



REPUBLIC OF KENYA



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**Republic v Sitati (Criminal Case E028 of 2022)
[2023] KEHC 21890 (KLR) (15 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E028 OF 2022
REA OUGO, J
AUGUST 15, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

JANE NAKAHUMICHA SITATI ACCUSED

JUDGMENT

1. Jane Nakhumicha Sitati, the accused, is facing a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that; on the night of 22nd August 2022 and 23rd August 2022 at Lukhuna village in Kimilili Sub- County within Bungoma County the accused murdered Moses Juma Wanyama.
2. The accused person denied the charge and the prosecution called 12 (twelve) witnesses. The accused gave a sworn statement.

Prosecution Case

3. Philmena Barasa (Pw1) testified that she is a resident of Kimilili. She knows the accused. The accused is a neighbor. On the 22/8/2022 she left the accused and Musa her husband at their place. The next day the accused called her to go dig for her at 10.00am. On going to the accused's place she found the deceased lying at her door. He was dead. She called a neighbor to witness what had happened. The deceased was not bleeding. She went to call Jane from where she had left her. The accused did not say what had happened to Musa. During cross- examination she told court that the deceased is the accused's husband and that she had not seen them quarrel. That people go to her place to drink changaa. That the deceased would also take changaa at Ochiro's place. That the accused and the deceased at times go to drink changaa at Ochiro's place. That when she left them on the 22/8/2022 at 8.00pm the 2 were okay. That she would not know if they left and went elsewhere or if the deceased went out alone. That on the 23/8/2022 the accused found her at Fred's place drinking. That the



deceased was found dead on the 23/8/2022. She left the accused drinking at Ochiro's when she went to dig for her and it then she found the deceased at Jane's door. She did not find anyone at the place. Jane was shocked when she went and called her. She did not see Jane beat the deceased.

4. Robert Barasa Simiyu (Pw2) testified that the accused is his sister-in-law. He stays about one kilometer from her home. On the 23/8/2022 at about 12.00pm he got a call from Robert Wanjala. Robert informed him that a body was found at Sitati's house. Sitati is the husband of the accused. He proceeded to the accused's home and found the deceased at the door lying dead. He was not bleeding. His face was facing down. The accused did not explain anything. The 2 had no issues. He acknowledged during cross examination that the deceased used to drink.
5. Ronald Wanjala Wanyonyi (Pw3) testified that he knows the accused, she is his sister-in-law. That on the 22/8/2022 at 4.00pm he was cutting cow feed. He saw Musa pass by heading for his place. Musa was okay. He entered the accused's house. The deceased was not staggering. He usually sees the deceased go to the accused house. On the 23/8/2022 between 11 and 12pm he was called by a boy and told that Musa was found dead at the accused's door. He went to the accused's door and found the deceased at Jane's door. The deceased was lying facing upward, he had a vest on and he was sleeping on his shirt and long trouser and was across the door. He did not check if the clothes were folded or were scattered, but they were on his back where he lay. His mouth was open and his eyes were closed. Thereafter he went to Philomena's place. Philomena called the accused and she did not talk when she arrived. During cross-examination Pw3 told court that the deceased used to drink and that as a family they lived in peace. That he does not know where the deceased was from on the 22/8/2022. He knew that Philomena had gone to call the accused. That he does not know if there were other people in the said home before he got there. That the deceased's shirt was removed and was on his back not placed on the head. That the shirt and trouser had no blood. That he did not kill the deceased. That he could not see the deceased from where he was in the shamba. That he saw Jane leave at 10.00am heading for the river. She usually uses the path along his home. He did not hear any screams or commotion.
6. George Masika Wanjala (Pw4) testified that the accused is his neighbor. On the 23/8/2022 he was picking coffee at his farm. He saw people ran and he joined to see what was happening. He found a person had died. He called the assistant chief. The accused was there and was alone. She did not explain anything. She was just in her house. The deceased had an inner wear, a vest and shoes which were off his feet. He was lying near the door. His clothes were also there. During cross examination he told court that one can see the accused from Ronald's place. That people beat the accused claiming she had killed the deceased. He denied going drinking with the deceased. That he takes his drinks elsewhere. He does not know who killed the deceased. That he does not know how the deceased's clothes were at his head.
7. Carolyne Nekesa Wekesa (Pw5) testified that on the 23/8/2022 at about 1 to 2.00pm she heard people say that the deceased Moses Wanjama was dead. The accused stays at the next village. She went to the accused's home and found the deceased's body lying at the door which had a lock with a padlock. The body was lying across. He had a vest and his clothes were folded and he was lying on them. He was facing upwards. It looked like he had been pulled to lie there. The body was at Jane's place. The accused and the deceased were cohabiting. She called the sub-chief. She heard the accused say she did not sleep there. People came and began beating the accused. The accused did not name anyone. She does not know who killed the deceased. During cross examination she admitted slapping the accused. She did so because of the pain she felt. That she did not see the accused cry. The deceased was lying on his back but his clothes were not under his head. She did not see any injuries on the deceased.
8. Alex Wanyonyi Nyongesa (Pw6) testified that on the 23/8/2022 he was told by boda boda people that his brother had been killed. They had gone to his home to collect him. They took him to the accused's home. He found his brother's body at the accused's door lying on his side. The said house had only



- one door for entering and leaving the house. He was aware that the accused and deceased were leaving together for about 2 years. He knows the accused sells alcohol. He attended the post-mortem which revealed he had been beaten. He had injuries in the right leg and his chest had a hole and blood in the legs. The deceased was not sickly. During cross-examination he told court that the deceased loved drinking busaa. That he was not aware of any dispute with the deceased and that he would not know of any reason why the accused would kill the deceased. That alcohol did not kill the deceased.
9. Joseph Wafula Barasa (Pw7) that he knows the accused person and the deceased too. The 2 live as husband and wife at the accused's place. The accused has 2 children who do not belong to the deceased. On the 23/8/22 he saw people passing by saying that Moses had died across on the other side. He decided to follow them. He found Moses dead at the accused's door step. He did not note any injury on the deceased. The accused did not talk to them. She was beaten by people. They arrested her and took her to the police. He does not know where the accused was the night before.
 10. Matayo Bale Orupia (Pw9) testified that she knows the accused person. She was the wife of Musa her brother. Musa the deceased used to live with the accused when he had money. He had a house in their home. The accused used to chase the deceased when the money got finished. They lived like that for 5 years. Moses's wife left. On the 23/8/22 she learnt at lunch that Moses had died. She went where Moses was and found him dead. She last saw Moses on the 22nd when he was taking the cows to get water. She is his close neighbor. She does not know the exact time the deceased left for the accused's place on the 22nd. They took the deceased's body to Dreamland mortuary.
 11. Bernard Simiyu Wasike (Pw9) testified that he knows the deceased he is the son of his cousin. On the 23/8/22 he heard screams that someone had died. Later he went to Dreamline mortuary and identified the deceased's body. His injuries were not visible externally. The deceased had a clot in his head. He also had a mark on his left hand like he had been beaten. During the post mortem they took samples of his liver and stomach contents and urine too.
 12. Doctor Graham Makokha (Pw10) testified that on the 25/8/22 he did a post mortem on the body of Moses Juma Wanyama at Dreamland Morgue. The deceased had no clothing the body was well preserved. He had minor bruises on the neck and forehead all less than 2 cms and blood clot in the neck. On the respiratory and cardio-vascular system were normal. On the digestive system he had an enlarged liver with dark consistency and they took the stomach contents. On the genito-urinary system the bladder was full. On the head there was blood clot intercerebral sinus. The spinal column and spinal cord were intact. As a result of his examination, he formed the opinion that the cause of death was suspected poisoning awaiting toxicology report. Specimens were taken from his stomach, kidney urine part of the liver and vitreous humor. Pw10 produced the said report as exhibit no. 1.
 13. Jane Nabututu Waya (Pw11) testified that she works at the government chemist in Kisumu. On the 16/10/22 she received samples from Kimilili police station under the escort of Geoffrey Onyancha the following exhibits with OB No. 32/23/08/22. A plastic container marked 'A,B,E' containing stomach with content , kidney and liver of the deceased Moses Juma Wanyama deceased. A plastic container marked 'D' with urine sample of Moses Juma Wanyama deceased. The same was accompanied with an exhibit memo which requested that they ascertain whether exhibits marked ' A,B,D & E' contained any toxic substance harmful to the human life and any information in exhibits marked ' A,B,D & E'. She did the analysis and found the following; 630.5mml % ethanol which is equivalent to 12 half-litre bottles of beer or 25 number of tots. This was detected in the urine sample. No other chemically substance were detected in the other exhibits. She produced the report as exhibit no. 2.
 14. No. 64094 P.C Richard Motolo (Pw12) testified that; he is attached to DCI Kimilili. On the 23/8/22 he received a report from a chief of Kumusinga area in Kimilili that a person had been killed and that



the suspect was almost being killed. Police from Kimilili went and rescued the accused person and took her to their police station. The body which was at her boma was taken to Dreamland mortuary in Kimilili. On the 25th August 2022 a post mortem was done on the deceased's body at Dreamland. He also recorded statements from the witnesses. An exhibit memo was prepared by P.C Onyancha for the samples which were taken to the government chemist.

Defence

15. Jane Nakhumicha Sitati, the accused gave a sworn statement. Her defense was as follows; she did not kill the deceased. She knew the deceased. He was a friend and not her lover. He would pass by from church. He used to take alcohol. She drunk alcohol with him once. On the 22/8/22 she was with the deceased at Fred Ochiro's place. They stayed there and then he left. She went to her brother's place called Christopher Wanyala to prepare the child for circumcision. She did not leave anyone at her place. She locked the place. On the 23rd she returned in the morning. She passed through Fred's place. Fred sells changaa. It was 9.30am. She stayed there till 1.00pm. Her in law called Philemon Barasa came and told her that he had seen someone sleeping near her door. She asked him whether he was okay or whether he was just sleeping. Another person came and told her that he had seen a person lying at her door. 11 of them went to her place and they found the person lying there and he was dead. They stayed there. She did not open the door. She had locked her door. She was forced to open the door. The people began beating her and she ran to the police station. She was asked to explain how the person died. Then she was charged. The doctor said he died because of taking alcohol and that he was hungry. She had no reason to kill him.

Submissions

16. The prosecution relied on the evidence on record. The defense relied on the written submission on no case to answer. In the said submission Mr. Wattangah submitted that there was proof of death of the deceased. On whether the prosecution proved that it was the accused who caused the unlawful death of the deceased, it was submitted that the prosecution had failed to adduce evidence that points directly to the accused and connecting her to the death. That the only evidence the prosecution relies on is that the deceased was found at her door step of the accused. That the said evidence is not watertight. That the toxicology report indicates that the cause of death was due to excessive alcohol intake which made the liver swell. On proof of malice aforethought malice cannot be gleaned from the events as they unfolded that led to the death of the deceased. No witness testified that the accused and deceased quarreled. That the prosecution failed to prove their case beyond reasonable doubt.

Analysis And Determination

17. In a case of murder, the prosecution is required to prove the following; the death of the deceased, that the death was due to an unlawful act or omission of the accused person and that the accused person had malice aforethought (See *Antony Ndegwa Ngari v Republic* [2014] eKLR).
18. There is evidence to prove the death of the accused person. Pw1, Pw2, Pw3, Pw4, Pw5, Pw6, Pw7, Pw8, Pw9 and Pw11 saw the body of the deceased after he died. Pw10 did the post mortem on the body of the deceased, he was of the opinion that the cause of death was suspected poisoning awaiting toxicology report. Specimens were taken from his stomach, kidney urine part of the liver and vitreous humor. The toxicology report indicated that there was 630.5mml percent ethanol which is equivalent to 12 half- litre bottles of beer or 25 number of tots. This was detected in the urine sample of the deceased. No other chemically substance were detected in the other exhibits.



19. On whether it is the accused who caused the unlawful death of the deceased, there is no direct evidence adduced by the prosecution that the accused caused the death of the deceased. The prosecution case is based on circumstantial evidence. The Court of Appeal in the case of *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 set out the conditions on when a case rests on circumstantial evidence 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 guilt of the accused;
- (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.”

20. The prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. The evidence adduced is that the deceased and the accused were cohabiting and that they used to drink together. That on the 22/8/22 they were seen by Pw1 at 8.00pm. That the next day the deceased was found lying dead at the accused’s door. This evidence is all circumstantial evidence. At the time the deceased was found the accused was not home. She was fetched from a drinking den at Ochiros’ place. She denied being with the accused that night but admitted that the deceased had left at the place they had been drinking together at Ochiros’. It is not the duty of the accused to fill in the gaps in the prosecution case.

21. Further the post mortem report indicates that cause of death was suspected poisoning pending the toxicology report. The report from the government analyst was that the deceased had 630.5mml % ethanol which is equivalent to 12 half- litre bottles of beer or 25 number of tots. This was detected in the urine sample. No other chemically substance were detected in the other exhibits. It was not the prosecution case that it is the accused who gave the deceased the alcohol. There were no visible body injuries that contributed to the death of the deceased.

22. In my view the accused remains a suspect. Suspicion cannot infer guilt on a person. The Court of Appeal in the case of *Joan Chebichii Sawe v Republic* Criminal Appeal No. 2 of 2022 held as follows;

“No matter how strong the suspicion will be this is a game with very clear rules of engagement. The burden of proof lies on the prosecution and must be proved beyond reasonable doubt. This was made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence”

23. On malice aforethought there was no evidence of malice adduced by the prosecution on the part of the accused. The last time the accused and deceased were seen by Pw1 they were sitting outside their place. None of the witnesses adduced evidence of malice on the part of the accused. The accused remains a suspect. It is the duty of the prosecution to prove their case beyond reasonable. I find that the prosecution has failed to do so. The accused Jane NaKhumicha Sitati is therefore acquitted of the murder of Moses Juma Wanyama. She is free to go unless lawfully held.



DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 15TH DAY OF AUGUST 2023.

R.E.OUGO

JUDGE

In the presence of:

Jane Nakhumicha Sitati/Accused- Present

M/s Omondi ... State Counsel

Mr. Wattangah .. Counsel for the Accused

Wilkister .. C/A

