



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ochango & 4 others (Criminal Case E045 of 2021)  
[2023] KEHC 20731 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20731 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL CASE E045 OF 2021**

**KW KIARIE, J**

**JULY 18, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MICHAEL MBILIKA OCHANGO ..... 1<sup>ST</sup> ACCUSED**

**SILAS ANYIRA MUDEKERE ..... 2<sup>ND</sup> ACCUSED**

**BENARD MARITIM ..... 3<sup>RD</sup> ACCUSED**

**STEVEN OTIENO OWINO ..... 4<sup>TH</sup> ACCUSED**

**WYCLIFFE KIPROP CHEPTOO ..... 5<sup>TH</sup> ACCUSED**

**RULING**

1. Michael Mbilika Ochango, Silas Anyira Mudekere, Benard Maritim, Steven Otieno Owino and Wycliffe Kiprop Cheptoo 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 17<sup>th</sup> day of September 2017, at Kamenya village, in Rangwe Sub County within Homa Bay County, murdered Sylvanus Oree Owinji.
3. When police officers were on patrol duties, on reaching at Kochia, they were informed of a bhang peddler. When they proceeded to the home of the deceased who was the suspect, the evidence on record is conflicting as to what transpired and led to his death. The accused persons were some of the police officers on patrol duty who went to arrest the deceased. They were blamed for his death.
4. There are two versions as to what caused the death of the deceased. One version was by Kennedy Ouma Owinji (PW1). He testified that the deceased raised an alarm and claimed that they had been attacked



- by thieves. This version was supported by the evidence of Erick Omondi (PW5). His evidence was that he heard the deceased calling for help.
5. The version of Mary Anyango Owinji (PW6), the widow of the deceased, is that when police officers went to her home and were searching the kitchen, the deceased ran out and the police pursued him. She was categorical that the people who went to their home that night were police officer and not thieves. She did not testify that her husband raised an alarm claiming that they had been attacked by thieves.
  6. The fateful night was dark according to the evidence of Kennedy Ouma Owinji (PW1). This was however contradicted by the evidence of Erick Omondi (PW1) and that of Mary Anyango Owinji (PW6) both of whom testified that there was moonlight.
  7. I am persuaded to believe the version of PW1 for PW5 testified that he was helped to see what transpired by the help of spotlights the police had. These spotlights were directed at the deceased. PW6 in her evidence said she was not able to see well the people who beat the deceased for it was at night.
  8. The prosecution has two versions of how the deceased sustained the fatal injuries. One theory was that the deceased was brutalized by police officers who were using hoe handles. This was testified to PW1, PW5 & PW6. This version is suspect for the following reasons:
  9. In his statement to the police, PW1 did not indicate that hoe handles were used to beat the deceased as it appeared in his statement to IPOA. In his earlier statement to the police he had stated that the officers were using whips.
  10. Though this witness denied that there was a machete at the scene, he conceded that he had heard an officer ask the deceased why he wanted to cut an officer with a machete. During cross examination he acknowledged that he indeed heard this. From his narration, the officers surrounded the deceased as they beat him. If he was beaten as testified to, he was not in a position to see who did what for in his own evidence, they had surrounded him as they did so.
  11. Erick Omondi (PW5) evidence was that he witnessed the police officers beating the deceased. This is suspect for he said he was about 100 meters from the scene. This was a dark night and the purported identification of the perpetrators can only be in the realm of fiction.
  12. The widow of the deceased herein, in her statement said that if she saw the officers, she could identify them. This is not supported by her earlier evidence where she stated that she did not see them well for it was at night. She actually said that she was about 100 meters from the scene of the incident.
  13. The second version was testified to sergeant Mulongo Tali (PW4). He was the scenes of crime officer. He concluded that the deceased may have died after a fatal fall. He indicated that he was treated to an imaginary scene by the family and the investigating officer.
  14. Tobias Omono (PW9), the investigating officer came up with his own theory which was not supported by any evidence on record. He claimed that the deceased armed himself with a machete after hearing screams from his wife that they had been attacked by thieves. He ran into a neighbour's latrine from where he was flushed out by the officers and beaten. It was in the process that he fell in a narrow trench.
  15. The widow PW6 did not testify that she screamed. In her evidence she said she knew that police officers and not thieves went to their home on the night of the incident.
  16. It emerges from the evidence of PW6 that her husband emerged from the house while armed with a machete. This also featured in the evidence of PW1.



17. The prosecution case is rife with contradictions that cannot be reconciled. The Court of Appeal in the case of *Ndungu Kimanyi vs. 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.
- In the instant case, I find that the evidence of the purported eye witnesses to be unreliable and unworthy of belief.
18. This is a matter that the prosecution ought to have called the doctor who performed the post mortem to testify on the cause of death in a situation where there are two competing theories by the prosecution. This was not done to the detriment of the prosecution case.
19. What is a prima facie case? In the Black’s Law Dictionary, 10th Edition prima facie case is defined as follows:
- Prima facie case. (1805) I. The establishment of a legally required rebuttable presumption. 2. A party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.
20. Has the prosecution established a prima facie case? The Court of appeal in the case of *Ramanlal Trambaklal Bhatt v. R* [1957] E.A 332 at 334 and 335, defined prima facie case as follows:
- It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
21. Article 50 (2) (i) of *the Constitution of Kenya* provides:
- (2) Every accused person has the right to a fair trial, which includes the right—
- (i) i) to remain silent, and not to testify during the proceedings;
22. In the instant case, if the accused persons opt to exercise their constitutional right hereinabove stated, I cannot convict any one of them based on the evidence on record. This therefore means that the prosecution has not established a prima facie case against any of the accused. I accordingly acquit each of them of offence of murder under section 306 (1) of the *Criminal Procedure Code*. Each is set at liberty unless if otherwise lawfully held.

**Delivered and signed at Homa Bay this 18<sup>th</sup> day of July, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

