



**Republic v Koroso alias Otiemo (Criminal Case E014 of 2021)
[2023] KEHC 21506 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE E014 OF 2021
RPV WENDOH, J
JULY 18, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNEDY MATIKO KOROSO ALIAS OTIEMO RESPONDENT

JUDGMENT

- 1 Kennedy Matiko Koroso alias Otiemo, the accused is charged, with the offence of murder contrary Section 203 as read with Section 204 of the [Penal Code](#).
- 2 The particulars of the charge are that on 3/10/2021, at Bohorera village, Masaba Sub location, Bugembe North, Migori County, murdered Yusuf Matwema Chacha.
- 3 The accused denied the offence and the case proceeded to full trial with the prosecution calling a total of six (6) witnesses. When called upon to defend himself, the accused gave a sworn statement and did not call any other witness.
- 4 The prosecution case is as follows: -
- 5 PW1 Caroline Akoth Rioba testified that he knew the accused as her father lover. They had parted because his wife objected to the relationship; that as of 3/10/2021, PW1 had another lover, the deceased, Yusuf Matwema Chacha; that on the said date, the said Yusuf asked her to go to his brother's house – Robi (PW3). Robi had left his house and returned about 8:00p.m and found the accused, Otiemo at the door of his house. The accused entered and sat in front of PW1 and started touching her thighs and she told him to stop; that the accused spoke to her in Kuria which she did not understand; that they were served with food and the deceased ate from the same plate with Accused; that the accused then left; that from their conversation it seemed accused knew the deceased before. PW1 further stated that about 9:00p.m they left to go home which was a distance away and when between same houses, somebody emerged from the front wearing gum boots and a black dust coat. She noticed that it was



- Otieno; that the person talked to the deceased in Kuria. They had stopped while she stood aside about 3 metres away; that suddenly, the deceased was cut on the neck and fell down. The person came where she was and started to beat her with something that looked like a panga. She screamed and he cut her above the left eye and below the left eye which wounds left scars. The person then ran off. PW1 got up went back to inform Robi (PW3) of what had happened, that Otieno had attacked them. They went to report at Masaba Police Station and when there, the accused arrived there and when asked if he assaulted the deceased he denied and was arrested. She was taken to hospital. She said that the place had electricity lights and there were electricity bulbs outside a nearby house.
- 6 PW2 Dr. Mark Otieno Oduor recalled that on 8/10/2021 he conducted a post mortem on the body of Yusuf Matwema Chacha. He found an obvious deep cut wound on the left lateral neck extending anteriorly to the back and front and it cut through the left carotid arteries, external and inter jugular veins; the trachea together with oesophagus and cervical born was also cut. The doctor formed the opinion that the cause of death was excessive blood, suffocation/asphyxia due to deep penetrating wound on the neck secondary to assault by a sharp object.
- 7 PW3 Yohona Rioba Nyamohanga told the court that the deceased was his younger brother. He used to see accused at Masaba Town; that he left Masaba for home and found accused at his door peeping inside. He passed him and invited him inside. Inside the house was his brother (deceased), Carol, PW1's deceased's wife; and Robi his wife . He asked for water and ate with the deceased; that Accused touched Carol's thighs and they spoke in luo, which he did not understand; that accused claimed to have learned something and left. Later the brother and Carol left and he went to sleep. After a short while, he heard screams, opened the door and saw Carol come running saying that they had been attacked and deceased had been cut on the neck. When he went to the scene the Yohona was already dead. They went to report at police station and when there, the accused arrived at the station and Carol said that it the Accused who had committed the offence.
- 8 PW4 Peter Nyambogai a cousin to the deceased and Accused knew accused as a neighbour. On 8/10/2021 he went to witness the post mortem on Yusuf Chacha's body. He noted a cut on the neck.
- 9 PW5 Marwa Boke Ngereni, wife to deceased's brother (PW3 Yohana) recalled that on 3/10/2021 at about 9:00p.m, the deceased went to her house and said he was hungry and by then she was cooking. Another lady Carol was called by the deceased and she came to the house; that Otieno stood at the door and then her husband also arrived; that on entering, the accused talked to PW1 in luo language which she did not understand. She served everyone in the house with food and after they ate, the accused left and when outside he said he had seen something but did not say what it was; that Carol left for her house which was nearby and so did Yusuf (deceased) and after a few minutes she heard screams, went to stand at the door and saw Carol PW1 running back and informed PW3 that they had been attacked and Yusuf had fallen but she did not say who attacked her. PW3 came back to inform them that Yusuf had died. They reported at Masaba Police Station and that accused came to the police station himself.
- 10 PW6 PC John Mali of DCI Kehancha was the investigating officer in this case. He received a report of the murder at about 11:30 p.m and proceeded to the scene with PC Tanui. They found Yusuf Chacha lying in the middle of the road and blood at the scene. He noticed a cut on the deceased's neck. PW6 learned that the deceased had been attacked while in company of PW1 Caroline, who was also injured on the right eye; that Carol she told the police that she was enabled to see by lights from a nearby home; that the Sgt then informed them that the suspect had surrendered at the police station; they collected body and from the police post to the police station claiming that his life was in danger.
- 11 Accused testified as DW1 and stated on Oath that the deceased was his neighbour and friend and they had never disagreed. He also admitted that Caroline (PW1) had been his girlfriend but they peacefully



parted in 2014; that at 9:00p.m he was in Apex bar with many other people i.e. Steve Machuba, Fredrick Mukami and Leonard Murimi when the barman switched off lights at the counter because there was noise outside. They went out of the bar find out about the screams of many people at Masaba Centre. On reaching the scene, they found the body of Yusuf and there were many people. They went to the police post. He saw the deceased's brother Robi who alleged that he is the one who had killed the deceased and he was arrested. He denied having been at Robi's house or eating super there that night . He denied knowing that PW1 was the deceased's girlfriend.

- 12 Both the prosecution counsel and defence counsel Ms. Otieno filed submissions.
- 13 The prosecution counsel submitted on the three ingredients required to be proved in a charge of murder. He submitted that there is no doubt that the deceased met his death following an assault; that PW1 partly identified the accused as the perpetrator as they knew each other and they had just been together that during and that identification of Accused was actually recognition. As for malice aforethought, counsel submitted that the use of a sharp object and the nature of the injuries which were to the neck clearly go to show that the accused had malice aforethought. He urged the court to convict the accused of the charge of murder.
- 14 On her part, the defence counsel submitted that proof of the charge is beyond reasonable doubt as was held in the case of *Woolmington vs. ODP*(1935 AC 462 and *Bakare vs. State* 1985 2NWLR 465; that the burden rests on the prosecution to prove a criminal case. Counsel urged that the prosecution relied on circumstantial evidence. She relied on the decisions in *Erickson Chengli Wanyonyi vs. Republic* (2018) eKLR, *Ahamad Abolfathi Mobammed and Another vs. Republic* (2018)eKLR and *Sawe vs. Republic* where the court considered what the prosecution should establish before the court can convict as based on circumstantial evidence. It was counsel's submission that the evidence was not sufficient.
- 15 On Alibi defence counsel, relied on the decision of *Ricky Ganda vs. Republic* (2012)ZAFSHC 59.
- 16 Counsel urged that the evidence did not meet the standard of proof required and the accused should be acquitted,
- 17 The accused faces a charge of murder and the burden lies with the prosecution to prove its case beyond any reasonable doubt. The case of *Woolmington vs. DPP* supra discussed what "proof beyond reasonable doubt "means.

"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 doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man 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."

- 18 See also *Bakare vs. State* supra and *Miller vs. Minister of Pensions* 1942 AC.
- 19 The three ingredients that the prosecution must prove beyond reasonable doubt are: -
1. Death of the deceased;
 2. proof that the death was caused by the unlawful act or omission caused by the accused;
 3. Proof that accused had malice afterthought in a Of death:
- 20 There is overwhelming evidence from the prosecution witnesses and even the accused did admit that he saw the deceased dead. The deceased's death was as a result of an assault. PW2, doctor conducted



the post mortem on the deceased after the body was identified by PW4. PW2 found the cause of death to be excessive bleeding, suffocation or asphyxia due to deep penetrating wound on the neck secondary to assault by a sharp object. No doubt the death was proved.

Who caused the death?

21 The only witness to the murder is PW1 Carol. She is the one who named the accused as the culprit. The deceased was attacked at night and the issue of identification is at the core. It is trite law that a fact may be proved by the testimony of a single witness unless another law provides otherwise,. In the case where there is only one identifying witness under unfavourable conditions, evidence of the said witness should be received with utmost care and the court has to warn itself of the inherent dangers of relying on such evidence in convicting the accused. In *Abdallah Bin Wendoh & another vs. Republic* (1953) 20 EACA 166, the court said;

Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence circumstantial or direct pointing to guilt is needed.”

22 Again in *Roria vs. Republic* (1967) EA 583 the court said

A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, LC said recently in the House of Lords in the course of a debate on S. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts;

‘There may be a case in which identify is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if they are as many as ten – it is in a question of identify.’

23 That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safer to act on such identification.”

24 See also *Maitanyi vs Republic*.

25 The case of *Republic vs, Turnbull* (1976) 3ALLER 549, came up with guidelines as to how a court can consider the evidence of identification in unfavourable conditions. The court said

... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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 relatives and friends are sometimes made.”

26 In the above case, the court recognised the fact that it is possible for a witness to make a mistake in identification even as respects the person he knows very well.



- 27 Having considered the various cases on identification, PW1 said that at the scene where the assailant stopped them, there were security lights and it was near some houses which had lights, and she was able to see that it was the accused. Unfortunately, the court was not told how far the houses were from the scene, the kind of lights and whether there was anything between and the houses that could interfere with the view at the scene. PW3 went to the scene but did not confirm whether there were lights. The investigating officer did not confirm whether he visited the scene and whether indeed there were lights on the road and the nearby houses.
- 28 PW1 further told the court that she had been with accused at PW3's house a few minutes earlier and that at that time, he wore slippers and a red shirt but that at the time of attack, the person wore a dust coat and boots. Later, when she met accused at the police station, the accused was wearing slippers and the red shirt. It would have been prudent for the investigating officer to investigate and establish whether the accused had changed his clothes that he was wearing by visiting his home. It is also not clear whether accused had time to change clothes from time of the attack and his arrival at the Police station.
- 29 Although PW1 said that the assailant stopped and talked to the deceased for a while before attacking him, she did not know what they talked about as they spoke in Kuria language which she did not understand. But she never told the court whether or not she recognised the person's voice. She merely said she noticed that it was the accused.
- 30 Whereas it is not denied that the accused had a history with PW1 and it would have been easy to recognise him, yet when she went to report about the attack, PW3 did not say that she told him who attacked them till PW1 reached the police station. PW2's wife (PW5) confirmed that when (Carol)PW1 came back screaming to the house, she never disclosed who it is that had attacked THEM. If PW1 had recognised the accused the court wonders why she did not mention his name immediately.
- 31 Although I find accused's conduct of denying that he had been to PW3's house that every strange, I believe PW1, PW3 and PW5 told the court the truth that accused was at their house and had a dinner with them that night. Their testimonies were very consistent in all material particulars regarding the accused's visit to PW3's house on the material night. He then left before PW1 and deceased left which made him a prime suspect because he had an opportunity to go and waylay the complainant and deceased.
- 32 The accused raised an alibi defence, that he was at Apex bar on the fateful evening and he named several people whom he was with. The burden of proving the case to the required standard always rests with the prosecution and never shifts to the defence. It is therefore the duty of the prosecution to prove the falsity of the alibi. In *Kiarie vs. Republic* (1984) KLR 739, the Court of Appeal held: -
- 33 An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to charge does not in law thereby assume any burden of that answer and it is sufficient of an alibi introduces into the mind of a convict a doubt that is not unreasonable. The judge had in accepting the trial magistrates finding on the alibi because the finding was not supported by any reasons.”
- 34 An alibi defence has to be interrogated in light of all the other evidence on record. Ordinarily, an alibi defence should be raised early during the prosecution case so that if necessary, the prosecution can call evidence to rebut it. In this case, it was raised late and that goes to question the credibility of the defence. However, under Section 309 *Criminal Procedure Code* the prosecution can move to ask the court to be allowed to all evidence to rebut the alibi. Section 309 *Criminal Procedure Coded* provided:-
If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”



- 35 See *Republic vs. Derrel Martin Momanyi* Criminal Case number 27 of 2013 (Malindi).
- 36 The prosecution never bothered to call evidence despite the fact the accused mentioned specific names . In my view the prosecution had the burden of controverting the alibi defence but did not bother to do so.
- 37 In the end, the identity of the perpetrator not having been watertight and in view of the appellant's alibi, I find that the prosecution did not prove the identity of the assailant as being the appellant beyond reasonable doubt. No doubt the appellant went to police station himself. Unfortunately, the officer who first received the accused did not testify to confirm the report that he got from the accused. According to accused, he went with others to find out what had happened to the deceased. In the end, I find that there is doubt as to identity of the assailant.
- 38 Having so found, I will not go on to consider whether malice afterthought was proved. Accused remains a prime suspect in the murder of the deceased but mere suspicion cannot sustain a conviction. For the foregoing reasons, will give accused the benefit of doubt. He is acquitted of the charge of murder under Section 322 *Criminal Procedure Code*. He is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 18TH DAY OF JULY, 2023

R. WENDOH

JUDGE

JUDGMENT DELIVERED IN THE PRESENCE OF

MR. KAINO FOR THE STATE.

MS. OTIENO FOR ACCUSED.

ACCUSED PRESENT.

EMMA/ FELIX COURT ASSISTANT

