at 2:00a.m till 1:00p.m when he heard news on Ramogi F. M. that the deceased had been slashed with a panga and was nearly dead. He went back home but found that his mother had gotten sick and was admitted at Ranen Hospital. Next day he went to the hospital discharged the mother on 7/9/2020; that on 6/9/2020 there was news that Daniel Dache had died. He went to work on 7/9/2020



when the mother called him at 9:00a.m to inform him that police officers had gone to the home to do investigations. He continued with his work for three months after which he was arrested in his house on 24/12/2020 at 5:00a.m He was informed that he was arrested because of things that were missing from his place of work.

14. DW2 Peres Akinyi Otieno the mother of the accused testified that on 6/9/2020, George Omondi was at work, doing gold mining at Kamindo which is far from the murder scene; that he was always away from home from Sunday to Sunday. She denied that the police ever looked for accused from the date of the murder to the time of his arrest on 24/12/2020. DW2 also denied the existence of a land dispute between the deceased and accused's family.
15. The Accused faces a charge of murder under Section 203 of the [Penal Code](#) It is incumbent upon the prosecution to prove their case beyond reasonable doubt. The legal burden of 'beyond reasonable doubt' was aptly discussed in [Woolmington v DPP](#) (1935) A. C. 462 pp 481 where Viscount Sankey L.C. stated thus:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

16. An accused person is always presumed to be innocent till proved guilty. What amounts to reasonable doubt was discussed by Lord Denning in [Miller v Ministry of Pensions](#) (1947) 2 ALLER 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 the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong 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 is proved beyond reasonable doubt, but nothing short of that will suffice.

17. The three ingredients that the prosecution must prove beyond reasonable doubt in a charge of murder are:-
  1. Proof of death of the deceased;
  2. Proof that the accused caused the death by an unlawful act or omission;
  3. Proof that the accused possessed malice afterthought.

### **Proof of death**

18. The fact of the deceased's death is not in doubt. The Accused confirmed that he heard of the deceased's death. PW1 was present when the deceased was assaulted; PW2 was with the deceased at the time of death; PW4 and PW5 confirmed the death of the deceased. PW6 performed the post mortem on the



deceased and his findings corroborated the testimony of PW1 who witnessed the incident and others as to what injuries that deceased sustained. PW6 found that the cause of death was head injury due to penetrating force trauma due to assault as well as haemorrhage due to a deep cut wound and the probable object used was sharp. It follows that the deceased did not die of natural cause.

#### **Whether Accused caused the unlawful act:**

19. The accused raised an *alibi* defence, that he was not at home on the day of the incident. An *alibi* defence is raised when an accused claims to have been in a different location from the scene of crime. The law is clear, that the burden of proof always rests on the prosecution and the accused has no duty to prove the truth or falsity of his *alibi*.
20. In the case of *Victor Mwendwa Mulinge v Republic* (2014) eKLR, the Court rendered itself thus:-

it is trite law that the burden of proving the falsely, if at all, of an accused's defence of *alibi* lies on the prosecution."
21. In the South African case of *S. v Malejo en Andere* 1998 (1) SACR 127 (W) 158 c -e, the Court set out five principle with respect to the assessment of *alibi* in evidence:-
  - (a) There is no burden of proof on the accused to prove his *alibi*.
  - (b) If there is a reasonable possibility that the accused's *alibi* could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.
  - (c) An *alibi* "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."
  - (d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").
  - (e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false *alibi*.
22. In another persuasive South African case of *R v Biya* 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:

If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this *alibi* evidence is true it means that there is the same possibility that he has not committed the crime."
23. In *Erick Otiemo Meda v Republic* Criminal Appeal No 55 of 2015, the Court of Appeal said that; the comparative decisions cited above are persuasive and espouse good law which the court adopted and came up with the following principles when considering an *alibi*:-
  - (a) An *alibi* needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
  - (b) An *alibi* defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.



- (c) The *alibi* defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the *alibi*, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the *alibi* to fail. (See *Mblungu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014))”
24. In *Athuman Salim Athuman v Republic* (2016) eKLR the Court of Appeal on *alibi* defence, also stated this:-
- The principle has long been accepted that an accused person who wishes to rely on a defence of *alibi* must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the *alibi*. Way back in 1939 in *R. v Sukha Singh s/o Wazir Singh & others* (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated:
- “If a person is accused of anything and his defence is an *alibi*, he should bring forward that *alibi* as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that *alibi* and if they are satisfied as to its genuineness proceedings will be stopped.”
25. The Supreme Court of Uganda, in *Festo Androa Asenua v Uganda*, Cr. App No 1 of 1998 made a similar observation when it stated:
- We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of *alibi* always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the *alibi*. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”
26. Although the appellant in this case put forth his *alibi* defence rather late in the trial, we cannot agree with counsel for the respondent that the *alibi* defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in *Ganzi & 2 others v Republic* [2005] 1 KLR 52, this Court stated that where the defence of *alibi* is raised for the first time in the appellant’s defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of *alibi* against the prosecution evidence...”
27. From the above, decisions, even though an *alibi* is raised easily or later in the defence the court must weigh it against the rest of the evidence tendered by the prosecution.
28. In this case, the attack on the deceased occurred in bright day light. PW1 vividly testified to seeing his own cousin, the accused come and attack his father, the deceased; that after the first attack, accused retreated but came back a second time. PW2 also testified to seeing Accused fleeing the scene and entering the sugarcane. On the other hand, Accused casually told the court that he was at work in a mine that day, DW2’s testimony did not help him at all because, accused’s mother, was not with him to confirm if he was at work. DW2’s testimony did not support DW1’s defence that DW2 was very sick and he went to visit her in hospital. Besides, DW2’s testimony that there was no land dispute between



the deceased and accused's family put her demeanour to question. All the prosecution witnesses are aware and confirmed it was even confirmed in cross examination of the witnesses and the investigating officer's testimony that there had been court cases between Accused and deceased and a case was pending before the Chief, over the land dispute between the deceased and Accused's father. The accused clearly avoided to say anything about the said very serious issue. I am convinced that the attack on the deceased was prompted by the land dispute between deceased and accused.

29. Further to the above, from the accused's defence, his conduct clearly shows that all was not well between him and deceased. Despite the fact that accused heard of the deceased's death, his own uncle, he allegedly took his mother from hospital and went back to work without even attending the funeral. The unsworn defence is totally unbelievable and accused's *alibi* has in no way dislodged the prosecution evidence that it is accused who killed deceased. The *alibi* was raised late in the day. The appellant was arrested in 2021. He raised the *alibi* for the first time on 15/11/2022 nearly, three years later. As held in the Athuman case (supra) the day goes to the accused's credibility. PW1 clearly saw accused assault his father, as a result of which he met his death.

### **Of malice aforethought**

30. Malice aforethought is defined in Section 206 of the [Penal Code](#) as:-
- a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted or not
  - (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually netted or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.
  - (c) An intent to commit a felony
  - (d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony”.
31. In the case of *Tubere s/o Ochen v Republic* (1945) EALR 63 the court explained when malice aforethought exist when it said;-
- "In determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."
32. In this case, the accused attacked the deceased with a panga, and inflicted a deep penetrating wound to the forehead which fractured the skull as a result of which there was bleeding in the brain. That one cut to a delicate part of the body using force was meant to end the deceased's life or seriously injure the deceased. The weapon used to inflict injuries is evidence of malice aforethought because of an existing land dispute which accused should have left to the law enforcement, agencies or court to deal. I find that accused, with malice aforethought, attacked and fatally, injured the deceased. I find the Accused guilty for the offence of murder contrary to Section 203 of [Penal Code](#) and convict him accordingly.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 4<sup>TH</sup> DAY OF MARCH, 2024.**

**R. WENDOH**

**JUDGE**

In presence of; -



Ms. Wainaina for the state

Mr. Agure for Appellant present

Appellant Present

Ms. Emma –Court Assistant

