



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Awino & another (Criminal Case 01 of 2018)
[2023] KEHC 1452 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 01 OF 2018
FA OCHIENG, J
MARCH 1, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

KEVIN AKONGO AWINO 1ST ACCUSED

IBRAHIM OTIENO AJWOGA 2ND ACCUSED

JUDGMENT

1. The accused persons, Kevin Akongo Awino And Ibrahim Otieno Ajwoga were charged with the offence of Murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the offence were that the accused persons murdered one Martin Ombogo Gayo on December 21, 2017, at around mid-day, within Sinyolo area in Kapwonja Sub-Location in Kisumu West Sub-County.
3. During the trial, the prosecution called 5 witnesses.
4. Pw1, Jackton Omondi Omolo testified that he knew both accused persons.
5. PW1 said that on the material day, he visited the “Middle Class Bar” which is located at Number Sinyolo Stage, along the Kiboswa – Daraja Mbili road. He was in the company of the deceased.
6. After they had had some drinks, PW1 and the deceased left the bar and started walking towards their respective homes.
7. After they had covered about 150 metres, PW1 heard someone calling him by his name. However, as it was already night-time, the deceased advised PW1 not to respond to the calls.
8. It was the evidence of PW1 that the deceased hurled an insult at the person who had called out to PW1.



- 9 After they had covered the distance of a further 100 metres, PW1 was hit on the shoulder; and the person who did so then tripped him, causing him to fall down.
- 10 PW1 told the court that it is the 1st accused, (who is commonly called “Young”), who hit him on the shoulder and then tripped him.
- 11 As “Young” was holding onto his shirt, PW1 let him have it. And when the shirt was being removed above his head, PW1 heard the sound like that of a bottle exploding on the road.
- 12 After PW1 had let the 1st accused take of his shirt, he ran away.
- 13 Later, PW1 learned that his friend Martin Ombogo Gayo had died.
- 14 During cross-examination, PW1 said that the 1st accused had attacked him. He made it clear that he did not see anybody beating up the deceased. Indeed, PW1 was not aware that the deceased had been attacked, until the morning of the following day.
- 15 Pw2, Rosemary Atieno Omondi Is A Sister To The Deceased. She Visited Her Brother At The Icu, where she found that he was not talking.
- 16 After learning that her brother was taken to hospital after being attacked by some people, PW2 reported the incident at the Maseno Police Station.
- 17 And after Martin succumbed to his injuries, PW2 identified his body at the mortuary, for purposes of post-mortem.
18. Pw3, Musa Ochieng Ongoro, testified that on the material day, he had visited his sick sister, in hospital. When they were heading home from the hospital, they found the deceased lying down on the road.
- 19 PW3 testified that the deceased had severe injuries, and was bleeding on the face.
- 20 PW3 was together with his brother Lucas Ochieng Obisa, and Hillary. Using their Motorbike, they took the deceased to Chulaimbo Hospital.
- 21 At that hospital, PW3 and his colleagues were instructed to take the deceased to “Russia Hospital”; and they did so.
- 22 During cross-examination, PW3 said that he did not know what had happened to the deceased before they found him on the road.
- 23 Pw4, Dr. Solomon Sava, is a medical practitioner. He conducted the post-mortem examination on the body of Martin Ombogo Gayo.
- 24 He said that the deceased had a chest infection, and a brain injury which was consistent with blunt force trauma to the head.
- 25 After conducting the examination, PW4 concluded that the cause of death was bronco-pneumonia and traumatic brain injury.
- 26 Pw5, Pc Robert Kibet, was the investigating officer. He was assigned the task by Chief Inspector Nthiga, the Officer-In-Charge, Maseno Police Station.
- 27 The records indicated that it was PW2 who made the report to the police; and that she told them that Martin had been assaulted by some people, who were known.
- 28 The investigator told the court that the police arrested the accused after the police had received a tip-off.



- 29 During cross-examination, PW5 said that when he visited the deceased at the hospital, the latter was in a coma. In the circumstances, the deceased was unable to tell the police the identity of the person or persons who had assaulted him.
- 30 During cross-examination PW5 said that the 1st accused had assaulted PW1. He further testified thus; Jackton took to his heels, leaving the deceased being assaulted by another person.
- 31 I don't have any statement of a witness who identified the 2nd accused.
The person who was hitting the deceased was unknown.
I insist that "Young" was beating Jackton.
Jackton did not identify the person who beat the deceased."
After PW5 testified, the prosecution closed its case.
- 32 The 1st accused, Kevin Okongo Awino gave a sworn defence. He confirmed that on the material day, he encountered both PW1 and the deceased. He said that he inquired from PW1 if he had finished drinking.
- 33 At that time, PW1 was with the deceased. It was the testimony of the 1st accused that the deceased hurled an abuse at him. He got incensed, and wanted to beat up the deceased. However, PW1 restrained him.
- 34 After they had walked a little while, the deceased hit the 2nd accused, using a bottle.
- 35 The 2nd accused, retaliated by kicking the deceased, on his head.
- 36 During cross-examination, the 1st accused said that he did not actually see the deceased hitting the 2nd accused, using a bottle. But he reiterated that the 2nd accused beat up the deceased.
- 37 The 2nd accused, Ibrahim Otieno Ajwoga, testified that on the material day, he encountered the 1st accused, PW1 and the deceased. His evidence was that those 3 people were abusing one another.
- 38 In particular, he heard the deceased uttering words relating to the private parts of the mother of the 1st accused.
- 39 Following the abuse, the 1st accused started fighting the deceased.
The 2nd accused testified that he tried to separate the two, but the deceased hit him on the head, using a bottle. But the 2nd accused denied fighting back.
During cross-examination, the 1st accused said that when the deceased hit him, he sat down, whilst the deceased slid and fell down.
- 40 In determining this case, I have to ascertain whether or not there was sufficient evidence to prove the case beyond any reasonable doubt.
- 41 First, it is clear that Martin Ombogo Gayo is dead. He did not die of natural consequences.
- 42 Whilst he had a chest infection, the doctor who conducted the post-mortem examination also found that the deceased had a brain injury, which was consistent with blunt force trauma to the head.
- 43 Although none of the prosecution witnesses saw the accused persons or either of them, assaulting the deceased, the evidence of the 1st accused is consistent with the cause of death. He said that the 2nd accused was hitting the deceased on the head. The 2nd accused was using his leg to hit the deceased.



- 44 Of course, the 2nd accused denied hitting the deceased. He said that although the deceased insulted him, and then hit him with a bottle, he simply sat down.
- 45 I find the testimony of the 2nd accused totally unbelievable. I deem it unrealistic that he would simply sit down after being abused and also after being assaulted by the deceased.
- I note that according to the 1st accused, his co-accused continued beating the deceased for about 15 minutes.
- 46 Although the 2nd accused denied beating the deceased, he testified that PW1 ran away from the scene. He said;
- Kevin and I called Jack to come for his friend. Jack came back much later; after about 15munutes.”
- In effect, the 2nd accused confirmed that he and his co-accused were with the deceased for about 15 minutes.
- The 2nd accused further said;
- When Kevin came back, the deceased was lying on the ground.”
- Kevin had run after PW1; but as the 2nd accused said;
- After about 3 minutes, Kevin came back for me. Jack ran away completely.”
- 47 So, between the 2 accused persons, they were alone with the deceased for about 12 minutes, after PW1 had run away.
- 48 The 2nd accused said that Kevin fought with the deceased.
- 49 Each of the accused lay blame on the other.
- 49 As it is only the 2 of them who were with the deceased, I find that the circumstantial evidence tendered points exclusively at the said accused persons as the people who assaulted the deceased.
- 50 The death of the deceased cannot be explained by any other hypothesis, other than through the culpability of the accused persons.
- 51 I also find that the force which they used when assaulting the deceased was so overwhelming that it resulted in the deceased suffering from a brain injury.
- 52 In the circumstances, the accused either intended to kill the deceased or to cause him to suffer grievous harm. Accordingly, I find that the accused had malice aforethought, as defined at section 206 of the [Penal Code](#).
- 53 By causing the death of Martin Ombogo Gayo, Whilst They Had Malice Aforethought, The Accused Committed The Offence Of Murder. Accordingly, Both Accused Persons, Kevin Akongo Awino And Ibrahim Otieno Ajwang are guilty and are hereby convicted for the said offence.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF MARCH, 2023.

FRED A. OCHIENG

JUDGE

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR

