



**Republic v Chemutai (Criminal Case 54 of 2019)
[2022] KEHC 10693 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 54 OF 2019
TM MATHEKA, J
JUNE 29, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

BETTY CHEMUTAI ACCUSED

RULING

1. The Accused person Betty Chemutai is 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 13th November, 2019 at Kipkekwa Village Kuresoi North Sub County within Nakuru County she murdered Benard Cheruiyot.
3. She first appeared in court on the 22nd of November 2019. She had a five (5) months old baby who was suffering from an ear problem. The court was also informed that there were other two very young children who had been left at home. Directions were issued for a P&C file as they were children in need of care and protection and for the children court to deal with their welfare.
4. On 29th January, 2020, the accused took plea. She pleaded not guilty.
5. The trial did not take off until 3rd March, 2021. The prosecution called four (4) witnesses in support of its case.
6. PW1, No.226011 Cpl Elkana Kiptoo, testified that he was the arresting officer. That on 17th November, 2019 he was the officer in charge Loret Police Station when the Assistant Chief Daniel Kirui from Kabartegan Location, made a report that one person had been killed in Kuresoi and the suspect of the crime was the wife of the deceased person. Upon receiving the report, he rang a Cpl Andrew Makoha at Kuresoi Police Station who confirmed the incident. Cpl Kiptoo informed Cpl



- Makoha of the assistant chief's report with respect to the suspect who advised that the suspect be arrested.
7. Cpl Kiptoo testified that the assistant chief Kirui led him to the home where they found the accused. She was identified by the Assistant Chief. It was Cpl Kiptoo's testimony that she appeared ready to travel. He arrested and escorted her to Loret Police Station. Later police from Kuresoi re-arrested her.
 8. On cross examination he told the court that where they found Betty was her cousin's home. That he did not interrogate her because his role was only to arrest her after confirming the report with Kuresoi Police Station. Asked how he knew she was Betty he told the court that it was the Assistant chief who identified her.
 9. PW2, Dr. Vincent Langa't, conducted a post mortem examination on the body of the deceased on 19th November 2019 at 1:30pm. He testified that externally the body was decaying, both eyes were missing, there was a fracture of the mandible and maxillae and missing tongue, decayed neck, visible spine, bruises on armpits going to the back, bruise on left chest about 6 x 8 cm, missing right arm, degloved right humerus, decayed right shoulder, cut wounds on the head at the frontal region measuring 3 x 0.5 cm and occipital region measuring 4 x 0.5 cm. He stated that internally there was blood in the chest ribcage, crushed left lung, blood below the skull skin and that C-spine and vertebra were displaced, rushed left lung crushed either because the deceased was beaten with a blunt object on the chest or stepped on. He formed an opinion that the cause of death was as a result of fractured C-spine and haemathorax due to assault. He produced the post mortem report as P. Exhibit 1.
 10. The Pathologist told the court that it was not possible to tell between the decaying and the inflicted injuries, while at the same time that the inflicted injuries were well defined. He also said that he could not tell whether the deceased had fallen or not but that the injuries could be as result of a fall from a high height.
 11. During cross examination he stated that the external injuries on the deceased's body could have been caused by wild or domestic animals because they were decaying but the internal injuries could not be caused by wild animals because rib cage was intact. He said he could not tell whether the missing tongue was out of decay or inflicted. He clarified that he conducted an autopsy on the deceased body more than 72 hours after death and that the date of death of 15th November, 2019 was filed by the police officers at the station. He could not tell with specificity when the death actually occurred.
 12. PW3, Remmy Ng'eno, testified that the deceased and his wife were employees of his brother in law one Sayola. On 15th November 2019, he was rang by neighbours to the farm that the workers had run away and the cattle were in the field by themselves. He visited the home and noticed that the doors were all locked but the cows were in the field by themselves. He testified that a neighbor of Sayola by the name Mary Sang told him that she had seen the accused running away with clothes; that he rang the said Sayola and notified him that his employees had run away.
 13. He also said that two days later Sayola called him and told him that the body of Cheruiyot was found. He went there and they called the chief, village elder and other people. He went to the scene and saw the deceased's body had been dragged next to the toilet and that it had cut marks on the head and one arm from the elbow was missing. He stated that the police came to the scene, broke into the house and when they entered inside they saw blood on the floor and a blood stained panga on the table, an axe and a pruning knife. He said the police officer took the said panga and moved the body to the mortuary. On cross examination he said he came back after he was called by the owner of the home
 14. PW4, Stephen Sang, the Village elder testified that he learnt about the deceased death through PW3. On 16th November, 2019 he went to the scene where he found the deceased, who he identified as an



employee of that home, who had been an employee for some months. He had been living with his wife but his wife was not in that day and the house was locked.

15. He said he saw the body which appeared to have been eaten by something he did not know. That he rang the police who came they entered the house together where he saw blood, a knife, an axe under the table and a panga on the table.
16. On cross examination he said he did not see anything on the panga that was found on the table. He said this house was about 800m from the scene and he knew the deceased as an employee of that farm and the accused as his wife.
17. At the close of the Prosecution case counsel for the accused Mr. Murunga filed written submissions on no case to answer. None were filed by the state.

Accused Person's Written Submissions

18. The accused's submissions were filed on 17th May, 2022 through her advocate Mr. Murunga.
19. He framed two issues;
 - a. Whether the Panga marked PMF12 suffices as admissible evidence against the accused person.
 - b. Whether the prosecution has established a prima facie case against the accused.
20. On the first issue, it was submitted that the prosecution did not call the investigating officer to testify during trial. That the Panga which was at the crime scene was not produced as an exhibit in court and as such its authenticity was not established. To support this position the accused relied on the case of *Republic vs Amani David Dena* [2001] eKLR where the court stated that unless items are properly produced as exhibits in court, they do not form part of the evidence to be considered by the court.
21. On the second issue, it was submitted that the prosecution had failed to establish a prima facie case against the accused person. That there was no evidence that any investigations had been carried out. That PW1 had arrested her without inquiring how she got into the house in which she was arrested.
22. It was further submitted that there was doubt as to the cause of death because, the doctor (PW2); stated that the broken part of the spine could have been caused by a fall from a high height; could not tell whether the deceased lungs were crushed as a result of being beaten by a blunt object or stepped on; confirmed that external injuries could have been caused by wild or domestic animals; and was unable to ascertain the approximate age of the inflicted injuries and that these injuries could have been inflicted to the deceased in the course of his duties as he was employed to tend to the cattle.
23. Further that PW3's testimony that he was informed by the deceased's neighbor that the accused was seen running away with clothes is inadmissible as it is hearsay evidence.

Issues For Determination

24. At this point, the only issue for determination is whether the prosecution has made out a prima facie case against the accused that would warrant her to give her defence.

Analysis

25. Section 306(1) of the *Criminal Procedure Code* provides as hereunder:

“S. 306. Close of case for prosecution



- (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
- (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”

26. At this point the issue is not whether the prosecution has proved the case beyond a reasonable doubt but whether there is evidence that court could convict on in the event the accused person exercised her right to remain silent. This is the same position that was taken in *Ronald Nyaga Kiura vs Republic* [2018] eKLR at paragraph 22 where the court stated:

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person.

27. Section 306(2) of the Criminal Procedure Code puts it in very strong terms; It says When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, that is when it can put the accused on the defence. It appears to me that this is more than a prima facie case, as the court is required to have evidence that the accused person committed the offence before it can place the accused on the defence.
28. It is the duty of the prosecution to present that evidence.
29. In a murder trial there are ingredients that ought to be established: death, caused unlawfully with malice afore thought, by the suspect.
30. In this case there is no doubt that the prosecution has established that death occurred. The body of Bernard Cheruiyot was found, with injuries, decaying, with parts missing, it was identified for post mortem, and the post mortem conducted by PW3.
31. However, the cause of death, whether it was caused by the accused person was not supported by any evidence.
32. The pathologist described the gory details of the injuries he found on the body, the deceased could have been attacked by people or animals or both. It is not conclusive.



33. Of a great significance is the connection between the accused and the said death. No investigations were conducted, hence;

- i) There is no evidence placing the accused at the scene or in that home at the time of the death of the deceased. The evidence of Mary Sang who it is alleged said told PW2 that she saw the accused running away was never called as a witness by the prosecution, neither is there any evidence from any other source that she was in that home at the material time.
- ii) The so called employer, one Sayola did not testify to confirm that the accused person and the deceased were actually living on his farm as husband and wife, this was said by the PW4 who did not give any evidence of having seen her in that place prior to the finding of the body of the deceased. Pw4's to place a motive, to alleged drunken quarrels between the deceased and whoever he lived with was clearly an afterthought, because, if he was to be believed that he heard quarrels in that home every day, then he would have been the one who would have noticed the silence in the home caused by the absence of the occupants of the home, and called PW2 to tell him of the neglected cattle. He was not even aware that the home was neglected and therefore he could not have been telling the truth to say that deceased and whoever he lived with were drunkards who quarreled every day.
- iii) The items that were collected from the scene, as alleged weapons used to commit the offence, panga, axe, knife were not produced as exhibits in the case and therefor cannot be considered as evidence. And of importance they were not subjected to any forensics to ascertain (a) whether they were the murder weapons (b) whether the accused had used them either in the committal of the offence or at all. The scene was generally not processed in any manner to place the accused in that house at the material time or at all.
- iv) The persons from whose home the accused was allegedly arrested were also not called to testify, despite the fact that their evidence was crucial, as to when did the accused went to their home, in what state she was in and whether her going there was in any way connected to the death. Neither was there any effort to prove that she was actually the wife of the deceased who was the suspect in his murder. In any event the chief did not testify to say how he identified the accused as the wife of the deceased, and why she was the suspect.

34. From the foregoing it is quite evident that the accused person was arrested as a suspect. Thereafter no one, not the police, not DCI conducted any investigation to determine how the deceased died and why anyone would kill him. To this I say that the holding in *Joan Chebichii Sawe vs Republic* [2003] eKLR stands good to date that no amount of suspicion can be used to infer guilt, only evidence cogent evidence that shows that the person committed the offence can be used to convict a person. The prosecution's case was so weak that they did not even make any attempt at circumstantial evidence. They just did not have any evidence and if they did it was not placed before this court.

35. It is in *Ramanlal Trambaklal Bhatt vs R* [1957] E.A 332 at 334 and 335 that the Court said;

“Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight, sufficient to put



the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of discredited worthless evidence.... A prima facie case [at least] must mean one which a reasonable tribunal properly directing its mind to the law and evidence could convict if no explanation is offered by the defence.”

36. As a reasonable tribunal I have weighed the evidence laid before me against the provisions of Sections 203 as read with 205 and 206 of the Penal Code, and Section 306(2) of the Criminal Procedure Code, and the loud question is whether I have evidence placed before me that demonstrates that the accused committed this offence.
37. I find that the answer can only be in the negative, as there is nothing placed before me to place the accused person anywhere near the murder of the deceased Bernard Cheruiyot.
38. The only outcome of that, is to make a finding of not guilty, dismiss the charge and acquit her accordingly, which I hereby do.
39. The accused person is at liberty unless otherwise legally held.
40. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 29TH DAY OF JUNE, 2022.

**MUMBUA T. MATHEKA,
JUDGE.**

In the presence of;

CA Edna

Ms. Murunga for state

Mr. Murunga for the accused

Accused present

