



**Republi v Kirong (Criminal Case E017 of 2021)
[2024] KEHC 193 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E017 OF 2021**

DK KEMEL, J

JANUARY 19, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

ROBIN KWEMOI KIRONG ACCUSED

RULING

1. The accused herein Robin Kwemoi Kirong has been charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the 22nd May, 2021 at Cheptoror village of Cheptais Sub- county within Bungoma County he murdered Zipporah Kaburu Simotwo.
2. The accused denied the charge and a trial commenced in which the prosecution called eight witnesses in support of its case.
3. Moses Simotwo Kirong (PWI) testified that the deceased was his grandmother and that he visited the scene together with other villagers and found the accused herein crying while the deceased lay beside him. He added that the deceased had injuries on the head while blood oozed from the nose. He also saw a broken wooden stool which was blood stained. On cross examination, he stated that he could not tell if the accused was within the vicinity when the deceased was killed. He also stated that the accused was arrested at the scene.
4. Benard Simotwo Moiben (PW2) testified that he was the village elder and that he joined other villagers at the scene where he saw the body of the deceased which had injuries on the head. He also saw bloodstained wooden stool. He alerted the area Assistant Chief who in turn alerted the police who came and collected the body.

On cross examination, he stated that the did not witness the incident. He added that the accused had been known in the area as an alcoholic and a trouble maker.



5. Samuel Juma Kiboi (PW3) testified that he rushed to the scene and found the accused wailing inside the deceased's bedroom and that the deceased had been covered with a blanket. He also saw a wooden stool with bloodstains and that he confronted the accused before alerting the authorities.
6. Dr. Wanambisi Caleb (PW4) conducted the autopsy and noted a swelling on the forehead and a depressed skull fracture. He formed the opinion that the cause of death was severe head injury due to assault by a blunt object. He produced the report as Exhibit one.
7. Rodgers Naibei Sangula (PW5) testified that he is the Assistant Chief of Chebyuk sub- location and that he rushed to the scene and found the deceased already injured. He organized to have the body collected and accused escorted to the police station. On cross examination, he stated that the accused had been brought up by the deceased. He also added that he did not witness the incident.
8. Godwin Khamala Waliama (PW6) testified that he analyzed some specimen at the Government Chemist Kisumu which composed of blood sample of the deceased, finger nails cutting of the deceased and a dark brown wooden stool. He established that the wooden stool was moderately stained with the blood of human origin and that the same matched the DNA profile generated from the reference samples from the deceased. On cross examination, he stated that no samples were collected from the accused and that there is nothing connecting the accused with the samples submitted.
9. No. 93768 PC Johnson Wanjohi (PW7) testified that he conducted investigations in the matter. He visited the scene and recovered the murder weapon namely a wooden stool which he forwarded to the Government chemist for analysis and then arranged for a post mortem on the body. He added that the accused later made a confession regarding the matter. He produced the broken wooden stool as exhibit No. 3.

On cross examination, he stated that he could not tell if the deceased fell on the wooden stool or that she suffered from epilepsy. On re-examination, he stated that there were no other people apart from the accused and deceased when the incident took place and that there were no breakages of the deceased's premises.
10. No. 21980 CIP George Barasa Mukhwana (Rtd) (PW8) testified that he obtained a confession from the accused in the presence of his brother Moses Kirong. On cross examination, he stated that the confession is in English Language. He denied threatening the accused with a gun so that he could sign the document. He stated that he followed all the requisite procedures. On re-examination, he stated that the accused did not raise any complaint regarding the use of Kiswahili Language.
11. Thereafter, the prosecution closed its case. Learned counsels for the parties opted to rely on the evidence so far tendered at this stage on the issue of whether the prosecution has established a prima facie case against the accused to warrant him to be called upon to make a defence. I have considered the evidence adduced at this stage of the proceedings and find that the only issue for determination is whether the prosecution has made out a prima facie case against the accused so as to justify him being called upon to make a defence.
12. It is trite that prior to placing an accused on his/her defence, the prosecution is required to have established a prima facie case against such accused. A prima facie case is established when the evidence adduced is such that a reasonable tribunal properly directing its mind to the law and evidence placed before it could convict an accused if no explanation is offered by the defence to the contrary. See *Bhatt v R* (1957) EA 232.
13. The Prosecution in order to sustain a conviction in a charge of murder, must prove on the ingredients of the offence which are inter alia, that there was death ; that the death was unlawfully caused and



- with malice afore thought; that the accused directly or indirectly participated in the commission of the alleged crime.
14. As to the fact of death, the evidence of the pathologist (PW4) is quite sufficient and that the cause of death was established to be severe head injury due to assault by a blunt object.
 15. As to the unlawful nature of the death, it is trite that all homicides are deemed unlawful unless caused accidentally or authorized by law. The deceased then aged 85 years lived a peaceful life, with the accused who is her grandson. She had no medical or health challenges and hence her health must have been unlawful as she did not contribute at all to her death in any way.
 16. As to the issue of malice aforethought, the post mortem report indicated injuries such as swollen forehead, depressed skull at the parietal area of the head, epidural hematoma of the brain substance. These injuries left no doubt that the assailant desired the death of the deceased or that the said grievous injuries would lead to the death of the deceased. Clearly, malice aforethought (mens rea) had been formed and or conjured up in the mind of the assailant prior to the incident.
 17. As regards the identity of the perpetrator, it is noted that the accused was arrested at the scene of crime. The accused and deceased lived together alone. Upon the arrest of the accused, he later made a confession before No. 21980 retired Chief Inspector of Police George Barasa Mukhwana (PW8) which was produced herein as exhibit No. 4. The murder weapon namely a bloodstained wooden stool was also produced as exhibit No. 3. Hence, the evidence placed the accused at the scene of crime and that his identity as the assailant was established by the prosecution. The accused therefore must offer an explanation as to how the deceased met her death.
 18. In view of the foregoing, I find that in the absence of any explanation to the contrary from the defence, the prosecution's evidence does establish the ingredients of the offence herein and thus place the accused at the scene of crime and that he had an opportunity to harm the deceased and that there is reason to believe that he did so since he was the only one who lived with the deceased from his childhood and the only one the deceased trusted and could allow access to her house. The evidence revealed that upon arrival from a drinking spree, the accused was impatient for food and vented his anger upon the helpless deceased by smashing her head with a wooden stool and left her in her room. I am aware that at this stage of the proceedings, the standard of proof is not one of beyond reasonable doubt as required for a fully pledged criminal trial but that this court is after evidence which if taken literally or on the face of it would establish the essential ingredients of the offence herein as well as the accused's participation therein. Having established that the accused was the last person to be with the deceased, the accused must now offer an explanation as to how the deceased met her death. The sum total of the evidence tendered is sufficient to sustain a conviction against the accused were he to elect to remain silent in defence.
 19. In the result, it is my finding that the prosecution has established a prima facie case against the accused herein. I find the accused Robin Kwemoi Kirong has a case to answer and is now called upon to elect to conduct his defence in accordance with the provisions of section 306 (2) of the [Criminal Procedure Code](#).

DATED AND DELIVERED AT BUNGOMA THIS 19th DAY OF JANUARY 2024

D KEMEI

JUDGE

In the Presence of :-

Robin Kwemoi Accused



Wamalwa R for Accused
Miss Kibet for Prosecution
Kizito Court Assistant

