



**Republic v Ngode & another (Criminal Case E026 of 2022)
[2024] KEHC 5301 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E026 OF 2022**

KW KIARIE, J

MAY 21, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

EZEKIEL OTIENO NGODE ALIAS ZAKI 1ST ACCUSED

TOBIUS OCHIENG OSURI 2ND ACCUSED

JUDGMENT

1. Ezekiel Otieno Ngode alias Zaki and Tobius Ochieng Osuri are 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 13th day of August 2022, at Kaduke village, Kasewe “B” sb location in Rachuonyo East Sub County of Homa Bay County, jointly with others not before the court, murdered Joash Onyango Midimo.
3. Some attackers struck the home of Martha Ogola Wasonga (PW2) at night. She raised an alarm, and rescuers, including the deceased, responded. This is when the deceased was fatally injured, and the two accused persons were alleged to be part of the attackers.
4. Both accused pleaded an alibi and contended that they were in the home of Ezekiel Otieno Ngode (accsed1), where they were discussing business. The second accused person claimed that he was attacked and injured as he was leaving the first accused’s house.
5. The issues for determination are:
 - a. Whether either or both accused were involved in the offence and
 - b. Whether the offence of murder was proved against any or all the accused.



6. During the trial, the prosecution presented evidence from witnesses claiming to have recognized the accused. However, the incident occurred at night, and while the witnesses testified that there was moonlight, evidence from Cosmas Nyangese Ondiek (PW1) revealed that it was a dark night. When the circumstances at the time of the alleged recognition, which the defence argues was mistaken, are not ideal, ensuring that the identification is accurate and error-free is essential. Lord Widgery CJ in R. v Turnbull and others [1976] 3 All ER 549 issued the following caution:

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.

7. I will, therefore, examine closely how each witness purported to have recognized each accused.
8. Cosmas Nyangese Ondiek (PW1) testified that he recognized Ezekiel Otieno Ngode (accsed1) while running across the gate and armed with a machete. He further said it was a dark night, and his spotlight had insufficient light. He, therefore, borrowed that of Joash Onyango, presumably the deceased. This was before the deceased was fatally injured.
9. The prosecutor did not elicit from him to explain to the court which part of the accused, who was running, he saw and could recognize.
10. The evidence of this witness is suspect. Previously, he had testified that while passing by the house of Martha Ogola Wasonga (PW2) at about 9 p.m., he heard the latter ask Tobias what he was doing in her home. PW2 did not testify anything to this effect. 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 that PW1 is an unreliable witness.

11. Martha Ogola Wasonga (PW2) and Jerry Rolins (PW4) testified that at about 9 p.m., they recognized the two with the help of the moonlight. We already know from the evidence of Cosmas Nyangese Ondiek (PW1) that it was a dark night. There was no possibility of any one of them recognizing either accused in the manner they said they did. They did not see who attacked the deceased and fatally injured him. During cross-examination, PW2 said she had a long-standing dispute with Ezekiel Otieno Ngode,



the first accused. This may have been the reason she suspected him. 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 for inferring guilt, which must be proved by evidence beyond reasonable doubt.

The evidence of this witness cannot form the basis for conviction.

12. Benta Otieno Serega (PW3) is the widow of the deceased, who is the subject of this case. According to her testimony, the deceased informed her that Ezekiel was responsible for causing the injuries that led to his hospitalization. It should be noted that this communication was made while the deceased was still alive. Andrew Ouma Odwar's (PW6) testimony supports Benta's version of events. This statement amounts to a dying declaration.

13. Section 33(a) of the *Evidence Act* Provides:

Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

14. The evidence attributed to the deceased is, therefore, admissible.

15. Courts have made many rulings on dying declarations as evidence. In *Pius Jasunga s/o Akumu v Regina* [1954] 21 EACA 331, the Court of Appeal for Eastern Africa stated that while corroboration is not legally required, the statement must be reliable. It is generally unsafe to base a conviction solely on a dying declaration since there is no opportunity for cross-examination unless there is satisfactory corroboration.

16. The evidence of PW3 and PW6 raises two crucial issues. One, whether the deceased made the allegations attributed to him. According to PW3, the deceased told her that Ezekiel had killed him. However, PW6 said that he heard the deceased tell PW2, "Zacky Onega". This is interpreted in English as "Zacky has killed me". The prosecutor did not elicit from these witnesses to state the actual words used by the deceased. Two, if indeed the deceased said Zacky had killed him, there was no evidence to show who Zacky was. The court cannot be left to speculate.

17. I, therefore, find that the dying declaration was not corroborated.

18. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie v Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.



19. In their defence, both accused contended that they were in the home of Tobius Ochieng Osuri (accused 2). The first accused had gone to negotiate for ploughing with his oxen for the second accused.
20. At about 9 p.m., when he was going home, he encountered many people and rushed back to the house of the second accused. These people pursued him and hit the door with a stone. After a short while, he (accused 1) ran out but returned bleeding from the head and said somebody had cut him. They stayed in the house until midnight when he was taken to hospital. They called witnesses who supported their version of events.
21. The evidence called by the prosecution did not displace their defence. I find that the prosecution has not proved the offence of murder against either accused. Each one is acquitted of the offence of murder and set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF MAY 2024

KIARIE WAWERU KIARIE

JUDGE

