



**Republic v Chepkwemo (Criminal Case E001 of 2022)
[2023] KEHC 26748 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E001 OF 2022**

DK KEMEL, J

DECEMBER 15, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

VELLA CHEPKWEMO ACCUSED

RULING

1. The accused herein Vella Chepkwemoi was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that on the 5th day of January, 2022 at about 9.00 pm at Tindi Bare within Emia Location, Cheptais Sub- County within Bungoma County , jointly with others not before court , she murdered Gilbert Naibei.
2. The Prosecution called six witnesses in support of its case which was as follows:-
3. PWI Geoffrey Masai Chepkenjo testified that on the 5.1.2022 at around 9.00 pm he was at his house when the accused herein who is his younger sister turned up as she usually does whenever she has disagreements with her husband. He allowed her to spend the night at his place. The following morning, he went to his farm only to be alerted later that the deceased had been found dead inside his house. He rushed to the scene and founder other villagers had thronged the deceased's compound. He entered the house and found the deceased lying next to a bed facing upwards and that there was a piece of rope dangling above the body. He saw bloodstains on the deceased's head. He later accompanied the accused to the police station where she was locked up. He confirmed that the accused and deceased had had frequent squabbles over the failure of the accused to bear him another child. He stated that he had heard the deceased claiming as to why the accused was assaulting him. On cross examination, he confirmed that the accused and deceased used to have frequent squabbles in which the deceased could assault the accused. He confirmed that it was possible that other persons could have assaulted the deceased since accused was then at his house.



On re-examination, he stated that he could not tell if the accused was involved in the murder of the deceased.

4. PW2, was Abigael Samoror Ndiema who testified that she was in her house at 9.00 pm. She had escorted her children outside to answer a call of nature when they heard noises from the house of the accused and deceased and that they assumed that they were the usual squabbles between the two. She stated that the accused later arrived at their home and claimed that the deceased had arrived while in company of strangers who wore hoods. She stated that the accused spent the night at their home and that she accompanied her to her house the following day only for the accused to decline to enter her house. She added that she managed to convince her to enter the house and that she joined her inside where she saw the body of the deceased lying on the ground.

On cross examination, she stated that she heard screams from one male person. That accused and deceased had had frequent fights in which the accused was forced to spend outside her matrimonial home. That the accused did not inform her as to what the strangers who accompanied the deceased demanded.

5. PW3, was Kibet Oliver Naibei who testified that he visited the home of the deceased and found him lying down and that there were bloodstains on the floor. He stated that he later witnessed the post mortem examination of the body which revealed injuries on the head and neck.
6. PW4 No. 61362, SGT Kibet Kosilei testified that he visited the scene and found the deceased lying on the floor facing upwards and that he had injuries on the face. He established that there were signs of a struggle suggesting that the body had been placed there. He also saw a disturbed scene within the compound with bloodstains on the ground.

On cross examination, he stated that he suspected the accused to have been responsible as she did not help her husband if indeed he had been attacked by strangers but opted to run away and leave him alone in the house. He stated that he established that the deceased used to assault the accused. That accused should have even raised alarm on seeing her husband being attacked.

7. PW5 NO. 77098 CPL Geoffrey Too testified that he investigated the matter. He visited the scene and found the deceased lying down on the floor next to his bed with injuries on the head, neck and knees. He stated that the body was taken to the mortuary and that he interrogated the accused who was already in custody. He later arrested another suspect named Evans Ndiema but who later escaped from lawful custody. He established from the said runaway suspect that he had been hired by the accused to kill the deceased. He added that none of the witnesses except the suspect who is at large linked the accused with the murder.

On cross examination, he stated that he did not get eyewitness and that no blood samples were collected from the scene. He confirmed that the accused spent the night at the home of PW1 and PW2. He also confirmed having arrested other suspects who were later released for lack of evidence. He stated that he did not establish fully that the accused had contracted Evans Ndiema to kill the deceased. He also stated that he did not collect a mobile phone from the accused but from the deceased.

8. PW6, Dr. Jemimah Muia testified that she performed the autopsy on the body of the deceased on 13.1.2022 and noted deep cut wounds on the left side of the neck as well as bruises on the knees. That there was epidural hematoma on the front skull. She formed the opinion that the cause of death was head injury secondary to assault. She produced the post mortem report as Exh.1.

On cross examination, she stated that the weapon was both sharp and blunt. She also stated that she could not tell if the injuries were inflicted by several assailants.



9. At the close of the prosecution case, learned counsel for the prosecution opted to rely on the evidence so far adduced on the issue of whether a prima facie case has been made out. Defence counsel filed submissions dated 27.11.2023.
10. I have given the consideration to the evidence adduced at this stage of the proceedings as well as the submissions presented. The only issue for determination at this stage is whether the prosecution has made out a prima facie case so as to warrant the accused to be placed on her defence.
11. It is trite law that in criminal trials the burden of proof is always on the prosecution to discharge. A trial court is therefore enjoined by law to determine whether at the conclusion of the prosecution's case there exists a case discharging that burden of proof. Indeed, the prosecution has an obligation to establish the guilt of the accused for the offence charged beyond reasonable doubt. See [Woolmington -vs DPP](#)(1935) AC 462. The burden of proof is also expounded in section 107 of the [Evidence Act](#) which provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
12. The tests and procedure for a trial Judge to decide if there is no case to answer is attributed in section 306 of the [Criminal Procedure Code](#) which provides as follows.

“ At the end of the Prosecution's evidence on either submissions by the prosecutor or defence or on the court's own initiative, may make a finding on whether there is sufficient evidence to prove the elements of the offence. If the prosecution evidence is capable of establishing the case for an independent tribunal to conduct it, it may call upon the accused person to take his or her defence in rebuttal. Whereas on the other hand if the evidence is insufficient for any independent and reasonable tribunal directing its mind to the facts may reach a verdict of not guilty and acquit the accused”.
13. The above test in the [Criminal Procedure Code](#) has been amplified in [Republic -vs Galbraith](#) 73 Criminal Appeal R. 124 as follows:-
 - a. If there is no evidence that the crime alleged has been committed by the defendant then there is no difficulty. The Judge will stop the case.
 - b. The difficulty arises when there is some evidence but it is a serious character, for example because of inherence, weakness or vagueness or because it is inconsistent with other evidence.
 - c. When the Judge comes to the conclusion that the Provisional evidence taken its high use is such that a jury directed could not properly convict upon it , it is his duty upon a submissions being made to stop the case.
 - d. Where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability or other matter which are generally speaking with the provisions of the jury, and where on possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the Jury.
14. The prosecution was under duty to prove the essential elements of the offence as provided for under section 203 as read with section 204 of the [Penal Code](#). The elements are inter alia; that the deceased is dead; that the death was caused unlawfully; that there was malice aforethought and that the accused directly or indirectly participated in the commission of the alleged offence. Hence, the prosecution while discharging the burden of proof, must establish at this stage that the evidence so far tendered



should be sufficient to sustain a conviction against the accused herein were she to elect to remain silent in defence. See *Bhatt -vs Republic* (1957) EA 332.

15. In the instant case, the evidence of the pathologist (PW6) Confirmed that the deceased died and that the cause of death was head injury secondary to assault. As regards the unlawful death, it is common knowledge that all homicides are unlawful unless authorized by law. The deceased was known to enjoy good health and was at his house when he met his death. Hence, I find that his death was unlawful. As to accused's involvement and whether there was malice aforethought, it transpired that the accused and deceased lived as a couple and that they used to have frequent squabbles and fights. This was confirmed by PW1 and PW2 who are their relatives and who are their neighbours. The two witnesses stated that the cause of the squabbles was due to the deceased exerting pressure on the accused for her failure to conceive a child as their last born was then aged twelve years. The investigating officer (Pw5) stated that on visiting the scene, he found the deceased lying down on the floor with injuries and that he checked the compound and noticed evidence of a struggle with some bloodstains on the ground . The said witness faulted the accused for failing to even raise alarm to alert the villagers if at all she had no hand in the death of the deceased. The said witness further stated that upon interrogating the accused, he was able to arrest one suspect named Evans Ndiema who claimed to have been hired by the accused to kill the deceased but that the said Evans Ndiema is said to have escaped from lawful custody. The evidence of PW1 and PW2 who are relatives of the accused is to the effect that they had heard the deceased's screams inside his house even before the accused left her house and sought refuge in their home for the night. It was their view that the accused deliberately failed to call for help at the time and which was backed by her conduct the following morning by her reluctance to enter her house which implied that she had something up her sleeve. There was also the claim by the suspect who escaped from lawful custody that he had been hired by the accused to kill the deceased. It is not in dispute that the accused was the last person to be with the deceased before she sought to spend the night at the home of PW1 and PW2. She did not even inform them about what had happened to the deceased and chose to proceed to sleep until the following day when the deceased was found to have been killed.

I find the totality of the evidence presented placed the accused at the scene of the crime as a perpetrator of the crime either personally or through proxies. It is my finding that the evidence availed at this stage of the proceedings have established a *prima facie* case against the accused to warrant her to make a defence. The evidence is sufficient to sustain a conviction against her were she to elect to remain silent in defence. Having been placed at the scene of crime, the accused must now offer an explanation as to how the deceased met his death.

16. In the result, it is my finding that the prosecution has established a *prima facie* case against the accused herein Vella Chepkwemoi. I find that she has a case to answer and is now called upon to elect to conduct her defence in accordance with the provisions of section 306 (2) of the *Criminal Procedure Code*.

DATED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF DECEMBER 2023

D. KEMEI

JUDGE

In The Presence Of:-

Vella Chepkwemoi Accused

Mechi For Accused

Mwaniki For Prosecution

Kizito Court Assistant

