



**Republic v Ongoma (Criminal Case E036 of 2022)
[2024] KEHC 11720 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11720 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E036 OF 2022**

KW KIARIE, J

OCTOBER 2, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

PATRICK OCHIENG ONGOMA ACCUSED

JUDGMENT

1. Patrick Ochieng Ongoma is 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 the 27th day of October 2022, at Rodi Trading Centre, in Homa Bay Sub County of Homa Bay County, jointly with another, murdered Joseph Onyango Abiero.
3. According to the prosecution, the accused fatally injured the deceased. However, in his defence, the accused contended that as he was going home in the company of the deceased, they were attacked by assailants. He managed to run away. He could not make him sit when he returned to assist him. He became afraid and went to report to the police.
4. The prosecution adduced evidence of a witness who claimed to have witnessed the accused using a stone to beat the deceased on the head.
5. The issues for determination are:
 - a. Whether the perpetrator of the offence was identified;
 - b. Whether the blood of the deceased on the pair of trousers of the accused was explained and
 - c. Whether the offence of murder was proved against any or all the accused.



6. Millicent Achieng Ojjo (PW1) testified that at about 2 a.m., she was roused from sleep by some noises from outside. Initially, she thought she was dreaming. She peeped through a hole in the door and saw a tall man with long hair beat another lying down. He kicked him and later picked a stone and hit him on the head. She subsequently identified this person at the police station as the accused. Whenever circumstances are not favourable for an identification, Lord Widgery CJ in *R. v Turnbull and Others* [1976] 3 All ER 549 issued the following caution:

Secondly, 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 the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? 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?

7. It needs to be verified if PW1 could see the culprit and identify him. During her testimony, she mentioned that she used the light from a street light and peeped through a hole to see what was happening. However, the prosecution did not provide any evidence regarding the intensity of the light that assisted her or whether the peeping hole was adequate. It is insufficient for PC George Akiri (PW5) to state that he visited the scene at night. He should have tested the hole that was allegedly used for peeping.
8. In her testimony during cross-examination, PW1 stated that she had not seen the man before and could not see his face. She also mentioned that she could not identify the culprit but could recognize him by his hair.
9. This witness did not identify the culprit, so her testimony regarding the supposed identification cannot be relied upon.
10. PC George Akiri (PW5) testified that when the accused reported to the police that they had been attacked, he was wearing a pair of trousers that were blood-stained. When the pair of trousers was submitted for DNA analysis, it was found that the blood was that of the deceased. The prosecution argued that the presence of blood on his clothes linked him to the crime. The accused, however, claimed that after fleeing from the scene and the attackers, he returned to try to help the victim sit up but was unable to do so. He then went to report the incident. This is how the victim's blood ended up on his clothes. His explanation seems more believable than the one provided by PW1, as her account did not clarify how the victim's blood ended up on his trousers.
11. After analyzing the evidence, I find that the prosecution has not proven the accused guilty of murder. Therefore, I acquit and release him unless lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 2ND DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE

