



**Republic v Atieko & another (Criminal Case E003 of 2024)
[2026] KEHC 3896 (KLR) (24 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E003 OF 2024**

DK KEMEL, J

MARCH 24, 2026

BETWEEN

REPUBLIC PROSECUTOR

AND

RICHARD OKUTA ATIEKO 1ST ACCUSED

CALVIN OTIENO 2ND ACCUSED

JUDGMENT

1. Both accused persons herein Richard Okuta Atieko and Calvin Otieno Okoka were charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that 7th September 2023 at unknown hours in Hawinga Sub Location in Siaya Sub County within Siaya County jointly with others not before court unlawfully killed one David Omondi.
2. The prosecution called eleven (11) witnesses in support of its case.
3. Dr. Okongo Eric (PW1) was the pathologist who conducted the autopsy on the body of the deceased. He testified that the body had multiple abrasions and on the shoulders, right and left fore arms and stomach. That there was a partial collapse of the left lung. That there was bilateral subdural hematoma. That he formed the opinion that the cause of death was severe head injury with tension pneumothorax secondary to blunt trauma. He produced the autopsy report as exhibit one and that a death certificate No. 1489665 was issued.
4. Paul Aoko Alunda (PW2) testified that he was on his way to his farm and on reaching Hawinga market, he saw someone being beaten and whom he recognized as David Omondi. That the assailants included Calvince Okola, Richard Oguta, Elly Okoth and others. That the assailants were using sticks and stones. That Richard Oguta is the 1st accused herein and who was armed with a short stick while the 2nd accused had a stone.



On cross examination, he stated inter alia; that the police placed him in custody but was not eventually charged; that he saw both accused at the scene; that the incident took place around 5.00 am and that there were street lights.

5. Alex Okoth Onyango (PW3) testified that he runs a Kinyozi at Hawinga market. He stated that he was asleep when at around 4.00 am – 5.00 am he was called by his landlord's family and was alerted that a person was being beaten at Hawinga market. That he took his torch and rushed there. That he found both accused herein and others at the scene. That Alonda (PW2) informed those present to beat the man and his girlfriend. That the man and his girlfriend were alleged to have stolen a motor cycle. That the motor cycle was stolen from a plot where the 2nd accused resided. That the man died at the scene while his girlfriend was rescued.

On cross examination he stated inter alia; that Hawinga market has no solar lights; that the lights had gone off; that he went with Alex, Denis and 1st accused and found Elly, Enock and Alonda at the scene; that he found deceased being beaten and tied and that the 1st accused joined in the beating while the 2nd accused stood by but did not beat the deceased.

6. Valery Night Onzere (PW4) testified that she was in company of the deceased when the incident took place. That she retired to bed with the deceased at his room when they were attacked by a group of people who claimed that the deceased had stolen a motor cycle. That they were frog matched to the trading centre where they were viciously assaulted and inter tied up with ropes. That she was later rescued but her companion died at the scene.

On cross examination, she stated inter alia; that she was able to identify the 2nd accused as among the assailants and that he was the one who removed her bra; that there were some lights at the centre.

7. Kevin Otieno Oduor (PW5) testified that he received a call from the deceased herein who wanted to be dropped at a certain premise and that he complied and later took him to a certain bar called club Rocket and while there, they were joined by his girlfriend (PW4). That they remained there up to around 1.30 AM when he dropped them at their residence. That the following day, he was alerted that a certain motor cycle had been stolen the previous evening at 10.00 PM. That he rushed to Awinga market where he found the deceased and his girlfriend being attacked by an irate crowd. That he intervened and informed them that he had been with them the previous night but they would not listen and thus he rushed to the police station to report. That the two accused herein were among the crowd at the scene as he had known them previously and that they were armed with clubs.

On cross-examination, he stated inter alia; that he did not witness the incident as he found the deceased already dead.

8. Boaz Odhiambo Olum (PW6) testified that she received a call from his sister that the deceased who was his nephew had been killed. That he rushed to Awinga market where he found the deceased tied with ropes and tethered to a certain stall and who had several injuries on his body.
9. Kevin Mark Otieno (PW7) testified that he was at home when his uncle alerted him that the deceased who was his cousin had been attacked at Awinga market. That he rushed there and saw the deceased tied onto a kiosk and that the body was taken to the County referral hospital.
10. Consolata Omolo Katiba (PW8) testified that she is the retired assistant chief of Kaugagi hawing sub location. That the area chief alerted her that a young man had been killed. That she rushed to the scene and found the body of the deceased while his female companion had been seriously injured and that she rushed the injured lady to hospital. That she learnt that a mob had attacked them on allegation that they were involved in a theft of a motor cycle the previous night.



On cross-examination, she state inter alia; that the trading centre had some solar lighting; that the body had been tied onto a certain kiosk; that the solar lights were able illuminate the area on both sides of the road.

11. Thomas Odianga Ndege(PW9) testified that on 7/9/2023 at 2.00 AM, the 2nd accused requested him to accompany him but I proposed that we do so in the morning as it was then raining. That he later received a report that his nephew had been killed. That he rushed to the scene and found the body and a certain lady who was still alive and whom they assisted to hospital.

On cross-examination, he stated inter alia; that the centre has street lights affixed to Kenya Power electric poles; that it is not true that the centre is served with one huge electric pole.

12. No. 66783 Corporal Simon Likonyi (PW10) testified that he visited the scene on 7/9/2023 at Hawinga market where he saw the body of the deceased tied with a rope onto kiosk. That the deceased had been attacked through a mob injustice. That he took seven photographs which he produced as exhibits 3(i-vii) while the certificate was produced as exhibit 2. On cross-examination, he stated that he did not find a solar pole lighting except for electric poles.

13. . No. 254222 Pc Clifford Gikundi (PW11) testified that on 7/9/2023 the Dcio instructed him to visit Hawinga market and investigate a case of mob justice which led to the death of the deceased and injury of his girlfriend. On cross-examination, he states inter alia; that there were signs that it had rained the previous night; that there were electric poles at the market but no solar poles.

14. At the close of prosecution's case, this court established that a prima facie case had been made out against the accused persons herein to warrant them to be placed on their defence. They opted to tender sworn testimonies and called one witness.

15. Richard Oguta Atieko (DW1) testified that he is the 1st accused herein and a resident of Hawinga. That he was at his house early in the morning when one Alex visited and informed him that he had apprehended a thief and need him to come out of his house. That he woke up and joined other members of public and that he found somebody had been tied onto a stall and being beaten by one Paul Ooko Alonda and that Alex also joined in the assault. That he tried to intervene in vain. That the evidence of Alex is false as they have had differences in the past after he lost a motorcycle and that there is an OB over the incident.

On cross-examination, he stated inter alia; that Alex led him to the scene and that Alex is his neighbour; that at 6.30 AM there was sufficient light for one to see; that he witnessed the incident and that four people assaulted the deceased; that he reported to the asst chief who testified herein; that his relationship with Alex is strained over the issue of the stolen motorcycle; that the issue of his stolen motorcycle was reported but no suspects have been nabbed to date; that he has been framed up.

15. Calvin Otieno Okola (DW2) testified that he is the 2nd accused herein and a resident of Hawinga. That on the material date, he heard noise and thus he woke up and joined his neighbours and that on reaching the roadside, they found a certain person being beaten by a crowd. That it had rained the previous night as there was no electricity lights. That there was also no solar lamp. That he later opted to go back home and continue with his sleep. That he did not manage to identify the assailants.

On cross-examination, he stated inter alia; that he heard the noise between 5.30 AM and 6.00AM; that he found his neighbours already at the scene; that he stood alone; that the 1st accused resides in another plot; that he did not manage to identify the assailants as it was dark at the time; that he has been framed up.



15. Wilberforce Oluoch Hassan (DW3) testified that he was on his way to Siaya through Hawing market when he came across a large crowd that had tied up somebody onto a kiosk and being assaulted and that the assault was by Aoko. That Brian Ochieng who was the owner of the stolen motorcycle was present together with the rider Elly Ouma. That there was a certain lady tied together with the deceased and who had been a barmaid at Hawing market. That at 6.30 AM one was able to see as there was sufficient lighting. That he did not see both accused at the scene. That the market had solar power but it had gone off in 2013 after its battery was stolen and that Kenya power electricity street lights were not working at the time as there had been a power blackout due to heavy rainfall during the night.

On cross-examination, he stated inter alia; that the incident took place between 6.00AM-6.30 AM and that there was some light as dawn had broken; that he did not see the two accused at the scene.

15. After the close of the defence case, learned counsels were directed to file and exchange submissions. However, it is only the defence which complied.
15. I have considered the evidence of the prosecution and defence as well as the submissions filed. I find the issue for determination is whether the prosecution proved its case against the accused beyond any reasonable doubt.
15. The burden of proof in all criminal cases is always upon the prosecution to discharge and that the standard is one of beyond any reasonable doubt. See *Woolmington Vs. DPP [1935] AC462*. Also in the case of *Miller Vs Minister of Pensions [1947] 2 ALL ER 372* the court held as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof of beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail 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 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.”

15. The offence of murder is defined in section 203 of the Penal Code as the killing of another person with malice aforethought through an unlawful act or omission. In a charge of murder, the prosecution is under obligation to prove certain essential ingredients inter alia; that there was death of the deceased; that the death was caused unlawfully; that there was malice aforethought; that the accused was the perpetrator of the crime.
15. As regards the aspect of death, the pathologist Dr Okongo Eric (PW1) formed the opinion that the cause of death was severe head injury with tension pneumothorax secondary to blunt trauma. I find that this ingredient was proved by the prosecution beyond any reasonable doubt.
15. As regards the unlawfulness of the death, it is trite law that all homicides are unlawful unless authorized by law. The deceased herein died at the age of 36 years and in good health. He was flushed out of his room while asleep and later viciously assaulted all over the body and then tied with a rope onto a certain kiosk. The manner in which he was assaulted and the injuries sustained left no doubt that the assailants intended that the injuries were to cause his death. He did not deserve to die in the manner that he did as the assailants ought to have presented him to the authorities if at he was a thief. Hence, I find the death was unlawful and that this ingredient was proved by the prosecution beyond any reasonable doubt.
15. As regards the aspect of malice aforethought, the Court of Appeal in the case of *Nzioka Vs R [1993] KLR 171* held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual



accused: -Intention to cause death.Intention to cause grievous bodily harm.Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

The foregoing authority is a replica of the conditions to be considered whether the ingredient of malice aforethought under Section 206 of the Penal Code has been established. It transpired from the evidence that the deceased herein was relaxing with his girlfriend when he was flushed out by a large mob and frog marched to Hawinga market where he and his girlfriend were viciously assaulted on allegation that he had stolen a motorcycle earlier in the night. It is clear that this was an incident of mob injustice meted on the deceased and his girlfriend. It would appear to me that the circumstances were not favourable to suggest that the said assailants had planned to kill the deceased. I find that it was a spontaneous reaction on the part of the assailants as it is a common problem in these parts of the country for irate members of public to join the fray and assault persons alleged to be thieves or those caught in the act of stealing without letting the authorities handle the matter. Hence, I find that this ingredient was not proved beyond reasonable doubt by the prosecution and that the eventual outcome would have to support a charge of manslaughter and not murder.

15. As regards the third ingredient, the accused persons have vehemently denied involvement in the death of the deceased. It was therefore incumbent upon the prosecution to present watertight evidence placing the accused persons herein at the scene of crime. The two accused persons herein in their defence confirm that indeed they joined the rest of the members of public at the scene but that they did not assault the deceased and that it was other persons and not them and that they maintain that they have been framed up. Further, the accused's witness (DW3) testified that he did not see the two accused persons herein at the scene. It would appear to me that the defence witness (DW3) has brought a new twist to the defence case as a defence of alibi is being raised as an answer to the prosecution's evidence. It is trite that once an alibi is raised, the duty to prove the guilt of an accused still remains with the prosecution to prove beyond any reasonable doubt. In the case of *Patrick Muriuki Kinyua & Another Vs Republic* [2015] KECA 1000 (KLR) it was held that an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged. Again, in the case of *R Vs Sukha Singh s/o Wazir Singh & Others* [1939] 6 EACA 145 the court held as follows:

“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 there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

It is noted that the alibi defence of the accused persons has been raised halfheartedly since the accused persons themselves confirm being at the scene of crime but their witness (DW3) seems to have cast doubt upon the defence evidence. This can be seen by the stand taken by the accused persons that even though they were at the scene, it was other persons who assaulted the deceased and that they have been framed up. The prosecution's evidence presented by PW2, PW3, PW4 and PW5 clearly placed the accused person at the scene of crime when they stated that they witnessed the accused herein leading the irate mob in assaulting the deceased and his female companion. The evidence of the deceased's female companion (PW4) is that the 2nd accused is the one who yanked off her bra as he taunted her while the other witnesses were categorical that the two accused herein were the ones leading the crowd in meting mob injustice to the victims. Again, the evidence of PW3 is that he saw 1st accused beating the deceased while the 2nd accused was standing together with the other assailants. The said PW3 was a neighbour to both accused and had no difficulty recognizing them at the scene. The defence has contended that



there were no security lights at the time as it had rained in the night. Whereas the witnesses gave varying views regarding the type of lights at the time, it transpired that at the time dawn had started to kick in and that the witnesses had no difficulty in identifying the accused persons who were well known to them. Again, the evidence of the accused's defence witness (DW3) is that the incident took place around 6.00 AM-6.30 AM and that there was some lighting at the time as dawn had commenced. I find that the prosecution's witnesses were not shaken even on cross-examination and hence the defence evidence as well their alibi did not shake that of the prosecution. The alibi defence was dislodged by the prosecution and further weakened by the defence witness (DW3). On the whole, iam satisfied by the evidence of the prosecution that the two accused herein were among the assailants during the mob injustice in which the deceased lost his life, while the deceased's female companion sustained injuries. Nothing transpired from the evidence that the witnesses had any differences with the accused persons herein so as to suggest a frame-up. Even though the accused persons had come out to answer a distress call, it was unlawful for them to team up with the rest of the irate mob and assault the victims. They should not have taken the law into their hands and assaulted the victims but they should have handed them over to the authorities so that the law could take its just course. I find that the prosecution proved this ingredient beyond any reasonable doubt.

15. In view of the foregoing observations, it is my finding that the prosecution has not proved a charge of murder against the two accused herein beyond any reasonable doubt. However, the prosecution has proved a charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code against both accused herein beyond any reasonable doubt. I find each of the accused herein, Richard Okuta Atieko and Calvin Otieno Okoka guilty of the charge of manslaughter and are hereby convicted accordingly.

DATED AND DELIVERED VIRTUALLY AT NAIVASHA THIS 24TH DAY OF MARCH 2026.

D. KEMEI

JUDGE

In the presence of:

Richard Okuta Atieko.....1st Accused

Calvin Otieno.....2nd Accused

N/A Ooro F.....for both Accused

Maurine.....for Prosecution

.....Court Assistant.

