



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Abich (Criminal Case E008 of 2020)
[2024] KEHC 4351 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E008 OF 2020**

KW KIARIE, J

APRIL 25, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

VICTOR ODHIAMBO ABICH ACCUSED

JUDGMENT

1. Victor Odhiambo Abich 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 22nd day of September 2018, at the Kamenya location in Ndhiwa Sub County of Homa Bay County, jointly with another not before the court, willfully and unlawfully murdered Margaret Ajwang Odira.
3. A group of about four people struck at the home of the deceased at about 12.30 a.m. They removed her from the house. She was killed, and some witnesses claimed to have identified the accused as one of the people who killed her.
4. Victor Odhiambo Abich, the accused, in his defence, contended that when the deceased was killed, he was at his place of work in Kisumu.
5. The issues for determination are:
 - a. Whether the accused was involved in his death; and
 - b. Whether the offence of murder was proved against any or all the accused.



6. The accused pleaded an alibi. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie v Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

7. In the instant case, while analyzing the evidence on record, I will seek to determine whether the evidence adduced by the prosecution displaced the defence raised by the accused.
8. Jack Okinyi Odera (PW1) and Wycliffe Odera (PW2) testified that they recognized the accused. When the conditions for identification are not favourable, it is incumbent upon the trial court to ensure that each purported identification or recognition is carefully scrutinized to ensure no mistake is made. Lord Widgery C.J. in *Turnbull and Others v Republic* [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?

...

Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

9. The evidence of Jack Okinyi Odera (PW1) at about 12.30 a.m., the door of the house he was sleeping in was forced open. Two people entered the house while one remained outside. He could see the accused when the person who remained outside directed his spotlight inside the house. This was when the two were walking out with his mother. His mother was before the two people who had entered the house. This evidence poses a question as to how he could see the person he claimed was the accused while his mother was in front and the light was coming from outside. Secondly, these people were in motion. He had a fleeting glance, which, given the prevailing circumstances, was inadequate for him to recognize anybody.
10. Wycliffe Odera (PW2), for his part, testified that when he heard his mother crying, he went to check what the issue was. He met with two people who directed their spotlights at him. He, therefore, did not recognise them. During cross-examination, he changed and said he recognised the accused as the person he fought with. In his statement to the police, he recorded that he did not recognise anybody. The Court of Appeal, in the case of the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA), held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a



person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

I find PW2 to be an untrustworthy witness.

11. The prosecution adduced evidence of a grudge between the two families. Without any other evidence, this is mere suspicion. A conviction cannot be founded on suspicion. The court of appeal in the case of *Sawe v Republic* [2003] KLR 354, the Court of Appeal held as follows:

Suspicion, however strong, cannot provide the basis for inferring guilt, which must be proved by evidence beyond reasonable doubt.

12. The upshot of the preceding analysis of evidence on record is that the prosecution has failed to prove the offence of murder against the accused. I acquit him and set him at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF APRIL 2024.

KIARIE WAWERU KIARIE

JUDGE

