



**Republic v Oywer (Criminal Case E025 of 2022)  
[2024] KEHC 10117 (KLR) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL CASE E025 OF 2022**

**KW KIARIE, J  
AUGUST 7, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ALFRED ODHIAMBO OYWER ..... RESPONDENT**

**JUDGMENT**

1. Alfred Odhiambo Oywer is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The defendant is accused of unlawfully killing Consolata Otieno Ochando on July 22, 2022, at the Kobuya location in Rachuonyo North Sub County of Homa Bay County.
3. The body of the deceased was found lying in a sand mine. The body was naked. A cap was found at the scene, and some recovered clothes linked the accused to the offence.
4. The accused pleaded an alibi and denied ownership of the cap, which was said to have been recovered at the scene.
5. The issues for determination are:
6. Whether the cap recovered at the scene where the body of the deceased belonged to the accused;
7. Whether the items recovered were in the house of the accused;
8. Whether the alibi defence of the accused was displaced or not; and
9. Whether the offence of murder was proved against any or all the accused.
10. The cap recovered at the scene was subjected to DNA analysis. The DNA profile generated from the cap was partial and inconclusive.



11. The accused denied ownership of the cap and contended that he wears a woollen cap, commonly known as “Marvin.”
12. The prosecution did not prove that the cap belonged to the accused.
13. According to PC Robi Stella (PW9) 's evidence, they went to the homestead where the accused lived. They recovered a kitenge dress from an abandoned house and a pair of female grey plastic shoes. When they were led to the accused's house by his mother, they recovered an ashtray and some cigarette filters. The cigarette filters and the ashtray were not taken for analysis as expected, especially after two pieces of cigarettes were found at the scene where the body of the deceased was found.
14. The investigating officer did not adduce any evidence to show that the accused was in control of the abandoned house where the exhibits were allegedly recovered. Secondly, the prosecution did not bother to elicit evidence of the number of occupants of the homestead where the accused stays.
15. There was no direct evidence to link the accused to the offence of murder. All we have is evidence of suspicion. The Court of Appeal in the case of *Sawe vs Republic* [2003] KLR 354 held as follows:

Suspicion, however strong, cannot provide the basis for inferring guilt, which must be proved by evidence beyond reasonable doubt.

1. in his defence, the accused contended that he was at the funeral the entire night. Martin Moses Alal (PW3) testified he saw him at the previous night's vigil. So, did Alfred Odhiambo Achiando (PW2). 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 vs 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.

1. In the instant case, the prosecution did not displace the alibi defence of the accused.
2. I find that the prosecution has not proved the offence of murder against the accused. I accordingly acquit him of the offence of murder and set him at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED AT HOMA BAY THIS 7<sup>TH</sup> DAY OF AUGUST 2024**

SIGNED BY:

**HON JUSTICE W. KIARIE**

**THE JUDICIARY OF KENYA.**

**HOMABAY HIGH COURT**

**HIGH COURT DIV**

DATE: 2024-08-08 10:31:32+03

**THE JUDICIARY OF KENYA**

