



**Republic v Abwoudha alias Tot & 2 others (Criminal Case 50 of 2018)  
[2024] KEHC 1763 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1763 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 50 OF 2018  
SC CHIRCHIR, J  
FEBRUARY 22, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GODFREY ABWODHA ALIAS TOT ..... 1<sup>ST</sup> ACCUSED**

**BRILLIANT ODUOR ALIAS TYSON ..... 2<sup>ND</sup> ACCUSED**

**GODFREY OPEMBE ABWODHA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. 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 offence are that on the night of 14<sup>th</sup> November 2017 at 1300 hours at Ibinda village Musanda location in Mumias West District within Kakamega County, murdered Luke Odhiambo Otieno.
3. They denied the charges and the matter went to full trial. A total of 6 prosecution witnesses testified.

**The Evidence.**

4. PW1 was the mother of the deceased. She testified that on 14/11/2018 at about 6am she got up and went to the farm. On the way she met with her father-in-law, Johannes Oduor, who inquired of her husband's whereabouts. He also informed her that the fence which her son had put up the previous day had been pulled down. She went and confirmed it for herself. She proceeded with her work and come back home at 9.30 a.m.
5. She further stated that at 11.00 a.m. she heard shouts coming from the "upper part" of her home. She rushed there. Some young men were shouting, they were saying that they are the ones who had cut the



fence. She realized that the shouts were coming from the home of Joanes. She found the 2<sup>nd</sup> Accused demolishing the pit latrine belonging to Joanes. . The 2<sup>nd</sup> Accused was also hitting the roof of the house with the back side of the jembe while the 3<sup>rd</sup> Accused was cutting the wire that had been put up using a spade. She further stated that the accused persons were shouting that they would kill somebody on that day. They were chasing away people. She stated that her son, the deceased was there, he was at the home with his friend , one Luke Odhiambo. The deceased came there and told his her , that they should keep away. They went and sat under a mango tree. While they were sited, the 2<sup>nd</sup> Accused came and hit the deceased with the back side of the jembe. . The deceased who was sited then fell down. He also hit the deceased on the back of the neck. The other two accused came and they all stated beating the deceased. Two were hitting the deceased with a jembe while the third one was using a spade. . She screamed. As the attack went on , one Dennis came and attempted to shield the deceased. The said Dennis suffered some injuries in the process. Also another lady called pamela came , rescued the deceased and took him to his mother's home. The incident was happening at the home of Joanes.

6. The witness further testified that she went to the chief's camp to report the incident . She found CPL Nyongesa, who accompanied her to the scene. When they arrived, she reported that she has seen the three accused persons hiding the weapons. Nyongesa told her to take the deceased to hospital and left. Her husband took the deceased to hospital. He was treated and discharged
7. She stated that after the incident her son was never the same again . He died 69 days later, on 23/1/2018.
8. She claimed that the cause of her son's death was from the beatings he had received . She did not attend the post-mortem.
9. The witness further testified that the accused were members of her family and that she had known them for a while and that they had no differences with the accused
10. On cross-examination, she stated that the incident occurred on November 2017 while her son died in January 2018 . She further stated that he had recovered from the wound injury. She further stated that the deceased had reported the incident but she did not have the OB extract; that the 3<sup>rd</sup> Accused had been arrested but released.
11. She refuted the suggestion that her son was cut with a power saw while cutting a trees. She agreed that there was a tree which fell on the same day at the same home of Jonanes but the tree fell on a house. She found the tress had been cut. She insisted that the trees were being cut at the home of Joanes and not in another home of one James Ochieng. ; that the two homes are far apart. She refuted the allegation that a tree fell on the deceased and that the three Accused persons were assisting the deceased, after the tree had fallen on him.
12. She further stated that her son was a farmer and had never operated a power saw and that the allegations that he was knocked by a tree while operating a power saw were not true
13. She further disagreed with the finding that her son died of a heart attack.
14. PW2 testified that the deceased was his cousin and that they were related to the accused persons. They lived In the same homestead.
15. He recalled that on 14/11/2017 he was cleaning the compound when he heard a power saw and later saw a tree fell from his grandfather's compound and later discovered that it was the deceased brother who cut down the tree. The deceased was together with the brother.



16. He claimed that he went to inform James Ochieng, who was the owner of the trees. He claimed that the deceased was pierced on the hand by the tree and that the owner of the tree reported the incident to the chief and they went to resolve the dispute.
17. He stated that he was not present when the accused allegedly assaulted the deceased and that he was arrested and forced to record and sign the statement.
18. The prosecution sought to have the witness declared hostile, which prayer was granted and allowed to cross-examine the witness.
19. During cross-examination by the prosecution, he claimed that although he wrote the statement, and signed, he denied the allegations that he saw the accused beat the deceased. He claimed that he had been forced to sign the statement. He denied the suggestion that he was now changing his statement because the deceased had died, and was out to protect his cousins.
20. On cross-examination by the accused counsel, he stated that some of the things recorded in the statement were not true. He stated that the only true statement was about the tree falling and the meeting between them and the Assistant chief.
21. He claimed that a tree fell on the deceased and he was pierced by the branches and that it was the family of the deceased who had changed the story, on what happened.
22. The Pathologist Dr. Dixon Mchana was Pw3. He testified that he conducted the post-mortem on the deceased from Kakamega county hospital on 24/1/2018 and two witnesses identified the body. Upon examination, he opined that the deceased had healed pale scar on the dorsum forearm; there was evidence of recent medical intervention and finger clubbing of the hands and feet.
23. He did not conduct an internal examination on the body since he was denied consent by the family. He reviewed the medical records.
24. He formed the opinion that the deceased died from acute heart failure secondary to severe low blood levels in the body. He noted that there were external injuries which were caused by an assault.
25. He went ahead and produced the post-mortem report as P exhibit 1.
26. On cross-examination he stated that the heart stopped due to severe anaemia. He further stated that the deceased was wasted, he was thin and was in a bad state of health. He told the court that dissection is important but cannot be forced. He clarified that the deceased had an injury on his hand.
27. On re-examination he stated that the deceased showed signs of poor health before he died. He restated that the deceased died due to low blood level and that this can be caused by various factors. He opined that an internal examination would have helped to clarify.
28. PW4 testified that on 14/11/17 at 9am, she heard screams coming from the home of John who was her immediate neighbour.
29. She went to check. On reaching there, she saw the 2<sup>nd</sup> accused enter the house of John and throw John out. She further stated that the 1<sup>st</sup> and the 2<sup>nd</sup> accused hit the deceased with the back of a jembe while the 3<sup>rd</sup> accused hit him with a spade.
30. PW5 was the father of the deceased. He recalled that on the material day at about 1.00 pm, he was at home when he heard some fracas and went to investigate. He saw the 1<sup>st</sup> Accused's parent Fredrick Ouma, the 2<sup>nd</sup> Accused's parents, James Ochieng and Stella Adhiambo and 3<sup>rd</sup> Accused's



mother. some women , Milkah and Caroline were screaming and Fred shouting “ Leo ni Leo “while jumping

31. He stated that the deceased was his first born son who stayed at his grandfather’s home. He stated that on that day, he was standing at the fence and could see what was happening from a distant. He stated that there were people destroying things in the compound and in the commotion the deceased was hurt on his hand and he was bleeding.
32. He testified that he took the deceased to the hospital in Butere and later went back for repeat treatments. He stated that on 3<sup>rd</sup> January 2018, the deceased complained about poor health and was taken to the health care centre where he was transferred to Butere Sub-county hospital. He stated that he was admitted on 17<sup>th</sup> January but his condition worsened and he was transferred to Kakamega county Referral hospital on 21<sup>st</sup> January 2018. He succumbed on 23<sup>rd</sup> January 2018.
33. He stated that the injury on his hand had healed.
34. During cross examination, he told the court that the deceased died 2 months after the incident.
35. He further stated that he was transfused blood during one of the hospital visit at Butere hospital. He was also tested for HIV which turned out positive. He testified no tree fell on the deceased and that was not the thing that caused his injuries. He insisted that the Accused persons are the ones who hit the deceased.
36. PW6 was the investigating officer, he testified that on 14/11/2017 while still based at kakamega police station, he was given the duty to investigate the attack against the deceased who claimed to have been attacked by people known to him.
37. He stated that the deceased was rushed to the hospital for treatment but later discharged and he went to report the incident to the police base. He later filed the P3 form which was submitted to the station.
38. He testified that the deceased continued with his treatment while at home but his health deteriorated and he was admitted on 3/1/2018 and 17/1/2018. He was back in kakamega county hospital on 21.1.2018 but died on 23.1.2018 while undergoing treatment.
39. On cross- examination, he claimed that he visited the scene of the crime where the whole fracas had started but most of the villagers feared to talk to him out of fear of repercussions from the Accused persons.
40. He stated that he visited the site of the damage to the trees but did not pursue a charge of malicious damage as there was no evidence.
41. He refuted the suggestion that the deceased could have died from HIV, insisting that the deceased had been leading a healthy life before, despite his HIV status.
42. He testified the cutting of the trees was a previous incident and a report had already been made about it. He insisted that it had no relationship to the attack of the deceased.
43. After the close of the prosecution’s case , the court was informed that the 1<sup>st</sup> Accused had died.
44. The 2<sup>nd</sup> and 3<sup>rd</sup> Accused were put on their defence.
45. DW1, was the 2<sup>nd</sup> Accused, He told the court that on 14/11/17 he heard screams from the deceased parents, Karen Okoth, Lucas Otieno Odhiambo and Pamela Anyango. He went towards the direction of the sound of the power saw and heard a tree fall and that people came to rescue the deceased. He claimed that the person who fell the tree, Martin Otieno, was arrested together with the owner of the



tree, one James Ochieng. He produced a letter dated 20/11/17 and another dated 4/11/17 as evidence that there was a tree cutting incident.

46. He stated that when he reached the scene, he found many people and were trying to rescue the deceased since a tree had fallen on his hand . He helped remove the tree from the and he was later rushed to the hospital
47. He denied being involved in the death of the deceased insisting that he was a good Samaritan. He stated that the deceased was his friend, although their parents were on bad terms.
48. DW2 was the 3<sup>rd</sup> Accused. He testified that on 14/11/17 he heard some screams and he decided to go towards the source of the screams. He saw one Martin Otieno with a power saw and a tree had fallen on the deceased. He joined in the rescue and later took the deceased to the hospital in the company of the deceased Father and the 2<sup>nd</sup> Accused.
49. During cross examination by the prosecution, he testified that he was not aware if the deceased had reported them to the police.

### **Accused persons' submissions**

50. It is the Accused persons' submissions that there was no Evidence that that the death of the deceased was related to the incident of 14<sup>th</sup> November 2017 or any evidence linking the deceased to them . It was further submitted that there was no bad blood between the deceased and the Accused persons and therefore there was no reason for them to want to kill him
51. It is finally submitted that the prosecution had failed to discharge its duty of proving its case. In this regard the defence relied on the case of *Mugoma & another v. republic* (2003)382.
52. The prosecution did not file any submissions.

### **Determination**

53. Section 203 of the *penal code* defines the offence of murder as follows: "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder".
54. In order to establish the offence of murder the prosecution must establish the following:
  - a) That death of the victim occurred (actus reus);
  - b). That the death was caused by an unlawful act or omission by the Accused Person; and
  - c). The unlawful act or omission was actuated by malice aforethought  
( Ref: *Anthony Ndegwa Ngari vs Republic* ( 2014) e KLR)
55. On the other hand, under section 206 of the *Penal Code*, provides that malice aforethought is established, when there is evidence of:
  - a. )Intention to cause death of or grievous harm to any person whether that person is the one who actually died on not;
  - b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not;
  - c. Intent to commit a felony; or



- d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
56. In this instant case there is no question that the death of the Deceased occurred. PW3, the pathologist testified that he conducted autopsy on the body of the deceased. The body was identified by Lucas Otieno Odhiambo and Mohammed Shiundi. He concluded that the death was due to a heart failure due to severe low blood levels in the blood.
57. On the question of whether the deceased was attacked by the Accused persons , I find that the testimonies of PW1,PW4 and PW5 are fairly consistent on the fact that the accused persons herein attacked the deceased and injured him on his hand. I find the defence of the Accused persons implausible. In the documents they produced , there was nothing to show that the tree cutting occurred on the day of the incident. I agree with the investigation officer ( pw6) that the two incidences happened on different dates. I do find that the Prosecution has established that indeed the Accused persons attacked the deceased.
58. The pertinent question is what caused the severe anaemia which led to the death of the deceased? Was it the attack by the two Accused persons as asserted by the prosecution ? Was it the chronic illness , namely HIV , about which the deceased's father ( pw5) talked about?
59. The main focus of this court however is on the prosecution's case, for with them lies the burden of proving that the death of the deceased is traceable to the acts of the Accused persons. I understand the prosecution to be saying the Accused persons attacked the deceased; they injured him on the hand and he bled; the bleeding led to severe anaemia resulting in the death of the deceased.
60. There is common ground on the site of the injury, it was on the hand . According to the post-mortem report there was a healed pale scar on the dorsum left forearm measuring 4 cm x 0.6 cm
61. I have carefully gone over the report as well as the pathologist's testimony. From both the report and his oral testimony he indicated that the family of the deceased declined to give consent for opening up of the body. His conclusion on the report was " Acute heart failure secondary to severe Anaemia with external evidence of Assault" ( Emphasis added).
62. In effect the Doctor did not attribute the Anaemia to assault . If the Anaemia was attributable to assault then I expected the wording to have been " .... Secondary to severe anaemia due to Assault"
63. The doctor's oral testimony was also telling . Under re- examination by the prosecution he stated: " what caused his death was low levels of blood which could be caused by many reasons..... Perhaps an internal examination would have helped"
64. I understood the doctor to have been saying he did not know if the severe loss of blood was due to the assault which took place on the 14<sup>th</sup> November 2018 or another cause.
65. There are other pieces of evidence, that in my view casts doubts on whether death was due to the assault. The deceased's father told the court that on 17.1. 2018 the deceased was given blood at Butere hospital. But is apparent that the transfusion did not make any difference on the blood level. We donot know how critically sick he was at that point , but I wonder why the transfusion did not make any difference if the blood loss was purely due to the Assault he had suffered . Such questions ought to have been posed to the pathologist . He would have been the right person to give an opinion as to why the blood transfusion never seemed to have made any difference.



66. I have also considered other portions of the pathologists testimony. He told the court that on examining the body he found evidence of poor health prior to death. He stated: “ The deceased was wasted, he was thin, in a bad state of health”
67. The Deceased father told the court that the deceased was tested for HIV at Butere hospital and the results came back positive for the disease.
68. The unanswered question is , could the deceased’s anaemic condition have been caused by any other condition other than the attack. The deceased died about 2 months by blood loss during the attack or by a pre-existing or even a post -existing condition. We will never know. We can only suspect or speculate. But speculation and suspicion can never be a basis of conviction. In the case of Sawe vs Republic(2003 KLR 364 it was held: “suspicions, however strong can not provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt” .
69. The prosecution has failed to link the deceased’s death to the attack of the deceased persons.
70. Further there deceased’s treatment records were not availed, to enable the court determine if the Accused persons could have been liable for a lesser offence.
71. In criminal cases , any doubts and unanswered questions are, and must always be resolved in favour of the Accused. ( see for instance *GNKvs Republic* ( 2020) e KLR
72. In conclusion. It is my finding that the prosecution has failed to prove its case herein against the accused persons and I hereby acquit them under section 215 of the penal code.
73. They shall be set free forthwith unless otherwise lawfully held.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of:

Godwin- Court Assistant

2<sup>nd</sup> Accused

3<sup>rd</sup> Accused.

