



**Republic v Ndekwa & 2 others (Criminal Case 52 of 2014)  
[2025] KEHC 626 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 626 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 52 OF 2014  
SC CHIRCHIR, J  
JANUARY 30, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ALFRED OMOGI NDEKWA ..... 1<sup>ST</sup> ACCUSED**

**JAMES OTUYA MWAMBWA ..... 2<sup>ND</sup> ACCUSED**

**RICHARD OBWAKA OTUYA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. Alfred Omogi Ndekwa, James Otuya Mwamba and Richard Obwaka Otuya (The accused persons), were charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. The particulars of the charge are that on the night of 7<sup>th</sup> and 8<sup>th</sup> October 2014 at Bulanda village, Inaya sub-location in Butere District, within Kakamega County, jointly with others not before court, murdered Stephen Were Alushula alias Enos Toto.
3. The Accused persons denied the charge and the matter went to full trial.

**Prosecution’s case**

4. PW1 was the deceased father. He testified that on 5.10.2014, he was in his farm when the deceased came to inform him that he wanted to start constructing his own house. The deceased later left with a bicycle belonging to the 1<sup>st</sup> Accused . The deceased never came back until he received news of his death on 8/10/2014. He went to the 1<sup>st</sup> Accused’s house and found the deceased lying dead, at about 5 metres from the 1<sup>st</sup> Accused’s ’s house. The deceased’s hands were tied, he sated. He did not witness the incident



5. PW2 was the deceased's grandmother. She was also informed of the death of the deceased. She went to the home of the 1<sup>st</sup> Accused and found the deceased's body lying under a mango tree in the 1<sup>st</sup> Accused's home. She saw bruises on the deceased's head and a cut on the leg. She never witnessed the killing.
6. PW3 was the wife to the 1<sup>st</sup> accused. She told the court that the deceased and the 1<sup>st</sup> accused had been together during the day. when it came the time to retire to bed , the deceased and the 1<sup>st</sup> accused slept in the living room while she went and slept in her bedroom.
7. She further stated that she observed that the deceased was suffering from some hallucinations. she heard the accused and the deceased fighting ,and later the deceased went away. She further stated that the deceased later came back and started attacking her , their grandmother and her children; that all this time the 1<sup>st</sup> Accused was sleeping. The 1<sup>st</sup> Accused later woke up and tied the deceased with a rope. She admitted that the deceased died in their compound.
8. PW4 was the investigating officer . He testified that he and his colleagues found the deceased lying on the ground with his hands tied. The body was in the compound of the 1<sup>st</sup> accused. His investigation indicated that the deceased and the accused were fighting. At some point the deceased ran away and the 1<sup>st</sup> Accused and his family started shouting "thief, thief". The deceased ran to the 2<sup>nd</sup> Accused's house in an attempt to seek refuge but the 2<sup>nd</sup> and 3<sup>rd</sup> accused beat him up instead, and tied him with a rope. They then pulled him back to the home of the 1<sup>st</sup> accused
9. He further stated that at the time of the arrest, the 1<sup>st</sup> accused had injured his eye ,apparently during the scuffle with the deceased.
10. He finally told the court that some of the witnesses refused to record statements due to their religious beliefs. He did not elaborate on this statement.
11. PW5 was the pathologist. He conducted the autopsy on 13/10/2014. The deceased body was identified by Caleb Alusula and Gilbert Muchebe Luta. He testified that the body that had brown soil and had been tied with manila rope on the wrist . He also had a cut wound at the top of the head, cut wound left foot, 3 bruises on right cheek, bruises on outer side of right shoulder and right arm, bruises and lacerations on the back, abdomen and chest . There was also bruising on the front of the chest towards the lower end. Internally there was bleeding under the brain covering. He formed the opinion that the cause of death was a head injury, secondary to blunt force trauma. He produced the post- mortem report dated 13/10/2014 (P PEXb. 10).
12. At the close of the prosecution's case, all the three Accused persons were put on their defence.

### **Defence's case**

13. The 1<sup>st</sup> Accused (DW1) gave an unsworn statement. He stated that on 7/10/2018, he was with the deceased in his house; that in the evening the deceased became violent and started attacking him. That the deceased later left the accused's house after they had made peace, and he went to bed. The following morning he heard screams and when he went to check the cause, he found the deceased had died . He went to make a report at the police station.
14. The 2<sup>nd</sup> Accused (DW2)also gave unsworn statement. He told the court that on the evening of 7/10/2014, he heard shouts emanating from the 1<sup>st</sup>'s house . He heard shouts of "thief! thief!". He opted not to go out because it was at night. In the morning he heard about the deceased's death.
15. On 10/10/2018 he was arrested by the police on accusations of having taken part in the killing of the deceased.



16. The 3<sup>rd</sup> Accused absconded court in the course of these proceedings and hence there was no evidence from him.
17. The Accused filed submissions which I have duly considered.

### **Analysis and determination**

18. Section 203 of the penal code defines the offence of murder as follows: “any person who with malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
19. The above elements of the offence were expounded in the case of Anthony Ndegwa Ngari v Republic [2014] e KLR, where the court stated that the prosecution must prove the following:
  - a. The death of the deceased
  - b. what caused the death
  - c. That the accused committed the unlawful act which caused the death of the deceased; and
  - d. That the accused had malice aforethought.
20. I will proceed to consider whether the prosecution has proved each of the above ingredients of the offence.

### **Death of the deceased and its cause**

21. On the first element of the death of the deceased, PW5, the pathologist produced the post-mortem report (PExb. 10), and opined that the cause of death was head injury, secondary to blunt force trauma. The body of the deceased was identified by Caleb Alusula and Gilbert Muchebe Luta. Thus the death of the deceased as well as what caused it, was proved.

### **Whether the accused persons herein caused the death of the deceased**

22. I have read through the prosecution witnesses’ testimonies and it is evident that none of them witnessed the killing of the deceased. The prosecution’s case is therefore purely circumstantial. The evidence of the investigations officer, though sounded quite detailed on what transpired, was all hearsay. He came after the event, and the witnesses who reportedly gave him the said details, did not testify.
23. The nature of circumstantial evidence was explained by the court of Appeal in Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, where the court stated as follows: “However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”



24. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court went on to state:

“Before circumstantial evidence can form the basis of conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a 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.”

25. The circumstances in this case are that the deceased's body was found outside the 1<sup>st</sup> Accused's home and the two had been together earlier that day. According to the wife of the 1<sup>st</sup> Accused, (PW3), the 1<sup>st</sup> Accused also spend the night in their living room with the deceased. There is evidence that they quarrelled and they fought.
26. From here it is not clear how the deceased met his death. PW3 who was notably the 1<sup>st</sup> Accused's wife was evasive in her testimony. This was noted too by the judge who took down her testimony. For instance her testimony that her husband was asleep as the deceased attacked him, and his family members could not have been true. It is not logical that the 1<sup>st</sup> Accused would insist on sleeping with all the commotion and when his own family was allegedly under attack. She further stated that she took her children away from the scene and when she came back, she found the deceased lying down. She did not know then that the deceased had died. She stated that she inquired from the people present , on what had happened but she did not get any response.
27. Do the above circumstances connect the 1<sup>st</sup> Accused to the death of the deceased? My answer is in the negative. From the account of PW3, apart from herself , her mother -in -law was also in the house. She also talked of other people whom she found on the scene when she came back from taking her children to safety.
28. The fact that the 1<sup>st</sup> Accused and the deceased slept together in the same room ; had entered into some alteration ; and finally the fact that the deceased's body was found in his compound are not sufficient to link the 1<sup>st</sup> Accused to the death of the deceased. There were other people in the scene according to PW3. Thus it can not be said with certainty that it was the 1<sup>st</sup> Accused none else who was responsible for the deceased's death.
29. In respect to the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons , there was nothing circumstantially connecting them to the death of the deceased. The testimony of the investigations officer, to the effect that the two attacked the deceased when he sought refuge in their house is inadmissible as aforesaid in terms of section 11 of the *Evidence Act*
30. In the end I find that there were gaps, missing or broken links, in the chain of events such that looked at in totality , the circumstances do not form a complete chain so to unerringly point to the guilt of the accused persons.



31. Consequently I do find that the prosecution has failed to prove the charge of murder against the three Accused persons and they are hereby acquitted, pursuant to the provisions of section 215 of the criminal procedure code.

32. They shall be set free forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**S. CHIRCHIR**

**JUDGE**

**In the presence of :**

Godwin- Court Assistant.

Ms. Kagai for the State.

Mr. Getanda for the Accused persons

1<sup>st</sup> and 2<sup>nd</sup> Accused present.

