



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Ogonji & 2 others (Criminal Case 4 of 2017)
[2026] KEHC 2390 (KLR) (24 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 4 OF 2017
AC BETT, J
FEBRUARY 24, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

WYCLIFFE TSUMA OGONJI 1ST ACCUSED

BRAMWEL MUKURA AMWAYI 2ND ACCUSED

PERIS NYAPERA AMWAYI 3RD ACCUSED

JUDGMENT

1. The Accused persons Wycliffe Tsuma Ogonji, Bramwel Mukuna Amwayi and Peris Nyabera Amwayi were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on 15th January 2017, at Ebulali Village, Mulwanda Sub-location of Khwisero Sub-County within Kakamega County, the Accused persons murdered Jack Onyengo Akaka.
2. The Accused persons denied the charge and the matter proceeded to hearing in which the prosecution called three witnesses.
3. PW1, James Amwayi Mwaka, recalled that on 15th January 2017, he and his friend Jack went to drink chang'aa at the house of Mama Peris. As they were getting ready to drink, Tsuma emerged and demanded work tools from Jack. They disagreed, fought and fell. Mama Peris then hit Tsuma with a piece of wood, and he ran away. Mulali, the 2nd Accused, stepped on Jack's stomach, then took "kisigi" and hit him on his chest. After that, the 2nd Accused forced the witness to carry Jack to the road. PW1, the 2nd Accused and his friend Simeon carried Jack to the road where the latter two persons left him. PW1 screamed, and Santo came to the scene. PW1 testified that he left Jack with Santo, then proceeded to make a report to the village Elder. When the village elder refused to go to the scene, PW1 went to Jack's home, where he informed Anyore, Jack's mother, that Jack was injured. He then left with Anyore's relative, Andila, and went back to the road where he had left Jack. He looked for a bod boda



- operator who came and took Jack to Namasoli Health Centre. PW1 stated that he spent the night with Jack at the hospital and that Jack informed him that he was injured and had left his items, including a mobile phone and Ksh. 8,700/= at Mama Peris' house. Jack was later discharged and went home, but died after 4 days. PW1 identified the Tsuma who fought with the deceased as the 1st Accused, Milali as the 2nd Accused and Mama Peris as the 3rd Accused.
4. On cross-examination, PW1 said that he and the deceased were long-time drinking friends, although he did not know the deceased's second name. He said that they never used to have scuffles with Mama Peris and that on the material date, the dispute concerned carpentry tools. According to him, when the 3rd Accused hit Tsuma, she intended to separate the two. He also stated that the 2nd Accused hit the deceased while the deceased was fighting with the 1st Accused. According to him, the 2nd Accused hit the deceased with a "kisigi" (stump) that they used to sit on. This was around 9.00 p.m., and they reached the hospital at 10.30 p.m.
 5. PW2 was Amwayi Lukoye, who testified that the 1st Accused is his Uncle, the 2nd Accused is his son, while the 3rd Accused is his wife. He said that on 15th January 2017, he was at home just before 8.00 p.m. when the deceased and Amwayi arrived. They exchanged greetings, after which the deceased asked if there was something to eat, and the witness referred him to the 3rd Accused. Shortly thereafter, the 1st Accused followed and asked for something to eat, and once more, he referred him to the 1st Accused. According to PW2, the people were asking for chang'aa. PW2 further testified that he saw the 1st Accused approach the deceased and demand his carpentry tools. A fight erupted between the two after the deceased refused to hand over the tools. While the deceased was drunk, the 1st Accused was sober. The fight angered the 3rd Accused. Amwayi rushed to PW2's son's house and returned with him, whereby the 1st Accused fled. PW2's son asked Amwayi and the deceased to leave, and they left. PW2 further recounted that two days later, the deceased, who had been taken to the hospital, died, and the police arrested him and his family, but he was later released.
 6. When cross-examined, PW2 said the deceased punched the 1st Accused, but they used to work together. He said that he did not see the 2nd and 3rd Accused beat the deceased, and this was between 7.00 p.m. and 8 p.m., but he had a torch.
 7. PW3 was PC Thomas Bii, who was the investigating officer. He recalled that on 18th January 2017, he received a report of the deceased, Jack Onyiego Akada. He, the OCS and Chief Inspector Gichuki proceeded to the home where they found the body of the deceased in his house with no visible physical injury. They took the body to Yala Hospital mortuary, and a post-mortem was done on 21st January 2017. The witness said that he undertook investigations and established that on 15th January 2017, the deceased and James Amwayi went to the 3rd Accused's house to drink. While there, Wycliffe Tsuma arrived and started quarrelling with the deceased on allegations that the deceased had taken his construction tools. The quarrel broke into a fight, and in the process, the 2nd and 3rd Accused joined in, and they all beat the deceased, after which James Amwayi was told to go away with the deceased. On the way, the deceased could not go further, and Amwayi went and informed the deceased's mother of the incident, and they went back where Amwayi had left the deceased and took him to Namasoli Health Centre, where he was treated and discharged. A report of the assault was not made until the deceased died, and then the report was made. PW3 said that he visited Namasoli Health Centre and established that indeed the deceased was taken there. He produced the post mortem report dated 21st January 2017 as P.Ex1, the treatment notes as P.Ex2 (a) and X-ray film as P.Ex2 (b) with no objection from the Accused persons' Counsel.
 8. On cross-examination, the witness said that the 2nd and 3rd Accused joined the fight according to the information he got from James Amwayi, the only eyewitness apart from the 3rd Accused's husband.



9. The Prosecution closed the case at that juncture and said that their other witnesses were dead. When placed on their defence, the Accused persons chose to give sworn statements.
10. DW1 said that on the material day, he went to drink chang'aa at the 3rd Accused's house. There, he met the deceased and James Amwayi and bought them chang'aa. After taking the alcohol, the deceased asked him if he had taken his carpentry tools. DW1 told him he had not taken them, but the deceased started making noise, whereof the 3rd Accused took a dropper post and started beating him, the deceased and Amwayi. DW1 said he got out and went home. The next day, he met Amwayi, who informed him that the previous day, after he left them, the deceased had been injured and was taken to the hospital. DW1 said he promised to visit the deceased but never made it because of work. He said that on the day he was preparing to visit him, he received news that Jack had died.
11. On cross-examination, DW1 said that the tools belonged to him and the deceased and that he worked far, so three days passed before he went to see the deceased. He said that the 3rd Accused hit him and injured him on the hand, so he ran away. He denied that there was any grudge between him and the deceased, or between him and James Amwayi, his cousin.
12. In his defence, DW2 stated that Jack Akaka was a distant neighbour. He insisted that on 7th January 2017 and not 15th January 2017, Jared Amwayi went to his house and informed him that his parents were asking for him. He heard his mother call him. He went out and found his mother, the 3rd Accused, calling him. She asked him to help separate the 1st Accused and the deceased, who were fighting. On arrival, he did not see the 1st Accused but found the deceased lying down. The deceased informed him that the 1st Accused assaulted him because he had taken his work tools. DW2 said he never witnessed the 1st Accused assault the deceased, but the deceased told him that when the 1st Accused hit him, he felt that he had been injured on the abdomen. According to DW2, he advised the deceased to report to the village elder or his parents, with the intention of getting the deceased and Amwayi to leave their homestead. The deceased and Jared Amwayi heeded his advice, and he never saw the deceased again.
13. On cross-examination, DW2 confirmed that the disputed tools belonged to the deceased and the 1st Accused, but the deceased had already taken the tools earlier. He said his mother called him at around 8.00 or 8.30 p.m., and when he reached her house, he found many people drinking chang'aa and saw his father holding a cow by the rope. He claimed that he talked with the deceased for a long time and that the deceased left with James while walking, and that it was not true that they took the deceased out of their homestead and placed him by the roadside, since he could not walk. He denied assaulting the deceased. He said he had no grudge with James.
14. DW3 was Peris Nyabera Auma. She said that on 7th January 2017, the deceased and Amwayi went to her house and asked for alcohol, which she told them she did not have. At the time, she was cooking ugali. She said that the deceased and Amwayi were extremely drunk. According to her, the 1st Accused also arrived and asked for alcohol, and when the response was negative, he left. Shortly thereafter, he came back and demanded his tools from the deceased. The deceased asked the 1st Accused to return his hammer first. She then saw the 1st Accused assault the deceased, and she asked Amwayi to separate them. Once she was through with making the ugali, she took a cane and hit the 1st Accused. She took the ugali inside and, on returning, found that the deceased, the 1st Accused, and Amwayi had left.
15. Under cross-examination, DW3 denied that she was selling the chang'aa on the material date. She said that she saw the 1st Accused get hold of the deceased by the neck and box him, and when she hit his hand, he let go of the deceased. She denied the suggestion that she sent Amwayi to call her son, the 2nd Accused and said her son was lying by claiming so. She said that when she went into the house to keep



the ugali, she came and found that the 2nd Accused, Amwayi and the deceased had gone and were by the gate. She also said that Amwayi lied when he said that she assaulted the deceased.

16. After the close of the defence case, the court directed the parties to file written submissions, which it has duly considered.

Analysis and Determination

17. For the charge of murder to be proven, the prosecution needs to prove the following ingredients:-

- a. That the person named as deceased died.
- b. That the death of the deceased was unlawful.
- c. That the accused was responsible for the act or commission that led to the death.
- d. That in causing the death, the accused had malice aforethought.

See Antony Negwa Ngari v. Republic [2014] eKLR, Roba Galma Wario v. Republic [2015] eKLR.

18. It is well established that the burden of proof in a criminal trial lies with the prosecution and it is proof beyond reasonable doubt albeit not proof beyond a shadow of a doubt. In Republic v. Ismail Hussein Ibrahim [2018] KEHC 4614 (KLR), the court held that:-

“To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:

“The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant’s guilt, but it does not mean that a defendant’s guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant’s guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there’s a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.”

19. In the first instance, there is no doubt that the person named as Jack Oyiengo Akaka died. The prosecution witnesses confirmed that he died. The Investigating Officer confirmed the fact of his death and produced a post-mortem report. A post-mortem cannot be conducted on a living person, so the fact that, according to the post-mortem report, an autopsy was conducted on 21st January 2017 on a body identified as belonging to Jack Oyiengo Akaka, the court finds that the death was conclusively proven.



20. On whether there was proof that the death was due to an unlawful cause, the post-mortem report indicates that the deceased had hemoperitoneum clots on the omentum and a ruptured left kidney. The Doctor concluded that the cause of death was internal bleeding as a result of an assault to the abdomen.
21. The court notes that although the Doctor who conducted the post-mortem was not called to testify, the Accused persons did not object to the production of the post-mortem report, treatment notes and X-ray of the deceased by the Investigating Officer.
22. Section 77 (1) of the *Evidence Act* allows for the production of certain documents by persons other than the maker and states that:-

“In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.”

23. In Republic v. Teresia Wairimu Thuo [2019] KEHC 1533 (KLR), the court dealt extensively with the admissibility of post-mortem and ballistic reports by an investigating officer and stated thus:-

“5. There is no requirement that the witness who produces the report on behalf of another under section 77 to be conversant with the handwriting of the maker of the report. Indeed, a post mortem report, it appears from subsection (1) of section 77, may be used in evidence, and it may therefore be produced a person such as the Investigation Officer in a case or any person who may have been given the report by the examining medical practitioner or by a hospital which maintains record of such reports, as in this case, and the Court may only call the maker for cross-examination, in compliance with the accused’s right to fair trial to challenge evidence.

6. If the maker is not available, the Court may nonetheless use it pursuant to section 33 (b) of the *Evidence Act*, which provides as follows:

33. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable, are themselves admissible in the following cases—

- a.;
- b. made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of



any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.”

24. I am of the view that the failure by the prosecution to call the maker of the post-mortem report did not render the report invalid or of no probative value. Such failure would only go to the weight of the post-mortem and would weaken the prosecution’s case in the event there was no evidence to confirm the injuries that are said to have caused the death. However, the Accused persons did not challenge the findings in the report, nor did they demand that the maker of the report be summoned to court for cross-examination. Moreover, there is no evidence that the failure to call the Doctor occasioned any prejudice to the Accused persons. I therefore find that the report was properly admitted in evidence and that it is a credible report as to the cause of death. See *Hussein Said Abdi v. Republic* [2021] KEHC 2571 (KLR).
25. The prosecution’s evidence was that there was a fight that led to the deceased sustaining some injuries that necessitated his being taken to the hospital on the same date. The treatment notes from Namasoli Heath Centre indicate that the deceased presented with a history of having been assaulted and featuring lower abdominal pain. The post-mortem report indicates that the deceased had hemoperitoneum and clots on the omentum. Hemoperitoneum is described in WebMd as “a type of internal bleeding in which blood gathers...in the space between your organs and inner lining of your abdominal wall.” According to WebMd, hemoperitoneum is caused by blunt trauma or penetrating injury. It goes further to state:-

“Blunt traumas are injuries from contact with an object, like being hit or falling. This can cause organ damage and bleeding...”
26. Based on the findings in the post-mortem and the eyewitness testimony, I find that it was proven that the injuries that caused the death of the deceased were caused by an assault. From the circumstances of the assault, I find that the cause of death was unlawful. See *Guzambizi Wesonga v. Republic* [1948] EACA 63.
27. Having determined that the deceased succumbed to an unlawful cause of death, the court has to determine whether it was proved that the Accused persons were responsible for his death.
28. PW1’s narration of the events was not elaborate, but from his evidence, the 1st Accused fought with the deceased and fell to the ground. From his testimony, the two friends were both involved in the fight, with the deceased being the instigator as he held the 1st Accused by his shirt, and in an effort by the 1st Accused to defend himself, a scuffle ensued, which ended up with the two friends on the ground. The 3rd Accused then hit the 1st Accused in a bid to separate the duo, and indeed, the 1st Accused left the fight.
29. There was no evidence that the 1st Accused had the intention to harm the deceased. Additionally, there is no evidence that the 1st Accused injured the deceased during the fight, as the confrontation appears to have been a hand-to-hand combat which was brought to an abrupt end by the 3rd Accused. In the circumstances, I find that the evidence against the 1st Accused is too weak to sustain a conviction.
30. As for the 3rd Accused, she merely intervened to stop the scuffle and hit only the 1st Accused. There was no evidence to link her to the injuries that caused the death of the deceased.
31. Regarding the 2nd Accused, the prosecution witnesses gave contradictory versions of the incident. PW1 claimed the 2nd Accused picked a “kisigi”, which is, to my understanding, a stump, and hit the deceased



with it as the deceased was fighting with the 1st Accused. The dimensions of the stump were not given to the court, but PW1 said they used to sit on it, so that it could have been the size of a small stool. According to PW1, the 2nd Accused stepped on the deceased's stomach and hit him on the chest with the stump. On the other hand, PW2 said that he never saw the 2nd and 3rd Accused persons beat the deceased.

32. In *Eric Onyango Odeng v. Republic* [2014] KECA 523 (KLR), the Court of Appeal held:-

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence.”

33. As a general rule, courts overlook minor contradictions in evidence unless they point to deliberate untruthfulness or are substantial and cannot be reconciled by analysis. In *MK v. Republic* [2020] KEHC 10388 (KLR), Odunga J. (as he then was), while defining contradictions, cited the Nigerian Case of *David Ojeabuo v. Federal Republic of Nigeria* [2014] LPELR-22555 (CA), where the Court of Appeal stated as follows:-

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

34. The overall effect of contradictions is that not every minor contradiction will lead to evidence being rejected. In *Twehangane Alfred v. Uganda Criminal Application No. 139 of 2001* [2003] UGCA 6, the Court held that:-

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually, but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to a deliberate untruthfulness or if they do not affect the main substance of the prosecution's case”.

35. The Court of Appeal has held that in determining whether discrepancies in evidence affect the credibility of the case, the court must consider the unique circumstances of each case. In *Philip Nzaka Watu v. Republic* [2016] KECA 696 (KLR), the Court of Appeal rendered itself thus:-

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions



of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

36. In the present case, there were significant discrepancies in the narrative given by PW2 and the defence vis-à-vis the testimony of PW1. However, PW2 was an Uncle to the 1st Accused, a father of the 2nd Accused and the husband of the 3rd Accused. On the other hand, PW1 was a friend of the deceased and a cousin of the 1st Accused. The court has to decide whether the contradictory testimony of PW1 and PW2 vitiated the Prosecution’s case while being mindful of the fact that it did not hear and see the prosecution witnesses as they gave their evidence, but took the evidence of the Accused persons in their defence, and was able to observe their demeanour.
37. The key evidence that links the 2nd Accused to the injuries that could have led to the deceased’s death was the testimony that he stepped on the deceased’s stomach and hit him on the chest using a stump. Although the 2nd Accused was said to have committed the offence while the 1st Accused and the deceased were still fighting, the 1st Accused did not mention that incident in his defence. The court is unable to determine whether the incident occurred as narrated by PW1 or at all.
38. It is quite evident that apart from the prosecution witnesses and the Accused persons, there were other eye witnesses at the scene at the time of the accident. One of them was Simeon, whom PW1 said assisted him and the 2nd Accused in aiding the deceased to walk to the roadside. The 1st and 2nd Accused also alluded to other persons being present and drinking chang’aa at the time. The Investigating Officer should have taken additional steps to call more independent witnesses, as they would have helped the court conclusively establish the truth of what transpired. This would have added weight to the prosecution’s case. Regrettably, the said eye witnesses were not called. The court cannot tell whether they are the witnesses who were said to have since died. The effect is that the only credible witness herein is PW1, as PW2 appears to have been evasive, no doubt to avoid implicating his wife, son, and uncle.
39. Whereas the court can convict an accused person based on the testimony of a single witness, it must be extra cautious where another material witness contradicts that testimony.
40. Section 143 of the *Evidence Act* provides that no particular number of witnesses is required to prove a fact. However, this is subject to the quality of evidence. Where there is inconsistent and contradictory evidence from the key witnesses, as in this case, the court can infer that the failure to call other available material witnesses was because their evidence would have been adverse to the prosecution’s case. In holding so, the court is guided by the principle in *Bukenya & others v. Uganda* [1972] EA 549, where the court held that the prosecution must make all necessary witnesses available to establish the truth, and that where the evidence presented is barely adequate, the court is entitled to draw an adverse inference.
41. In *JKY v. Republic* [2014] KECH 2000 (KLR), the court acquitted an accused person where there was contradicting evidence and the lack of conclusive evidence coupled with the failure by the prosecution to avail the Investigating Officer to give evidence.



42. One golden principle of criminal law is the presumption of guilt that places the onus of proof on the prosecution, never on the accused. Where the case is marred by conflicting and contradictory evidence, leading to significant gaps in the prosecution's case, the lacuna must be interpreted in the accused's favour.
43. In evaluating the two primary witnesses, the court has noted material and irreconcilable contradictions in their accounts of the events leading to the deceased's death, which were not fully resolved by the end of the case. In the premises, the court has no option but to acquit the three Accused of the offence of murder, contrary to Section 203, as read with Section 204 of the Penal Code, pursuant to Section 322(1) of the Criminal Procedure Code. The Accused persons are set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 24TH DAY OF FEBRUARY 2026.

A. C. BETT

JUDGE

In the presence of:

Mr. Sirtuy for the State/Prosecution

Mr. Mbetera for the Accused persons

Court Assistant: Polycap

