



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Criminal Case 11 of 2008

REPUBLIC ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

=VERSUS=

STEPHEN TOROITICH CHEMAIYO ::::::::::::::: ACCUSED

JUDGMENT

The accused, **Stephen Toroitich Chemaiyo** (hereinafter “**the accused**”) is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that the accused, on the 14th day of February, 2008, at Katuya Village, Chepkongony Sub-location, Plateau location in Uasin Gishu District of the Rift Valley Province, murdered **Gereza Chimera** (hereinafter “**the deceased**”)

The prosecution was led by **Mr. Kabaka**, learned State Counsel whilst the accused was represented by **Mr. Okara**. The State called a total of ten (10) witnesses in support of the charge. The 1st witness testified before Mwilu **J.** before the learned judge was transferred out of this station. After complying with the provisions of section 200 (3) as read with section 201 (2) of the Criminal Procedure Code, I heard the rest of the witnesses.

The facts presented by the prosecution are as follows:- The deceased, in the company of the accused, on 14th February, 2008, at about 10.30 a.m., went to the home of **Teresa Chepkoech Sang** (P.W.1), who was in the business of selling vegetables and ‘busaa’ – a local brew. They each bought ‘busaa’ of Kenya shillings ten (10/=) which they consumed at the home of (P.W 1). They then left separately, the deceased being the first to leave.

At 3.00 p.m., the same day, the deceased called **James Kimutai Ruto** (P.W.2), her son, using her mobile phone number 0720448566 and discussed a family issue. She also rang **Bentina Jepkogei Mutai** (P.W.3), her daughter in-law, over the same issue at about 5.10 p.m. At 10.00 p.m., P.W.2 received another call from the same mobile phone from a person who identified himself as **Toroitich**. The person informed him that he had killed the deceased and described where her body was. P.W.2, at about the same time, also received a call from P.W.3 informing him that she too had received the same news from the same caller.

P.W.2 informed **Philemon Kipchumba Saina** (P.W.4), his neighbour, about the call from the deceased’s phone and requested him to check whether the deceased was at home. He checked and, on not finding her,

relayed the information to P.W.2 who asked him to visit the place the caller had described. P.W.2, also informed William **Cheruiyot Kiplagat** (P.W.5), his uncle of the matter.

P.W.4 and **Andrew Kipruto Kimutai**, (P.W.6) visited the scene the same night and found the body of the deceased. They woke up neighbours who gathered at the scene. P.W.5, on 15th February, 2008, reported the matter to Eldoret Police Station. On the same day, while P.C **Obadiah Ngigi** (P.W.8) was at Kaptagat Police Station, he received the accused person who informed him that the previous evening at about 7.00 p.m., he had had a disagreement with the deceased and another man called **Wambii** ending in an assault on the deceased and had been informed that the deceased had died. P.W. 8 then arrested the accused.

P.C. **Peter Khwatenge** (P.W.10), then at Eldoret Police Station – Crime branch division, was informed by his OCS on 15th February, 2008 that the accused had surrendered himself at Kaptagat Police Station. In the company of other police officers, P.W. 10 proceeded to the scene, interviewed witnesses and after the scene was photographed by Sgt **Fredrick Simiyu Sirengo**, (P.W.7), he took the body from the scene. He proceeded to Kaptagat Police Station where the accused was handed over to him. The accused informed P.W.10 that he had left the mobile phone at his house. The team therefore proceeded to his house. A search in the house yielded nothing but while there, a member of the public retrieved the mobile phone from a larine. He then escorted the body of the deceased to Moi Teaching and Referral Hospital Mortuary and the accused to Eldoret Police Station where he was placed in cells.

On 21st February, 2008, **Dr. Nalyanya** performed the post-mortem examination on the body of the deceased after it had been identified by P.W.2 and P.W.5. The doctor opined that the deceased had died of manual strangulation. The post-mortem form duly completed by **Dr. Nalyanya** was produced (Ex.3) by **Dr. Macharia Benson** (P.W.9) who testified that he had worked with **Dr. Nalyanya** for ten (10) years and was conversant with his handwriting and signature. The accused was then charged as already stated.

SUMMARY OF THE EVIDENCE:-

P.W.1, **Teresa Chepkoech Sang**, testified that, she is a businesswoman. She recalled the 14th February, 2008 at about 10.30 a.m., when the deceased and the accused went to her home and each consumed busaa worth Kshs 10/=. They then left separately at different times. The following morning, she heard that the deceased had died. She went to the scene where the body was under bushes and close to their water point.

P.W.2, **James Kimutai Ruto**, testified that the deceased was his mother. He recalled that she had rang him using her mobile phone No. **0720448566** when he was in Nakuru at 3.00 p.m. on 14th February, 2008 concerning his brother who was to join secondary school. Then at 10.00 p.m., of the same date, he received another call from the deceased's said phone number from a caller who identified himself as **Toroitich**. The caller informed him that he had killed his mother. Naturally, P.W.2 was shocked. He asked for details but the caller declined to give the same. He however, described where the body was concluding that he was on his way to Kaptagat Police Station. At about the same time, P.W.2 received a call from his wife **Bentina Jepkogei Mutai** (P.W.3) enquiring about a similar report she had received from a caller who gave the same name and used the deceased's mobile phone number.

P.W.2 telephoned **Philemon Saina** (P.W.4), his neighbour and gave him the information he had received and further asked him to check at the deceased's home. P.W.2 was informed that the deceased was not at home by P.W. 4. He then requested him to go to the scene described by Toroitich, the caller. P.W.2 also gave the same report to his uncle **William Kiplagat** (P.W.5). At 1 a.m., of the same night, P.W.2 was informed by P.W.4, that the body of the deceased had been found.

Later on 21st February, 2008, he identified the body of the deceased to the doctor who performed the post mortem examination on the body of the deceased at Moi Teaching and Referral Hospital.

P.W. 2 further testified that he had known the accused for almost ten (10) years as he was his

neighbour and also used to do casual jobs for him.

In Cross-examination, P.W.2 testified that the deceased used to consume alcohol and further that the person who killed the deceased did not give any reason for doing so. He further stated that the accused's bad behaviour had led to the deceased discontinuing his services as a casual worker.

P.W.3, **Bentina Jepkogei Mutai**, testified that she is married to P.W.2. She recalled the 14th February, 2008 at 5.00 p.m., while she was on duty at Moi teaching and Referral Hospital where she works as a clinical officer, receiving a call from the deceased. The deceased enquired about P.W.3's brother-in-law who was due to join secondary school. At 10.10 p.m., P.W.3 received a call from one **Toroitich** on the deceased's phone. The caller said he had killed the deceased. He did not give any reason for the killing but described where the body was concluding that he was going to the police station. P.W.3, then telephoned P.W.2 who confirmed receiving a similar report.

On 15th February, 2008, between 8 a.m. and 9 a.m., P.W.3 went to the scene in the company of Police Officers. She identified the deceased and police officers took photographs of the scene and the body. She accompanied police officers when they took the body to Moi Teaching and Referral Hospital passing through Kaptagat police station where the accused was picked. Before going to Eldoret, they passed through the home of the accused where a search was conducted in his house without yielding anything. According to P.W.3, the accused told police officers that the mobile phone was in a pit latrine from where indeed, it was retrieved.

In Cross-examination, P.W.3, testified that the relationship between the deceased and the accused was sour even though they used to drink together.

P.W.4, **Philemon Kipchumba Saina**, testified that on 14th February, 2008 at around 11.00 p.m., he received a phone call from P.W.2 informing him of the report he had received about the death of his mother, the deceased. He then visited the deceased's home only to find the door to her house locked. P.W.2 then instructed him to visit the scene of crime which he did in the company of **Andrew Kipruto** (P.W.6). The two found the body of the deceased and woke up neighbors who gathered thereat. On 15th February, 2008, P.W.2 set off to report to Kaptagat Police Station and on the way, met police officers from Eldoret Police Station and returned with them to the scene. He witnessed police officers take photographs of the scene and later his statement was recorded.

In Cross-examination, he told the Court that he had known the accused for over ten (10) years and knew that she used to take alcohol.

P.W.5, **William Cheruiyot Kiplagat**, testified that on 14th February, 2008, at 11.45 p.m., he was asleep in his house when he received a phone call from P.W.2 that the deceased, who was his sister, had been killed. The next day, he reported the killing to Eldoret Police Station where he was given police officers and the team set off for the scene via Kaptagat Police Station where they picked the accused who had surrendered himself. According to P.W.5, the accused told them that the deceased's mobile phone was at his house. They proceeded to the scene and found the body of the deceased. The police officers took photographs at the scene and they proceeded to the house of the accused. The phone could not be traced in the house but was found in a latrine. The team then took the body to Moi Teaching and Referral Hospital where the post mortem examination was carried out.

P.W.6, **Andrew Kipruto Kimitai** testified that on 14th February, 2008 at 11.00 p.m., P.W.4, had gone to his home with a report from P.W.2 that the deceased had been killed. In the company of P.W.4, he visited the scene and found the body of the deceased. Nearby was a bottle of whisky and a shoe. He however observed no injuries on the body of the deceased.

P.W.7, Sergeant **Fredrick Simiyu Sirengo**, recalled that on 15th February, 2008, he visited the scene of crime and found the body of the deceased. He observed bruises on the head. Near the body was a shoe and a bottle. He then took photographs of the scene which he produced as P.Ex. 2 together with his

report.

P.W.8, P.C. **Obadiah Ngigi** recalled the 15th February, 2008 when he was stationed at Kaptagat Police Station on general duties. He received the accused who informed him that the previous day, at about 7.00 p.m., he had had a disagreement with the deceased who was his girl friend and one called Wambii. He had then assaulted the deceased leaving her helpless. Later, he had heard that she had died. P.W.8 then arrested the accused and placed him in custody.

P.W.9, **Dr. Macharia Benson**, was a Pathologist at Moi Teaching and Referral Hospital and so was Dr. **Nalyanya** who he had known for ten (10) years. He was conversant with the latter's handwriting and signature. He confirmed that **Dr. Nalyanya** had performed the post mortem examination on the body of the deceased and prepared a report to that effect. He concluded that the deceased had died of strangulation. He produced the post mortem form as P.Exh. 3.

P.W. 10, P.C. **Peter Khwatenge**, testified that on 15th February, 2008, at 11.30 a.m., while on duty at Eldoret Police Station, his OCS informed him that a dead body had been found in plateau location and a suspect had surrendered himself at Kaptagat police station. In the company of other police officers, he went to Kaptagat and was met by P.W.5 who led them to the scene of crime. At the scene, they found the body of the deceased which had bruises on the face. Photographs were taken at the scene and witnesses interviewed. He was then informed that the suspect had been communicating with the deceased's son and daughter-in-law using the deceased's phone. They then took the body of the deceased and went to Kaptagat Police Station where the accused was then held. The accused was handed over to him. The accused informed him that he had left the mobile phone at his house. The team proceeded to his house but could not trace the mobile phone. While there, however, a member of the public retrieved the mobile phone from a latrine. The same was identified by P.W.2 and P.w.5. He produced the phone as P.Ex. 1. P.W.10 then took the suspect to Eldoret Police Station where he was placed in cells. On 21st February, 2008, he identified the body of the deceased to the doctor who conducted the post mortem examination.

In Cross-examination, P.W.10 told the Court that the deceased's mobile phone was recovered by a member of the public who handed the same to the police team at the home of the accused.

Put on his defence, the accused gave an unsworn statement. He stated that on 14th February, 2005, he woke up in the morning and went to work on his farm. At 10.00 a.m., the deceased passed by. He enquired of her where busaa could be found. The deceased informed him that P.W.1 had the brew. They both then went to P.W.1's house where they each bought busaa worth shillings ten (Kshs 10/=) and consumed it at P.W.1's home. The deceased bought vegetables from P.W.1 and left at about 11.00 a.m. After about 30 minutes, he too left and returned to his farm where he worked until evening. He then went home and slept. The next day, at 7.00 a.m., he went to sell his uncle's cattle at Cheptiret auction sale and returned home at 2.30 p.m.. While at his home, he was informed that the body of the deceased had been found and police officers had taken it leaving information that he reports to them. He went to Kaptagat police station in response, at about 4.00 p.m. but was informed by the OCS that his station was not involved. Later Eldoret Police Officers went to Kaptagat Police Station and took him to Eldoret Police Station. The accused denied committing the offence. He complained that he remained in police custody until 21st March, 2008 when he was arraigned in Court.

On the conclusion of the evidence, counsel opted not to make any final submissions.

ANALYSIS OF THE EVIDENCE

The key witnesses for the prosecution were no doubt P.W.2 **James Kimutai Ruto** (the deceased's son) and P.W.3, **Bentina Jepkogei Mutai**, the wife of the deceased's son (the deceased's daughter-in-law). The former's evidence was that on the material date, he received a phone call from the deceased at 3.00 p.m. and they discussed a family issue. Then, in the night, at 10.00 p.m., he received another call from the deceased's phone. That time, the caller identified himself as **Toroitich**. He said he had killed

P.W.2's mother. Although the caller declined to discuss details, he described the location of the body of the deceased. Shortly afterwards, P.W.2 received another call from his wife, (P.W.3). She informed him that she too had received a call from the deceased's phone made by a person who identified himself as **Toroitich**. The caller had informed her that he had killed the deceased and described where the body was. P.W.3 confirmed that testimony when she gave evidence herself. She added that she had earlier on, on the material date discussed the same family issue with the deceased over her mobile phone.

P.W.2 then, informed **Philemon Kipchumba Saina** (P.W.4) at about 11.00 p.m. of the tragic news he had received. He also informed **William Cheruiyot** (P.W.5) of the same. P.W.4 together with **Andrew Kipruto**, (P.W.6) visited the scene of crime and indeed found the body of the deceased. On his part, P.W.5 reported the matter to Eldoret Police Station who commenced investigations culminating in the arrest of the accused who had surrendered himself to Kaptagat Police Station where he was received by P.C. **Obadiah Ngigi** (P.W.8). According to P.W.8, the accused informed him that the previous day at about 7.00 p.m., he had had a disagreement with his girl friend (the deceased) with a **Mr. Wambii** which disagreement had culminated in an assault upon the deceased and that he had received information that the girl friend had died.

The body of the deceased was then taken to Moi Teaching and Referral Hospital where a post mortem examination performed on her body revealed that the deceased had died of manual strangulation.

From the above analysis of the evidence of the key prosecution witnesses, it emerges that no one saw the deceased being killed. There was in other words no eye witness to the strangulation of the deceased. The prosecution has sought to show that the accused placed himself at the scene of crime and indeed admitted killing the deceased to P.W.2 and P.W.3. The corner-stone of the prosecution case is therefore the mobile phone conversation between P.W.2, P.W.3 and one called **Toroitich** who the prosecution seeks to demonstrate to have been he accused. To that end, the prosecution produced a mobile phone which was identified by P.W.2 and P.W. 5 as belonging to the deceased. To support that testimony, the prosecution led evidence on the recovery of the mobile phone in a latrine near the house of the accused.

With regard to the mobile conversation said to have been between P.W.2, P.W.3 and **Toroitich**, I only have the mere say so. The prosecution did not identify any call having been made on the mobile phone produced. P.W.2 and P.W.3 who testified that they received calls from the deceased's said mobile phone did not demonstrate that their own mobile phones indeed received calls from the deceased's phone. The prosecution did not bother to establish whether indeed P.W.2 and P.W.3 had mobile phones and further whether, if they had, those mobile phones recorded incoming calls from the deceased's phone at all. That evidence was crucial given that it was the sole link the prosecution had between the death of the deceased and the accused.

Besides lack of positive identification of the calls made using the deceased's mobile phone, the prosecution did not also seek to demonstrate that the **Toroitich** to whom P.W.2 and P.W.3 talked to over the deceased's mobile phone was indeed the accused. P.W.2 and P.W.3 testified that they had known the accused previously. P.W.2 had in fact known him for ten (10) years. The two witnesses did not however, testify that they positively recognized the accused's voice on the deceased's mobile phone. Indeed, according to them, the caller identified himself as **Toroitich**. P.W.2 and P.W.3 did not testify that they could positively recognize the accused by voice even if he had not identified himself. In **Choge –vrs- Republic [1985] KLR**, it was held, inter alia, as follows:-

“9. Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake on testifying to that which was said and who had said it.”

In this case, P.W.2 and P.W.3 testified that the caller using the deceased's mobile phone identified himself as **Toroitich**. They did not testify that the accused had previously talked to them on the same

phone. They had therefore not heard his voice over that mobile phone. It is doubtful that they would have identified the accused by voice, over the phone. P.W. 2 & P.W.3 did not say they did so. They merely concluded that the caller, having identified himself as **Toroitich**, the caller was therefore the accused.

Then there is the evidence of recovery of the said mobile phone. P.W.2 testified that the accused informed police officers that the mobile phone was in a pit latrine. P.W.10, P.C. **Peter Khwatenge**, on his part, testified that the accused told him that the mobile phone was in his house. A search in the house of the accused did not however yield anything. He added that while at the home of the accused, a member of the public retrieved the mobile phone from a pit latrine and handed the same to him. That member of the public was not called to testify. It was also not demonstrated that the pit latrine was not accessible to other members of the public. In the premises, the finding of the mobile phone in a pit latrine not established to be exclusively used by the accused, did not conclusively point to the accused as the person who may have dropped it there.

There is then the evidence of the alleged surrender of the accused to P.C. **Obadiah Ngigi** (P.W.8). According to this witness, the accused informed him of a disagreement between him and the deceased and one **Wambii** which disagreement culminated in his assaulting the deceased whereupon P.W.8 arrested the accused. P.W. 8 added a new angle to the matter. He stated that the accused had referred to the deceased as his girl friend and that the disagreement had involved another man called **Wambii**.

The testimony of P.W.8 is incongruous with the rest of the evidence the prosecution put forward. I accept the evidence of P.W.1, **Teresia Kipkoeh Sang**, that at about 10.30 a.m., of the material date, the accused and the deceased went to her house where she sold to each of them a local brew worth shillings ten (Kshs 10/=) and that after drinking the same, the accused and the deceased left her home separately and at different times.

The accused admitted going to P.W.1's home in the company of the deceased at about the same time and left after drinking the local brew at about 11.30 a.m. According to him, the deceased preceded him at about 11.00 a.m. He then resumed his work on his land and went home in the evening. The next day he attended a cattle auction at Cheptiret and returned home at 2.30 p.m. where he was informed that the body of the deceased had been taken by police officers from where it had been found and that the police officers wanted him. He complied and that is when he was arrested.

The accused in essence set forth the defence of alibi. That defence in view of my above analysis was not displaced by the evidence adduced by the prosecution. The surrender of the accused was in my view pursuant to the oral summons issued by the police on finding the body of the deceased given that the accused had been with the deceased at the home of P.W.1 upto about 11.00 a.m. of the material date. P.W. 1 was however, categorical that the deceased left her home alone. P.W.2 and P.W.3 allegedly talked to her at 3.00 p.m. and 5.00 p.m. respectively. The post mortem report did not indicate the approximate time the deceased died. Her body was however, found by P.W.4 and P.w.6 after 11.00 p.m. The prosecution did not adduce evidence of where the deceased was between 11.00 a.m. and 11.00 p.m. of the material day. **Dr. Nalyanya** who performed the post mortem examination on her body on 21st February, 2008, detected a strong smell of alcohol on opening her abdomen. That finding suggests that the deceased ingested more alcohol than the amount P.W.1 sold to her. It is therefore plausible that the deceased may have been on a drinking spree after 11.00 a.m. and before her body was found. In that period, she must have been with other persons. Police investigations failed to cover that period.

The upshot of my above analysis is that I entertain doubt whether the accused indeed confessed to killing the deceased to P.W.2 and P.W.3. I also entertain doubt that the deceased's mobile phone was found with the accused. With regard to the statement allegedly made to P.C. **Obadiah Ngigi** (P.W.8) by the accused when he reported to him on 15th February, 2008, the same was not an admission and is in any event worthless having been made to a person not qualified to receive such a statement. See Section 25 A of the Evidence Act Cap 80 Laws of Kenya. Those doubts must be resolved in favour of the accused.

In the premises, the charge of murder or any other charge has not been proved beyond reasonable

doubt against the accused person. I accordingly find the accused not guilty and acquit him of the charge. He should be released forthwith unless he is otherwise lawfully held.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET

THIS 24TH DAY OF MAY 2012.

F. AZANGALALA

JUDGE

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Read in the presence of:-

Mr. Chirchir holding brief for **Mr. Kabaka** for the Republic and **Mr. Okara** for the accused.

F. AZANGALALA

JUDGE

24/5/2012.