



**Republic v Kanyango (Criminal Case E002 of 2022)
[2024] KEHC 12068 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE E002 OF 2022
RPV WENDOH, J
OCTOBER 3, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MARTIN ACHOLA KANYANGO ACCUSED

JUDGMENT

1. By an information dated 14/07/2021 the accused Martin Achola Kanyango was charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 13/1/2021, at Muhuru Bay Township, Nyatike sub-county Migori County Murdered, Bob Otieno Odhamba. He denied the offence and the case proceeded to hearing with the prosecution calling a total of six witnesses in support of its case.
2. At the close of the prosecution case, the accused was found to have a case to answer and was called upon to defend himself and he offered unsworn statement and did not call any other witness.
3. This case was prosecuted by Mr. Kimanthi, Mr. Omworia and later Mr. Kaino Counsel for the DPP while accused was represented by Mr. Awino Odondi Advocate.
4. PW1 Samson Omwenga Onyango, a resident of Muhuru Bay, recalled that he knew the accused as a teacher and they resided in the same plot but different houses at Muhuru Bay. He told the court that the houses were one-roomed and that the accused shared the house with one Bob Otieno, the deceased. PW1 was the agent of one Benson, who is the father of the deceased; that the deceased used to manage the houses before but that he would spend all the money on alcohol and therefore the father replaced deceased with PW1 as the agent. PW1 recalled 13/1/2021, he had come back home from the farm, When one Vivian came to inform him that the accused was hitting the deceased with a panga near the gate. He did not do anything because it was raining. Next day, a neighbour came to ask him why he was sleeping when something was happening in the teacher's house. PW1 said he lived in house No. 8 and



- accused and deceased lived in house No.1. He went to the accused's house. He saw Bob's body inside the house where he lay facing upwards. He observed Bob's body which had injuries, a cut wound on the right hand, the back of the head and the back. He saw all the injuries when police came to pick the body. He said that accused was not in the house at that time; that photographs were taken of the scene. PW1 said that he was the agent for the plot and that at times, accused and the deceased would disagree and he would be called upon to resolve their issues. PW1 said that accused used to assist Bob cook and wash clothes because Bob had a bad hand and accused would not pay rent. PW1 also stated that both accused and deceased used to take alcohol.
5. PW2 Odemba Fredrick Otieno, testified that he is half brother to Bob Otieno – deceased. He also knew the accused as one of the tenants in their plot at Muhuru Bay and that he is a teacher. He said that the deceased moved to the plot at Muhuru Bay in 2015 after he disagreed with his wife while accused had started residing there in 2012; that the deceased and accused struck a friendship because of taking alcohol together and that in 2018, the deceased sold all his properties and went to live with the accused in his rented house and that deceased informed him that they were sharing the rent. On 14/1/2021 at 6.20 a.m., he received a phone call and was informed that the agent, Samson had opened Accused's house and found deceased lying in a pool of blood. PW2 proceeded to the scene and found Bob dead and was bleeding from the forehead, a cut on right hand, back of the head. Photographs were taken of the scene. On 20/1/2021 he attended the post-mortem and identified deceased's body to the doctor.
 6. PW3 is a Doctor, Ian Omuom of Migori County Referral hospital who performed the post mortem on the deceased on 20/1/2021 after Fredrick (PW2) identified it. He observed that the body had a peripheral parlouk which is evidence of loss of blood, 2cm cut wound on the right thumb; 4cm cut wound on the right thumb; 4 cm cut wound in the dorsum of the right hand with smooth edges, 3cm cut wound on right upper arm. Multiple cut wounds to the head, 4cm and 3cm cut wounds on the occipital and right parietal region and there was accumulation of blood under the skin and 2cm wide ligature mark on the neck meaning a rope was tied to the neck before death.
 7. The doctor formed the opinion that the cause of death was severe head injury, and antecedent cause was severe anaemia secondary to multiple cut wounds.
 8. PW4 Cpl. James Olago of scenes of crime DCI Migori visited the scene of Murder at Muhuru shopping centre on 14/11/2021, a single room with two beds. On deceased's bed were two blood-stained mattresses, and blood stained curtain. A blood sample was collected from the pool of blood and he took fourteen (14) photographs of the scene P.ex.No.1-(a-n)
 9. PW5 Salvin Cheruto Katukoi of Kisumu Government Chemist received some specimen from Nyatike for analysis as they included swab sticks with red stains (a) two mattresses in two gunny bags B & C, cream curtain (d) , A purple long sleeved shirt (e) fingernail and pubic hair from the deceased (f) and later on 15/2/2021 he received blood sample of the accused (Martin). He did his analysis and from the DNA generated from all the items a-e matched the deceased DNA and one matched the accused's DNA.
 10. PW6 CPL. Kimeli Rono of DCI Nyatike, the Investigating officer in this case received a report of the murder from Muhuru Bay police post. Photographs were taken of the scene and a sketch plan drawn and from the scene they collected the items they sent to the Government analyst for analysis. He observed that the deceased body which had several cut wounds. PW6 stated that accused reported to Muhuru Bay police post that he had woken up and found that somebody had murdered his housemate and he was detained. The OB report is No.20 of 14/1/2021, report made at 06.01 hours.
 11. Accused gave unsworn evidence in his defence that on 13/1/2021, his friend Bob woke up early and said he was going to get his money from creditors. He prepared and left for school where they were



preparing standard eight (8) students for exams. Being a Kiswahili teacher, he had to mark 300 Insha papers till 6.00 p.m. He was very tired, went into one of the clubs took alcohol, got drunk, and could not go to the house. He remained in the club till 3.00 a.m. He went to the house and found deceased had been killed. He reported the incident and was detained and later charged. Mr. Awino, accused Counsel submitted that the charge is based on suspicion and the court should return a verdict of not guilty.

12. The accused faces a charge of murder contrary to section 203 of the PC and the ingredients that need to be proved by the prosecution under the said section are as follows
 1. Proof of death of the deceased
 2. Proof that accused caused the unlawful act or omission that led to the death.
 3. That the accused possessed malice aforethought.
13. The standard of proof in criminal cases is one of ‘beyond reasonable doubt’ and therefore the onus lies with the prosecution to establish the above ingredients beyond all reasonable doubt. The term “Beyond reasonable doubt” was defined in the case of Woolmington v DPP [1935] AC 485 as follows;-

“The degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”
14. Based on the definition given in the above case, this court has to evaluate all the evidence tendered before the court to determine whether the three ingredients have been established

Death of the deceased;

15. The death of the deceased is not in dispute. PW1, PW2, 4, and 6 who went to the scene of crime saw the deceased’s body lying in a pool of blood in his house with various injuries which were confirmed by PW3, the doctor who performed the post-mortem on the body after PW2 identified the body of the deceased. The immediate cause of death was confirmed to be severe head injury and multiple cut wounds. The deceased did not die of natural causes.
16. Whether the accused caused the death by unlawful set or omission; Nobody witnessed the accused injure the deceased. The prosecution case therefore turns on circumstantial evidence. Circumstantial evidence can only be a basis for a conviction if the threshold set in the case of Abang’a alias Onyango v Republic CRA 32/1990 has been ref ie
 - i. “The circumstances from which an inference of guilt is sought to be drawn, must be cogently and fully established;
 - ii. These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
 - iii. The circumstances taken cumulatively should form a complete chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”
17. In the instant case, there is no doubt that accused resided with the deceased in the same room at the plot owned by deceased’s father. PW1 and PW2 confirmed that fact and accused as much as admitted.



18. According to PW1, one Vivian informed him that the deceased was being assaulted by the accused using a panga at the gate but he did not get out of his house to assist because it was raining. It was not till next morning that he was again informed of what was going on at Accused's house that he went only to find Bob dead and observed the multiple injuries to his body. PW1 said that Vivian was going to be a witness in this case. PW6, the Investigating officer however told the court that the said Vivian was a Tanzanian and moved away from the plot and efforts to trace her have been futile. PW6 also told the court that he recorded the statement of an Eliud accused's student, who saw the accused assault the deceased but that the said boy died on 5/1/2022. No application was made to produce the said witness statement as evidence.
19. The accused purported to raise an alibi defence in his unsworn statement. This alibi was raised for the first time during the defence, three years since the charge was preferred against accused. The law as regards alibi defence is that if accused raises an alibi defence, the onus of proving falsity or otherwise and the guilt or otherwise of the accused lies on the prosecution and at no time does that onus shift to the deceased.
20. (See *Karanja v Republic* [1983] eKLR501. The above case was applied in *Victor Mwendwa Mulinge v Republic*[2014] eKLR where the court of Appeal said ..." It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution...."
21. An alibi defence is supposed to be raised at the earliest opportunity so that the prosecution can be one accorded an opportunity to test the veracity or lack thereof, of the alibi. The principle has been long accepted as was stated in the case of *R.V. Sukha Singh s/o Wazir Singh and others* [1939] 6 EACA 145, the court said if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped" will be stopped." see also *Festo Andra Asenna v Uganda* CR.App no. 1998
22. In the instant case, though the alibi was raised late in the day, yet I still find that the circumstantial evidence against accused is too weak to sustain a conviction. The suspicion against accused is strong but suspicion alone however strong, cannot sustain a conviction. For that reason, I will give the accused the benefit of doubt and acquit him of the charge of Murder.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 3RD DAY OF OCTOBER 2024.

R. WENDOH

JUDGE

Ruling delivered in the presence of

Ms. Kogos for the State.

Accused- Present

Mr. Awino for accused.

Juma/Emma – Court Assistants

