



**Republic v Rotich (Criminal Case 26 (E002) of 2020)
[2024] KEHC 2665 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 26 (E002) OF 2020
AC MRIMA, J
MARCH 14, 2024**

BETWEEN

REPUBLIC STATE

AND

ELIUD KIPKOECH ROTICH ACCUSED

JUDGMENT

1. The accused herein, Eliud Kipkoech Rotich, was 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 were as follows: -
On the 5th day of September, 2020 at Sabwani Location within Kenya Seed Forest Section C5 IN Trans Nzoia County murdered Kevin Ngetich.
3. When the accused was arraigned and charged before Court, he denied committing the offence thereby prompting the hearing of the case.
4. After the close of the prosecution's case, the Court found that a prima facie case had been established against the accused. The accused was placed on his defense. The Accused elected to give sworn testimony and called no witness.

The Prosecution's case:

5. The Prosecution called a total of 7 witnesses. The prosecution's case was that accused was married to Jane Rose Nasambu (testified as PW6). Prior to their marriage, PW6 had a son from a previous relationship. The son was the deceased herein, Kevin Ngetich. PW6, did not, however, move with the deceased into the home of the accused. Instead, the deceased was left in the care of PW6's sister one Everlyne Nekesa Wanjala (testified as PW4).



6. PW4 testified that she had lived with the deceased for 2 years before his demise. That, the deceased left her home on 3rd June, 2020 at around 1:00 am informing PW4 that he had been called by the accused, (who was his step father) to meet him at the nearby trading centre so that the accused could buy him a puppy. PW4 was with one Merceline Chepkemoi (testified as PW3) who was a daughter to another PW4's sister.
7. The deceased left wearing a red Tee-Shirt with black stripes and a brown khaki short and did not return.
8. The prosecution contended that sometimes in May 2020, the accused called one Dorcas Nanjala Simiyu (testified as PW1) who was a neighbour to PW4. He requested PW1 to tell the deceased to meet him and collect a puppy. PW1 went to the home of PW4, but did not find the deceased. The accused called PW1 again on the following day with a similar request. PW1, however, did not pass the message to the deceased. The accused called PW1 for the third time, but PW1 did not act. The accused did not relent. He again called PW1 on 1st June 2020 with the same message. PW1 told the accused to look for the deceased by himself.
9. PW1 was later surprised to hear that the deceased had disappeared from PW4's home. That was on 3rd June 2020 at around 8:00pm. PW1 called the accused who denied seeing the deceased that day.
10. PW3, lived with PW4 and the deceased, stated that she sent the deceased to the market to buy some vegetables in the afternoon of 3rd June 2020, but the deceased delayed. On return, PW3 asked him why he took so long and the deceased told him that he had met the accused who promised to give him a puppy. That, he had been asked by the accused to go and meet him after taking lunch. The deceased told PW3 that the accused had told him to go back alone and not to tell anyone about their plan.
11. PW3 prepared lunch and the family partook. The accused then took a shower and left to see the accused. According to PW3, the deceased wore a red Tee-Shirt with black stripes and a brown khaki short as he left their home.
12. Curious about the fact that the deceased was told not to be accompanied by anyone else and to tell no one of their plan, PW3 followed the deceased from a distance. She saw the deceased meet the accused who wore a brown marvin, a blue Tee-Shirt and a black pair of trousers. The two then left. According to PW3, the deceased did not return to their home.
13. Eugene Wamalwa was a friend to the deceased. He testified as PW5. He stated that on the 3rd June 2020 he accompanied the deceased to buy vegetables at the nearby market. That, on their way back, they met the accused whom he knew him as the father to the deceased. The accused called the deceased and they moved aside. However, PW5 overheard the accused telling the deceased to go home and take a shower then meet him to be given a puppy. PW5 left the two and went to his home. He did not see the deceased again.
14. PW4 became so concerned as the day fell and the deceased had not returned home. She and PW3 began looking for the deceased within their neighbourhood. They met PW1 who informed them of her previous dealing with the accused. PW1 then called the accused.
15. PW3 and PW4 did not find the deceased within their neighbourhood. PW4 then called and informed the mother of the deceased, PW6. She also her brother one Moses Simiyu Wanjala (testified as PW2).
16. In her testimony, PW6 confirmed that the deceased was her first-born son and lived with PW4. That, she was married to the accused and they lived together for 2 years before they separated. On being called by PW4, she was informed that the deceased had left with the accused. She urged them to continue looking for him as she went to join them in the search. On the following day, PW6 called the accused



- and asked him the whereabouts of the deceased. The accused told her that whereas it was true he had met the deceased the previous day, the deceased left and returned to PW4's home.
17. PW2, PW3, PW4 and PW6 decided to, and, reported the matter to the police at Endebes Police Station.
 18. The investigations were led by one No. 108678 PC Eddie Mwangi Njoroge, then attached at the DCI offices in Endebes. He testified as PW7. He stated that the accused was arrested by members of public and brought to the station on allegations that he had lured, abducted and possibly killed the deceased. PW7 re-arrested him and placed him in cells.
 19. It was PW7's testimony that while in custody, the accused was very co-operative with the police. That, he confessed to killing the deceased and throwing him in the ever fast-flowing River Sabwani. The accused even offered to show the police where he had buried the deceased's clothes prior to throwing the body into the river. PW7 was accompanied by the DCIO, officers from the Scenes of Crime unit, other officers and two police reservists.
 20. The accused led them into the deep forest, within Section C5, near the River Sabwani. He showed them where he stood as he threw the body into the river. The accused then led them to where he had buried the clothes. The clothes were recovered. They were a brown khaki short with a blue belt and a blue-green vest.
 21. PW3 and PW4 identified the clothes that were recovered as among those the deceased wore when he left home to meet the deceased.
 22. On completion of the investigations, PW7 recommended the charging of the accused with the information of murder. The recommendation was approved by the Office of the Director of Public Prosecution who drafted the information dated 15th September, 2020. The accused was accordingly charged after he underwent a mental examination assessment which confirmed his fitness to stand trial.
 23. PW9 eventually produced all the items he gathered in the course of the investigations as exhibits in the matter.
 24. After close of the Prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence.

The Defence:

25. The accused elected to give sworn testimony without calling any witness.
26. The accused denied ever leading the police to recover the clothes which were produced in Court. He also denied killing the deceased whom he had no grudge with at all. He also denied calling PW1 as alleged and contended that he even did not have her number.
27. The accused further denied meeting the deceased at the market as alleged by the prosecution witnesses and contended that it was not possible for him to have asked the deceased to meet him since he had never lived with him and barely knew him.
28. After the close of the defence case, parties were directed to file their respective rival written submissions. Mr. Khisa, Learned Counsel for the accused filed submissions dated 11th December, 2023. He contended that the prosecution failed to prove the information against the accused and called for dismissal of the charge and that the accused be set at liberty. To Counsel, the circumstantial evidence on record did not meet the threshold to find the accused culpable. He referred to several decisions in buttressing the arguments.



29. The Prosecution on the other hand presented its written submissions dated 30th November, 2023. It submitted that the State had established a case to the required standard of proof, being beyond reasonable doubt, against the accused. It urged the Court to find the accused guilty as charged.

Analysis:

30. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari v Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -
- (a) the death of the deceased occurred and its cause;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
31. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased and its cause:

32. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
33. In this case, the evidence of and the cause of the death of the deceased were not adduced. However, that is not to say that it is the end of the road for the prosecution. There are exceptional instances where a Court may convict for murder even when the body of the deceased is not found. It is all about the evidence at hand.
34. This discussion found its way to the Court of Appeal in *Chengo Nickson Kalama vs. Republic* [2015] eKLR where the Court in interrogating a High Court decision in Tanzania to wit; *Republic v Cheya & Another* [1973] E.A. 500 which decision affirmed the position that ‘.... the absence of medical evidence as to the death and the cause of it is not fatal because as I said at that stage post-mortem reports primarily are evidence of two things; the fact of death and cause of death. Therefore, it was open to the prosecution to produce and rely on other evidence to establish these facts...’ had the following to say: -
- The judgment in Cheya case gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case (sic) of the death in the circumstances relied on by the prosecution..... Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.
35. In expressing displeasure with the *Cheya case* (supra) the Court of Appeal stated as follows: -
- To return to Cheya it is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision.....



36. The Learned Judges of Appeal then went ahead and stated as follows:
..... The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased
37. Turning to the matter at hand, the body of the deceased was not found. The prosecution's evidence at hand, and which is vehemently opposed, is that the deceased was last seen alive in the company of the accused. The only thing that was recovered were the clothes that the deceased wore on the very day he was allegedly with the accused.
38. To this Court, therefore, since the case revolves around circumstantial evidence, it is prudent to deal with that evidence first since its outcome will have a bearing on this issue. This Court will, hence, revert to this issue later in this judgment.

Whether the accused committed the unlawful act which caused the death of the deceased:

39. In this matter, there was no eye-witness account on what exactly happened to the deceased. The body of the deceased was never found.
40. Be that as it may, the case, therefore, revolves around circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -
- (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
 - (ii) The 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.
41. The foregone principles were set out in the locus classicus case of *R v Kipkering arap Koske & Another* [1949] 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI v Republic* [2013] eKLR, *Musii Tulo v Republic* [2014] eKLR among many others.
42. The Court of Appeal in *Musii Tulo* (supra) in expounding the above principles expressed itself as follows:-
4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v R* [1958] EA 715 citing with approval *Teper v R* [1952] AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'
43. Further, the Court of Appeal in *Sawe v Republic* [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -



.... In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....

44. The prosecution alluded that the deceased left with the accused. The accused denied as much. The evidence of PW3 and PW5 affirmed the prosecution's proposition. PW5 was a friend to the deceased. He accompanied the deceased to the market to buy vegetables when the deceased was sent buy PW3. PW5 saw the accused who called the deceased and stepped aside to talk. He even partly heard their conversation to the effect that the deceased was to go home and take a shower before he returned to meet the accused.
45. The evidence by PW5 that he knew the accused as the father to the deceased was not impugned. Likewise, the fact that PW5 accompanied the deceased to the market was not controverted. Closely related to that piece of evidence is the evidence of PW3 who followed the deceased at a distance after the deceased told her that the accused told him not to let any one aware of his whereabouts and their plan. PW3 saw the accused. She described how the accused was dressed. That evidence was not countered in any way.
46. On a careful consideration of this factual aspect, this Court is satisfied that indeed the accused met with the deceased at the market. The Court is further satisfied that it was the accused who left with the deceased after returning from PW4's home on the day the deceased did not return.
47. Another crucial aspect of evidence calling for interrogation relates to the recovery of the clothes which the deceased wore on the day he left home not to return. The identity of the clothes is not in issue. It was PW7 who testified that the police were led by the accused to recover the same in the deep forest near River Sabwani. PW7 stated that he was accompanied by other police officers including the DCIO, Scenes of Crime personnel and two police reservists.
48. From the above disposition, two issues come to the fore. The first one is that the recovery of the clothes/ exhibits was not documented. There was no inventory that was prepared and signed by those present. Further, none of those who lived with the deceased accompanied the police on the recovery mission. Again, apart from PW7, no other person who was present during the recovery testified. Surprisingly, even the photographs which were taken at the recovery scene, and which PW7 stated that they were to be produced by the relevant officers, were not so produced and no explanation or at all was given.
49. The second issue related to the alleged confession by the accused. Again, that was not recorded under the guiding law and rules of procedure. No explanation was also rendered.
50. At this point in time, this Court is appalled by the pathetic state of investigations in this matter. The recovery of the exhibits was by among others the DCIO, who is a very senior officer. The reason as to why the process of recovery was not documented, and as required in law, leaves many doubts including the possibility of the police having called for similar clothes that the deceased wore on the day he met the accused and planted them on the accused.
51. Further, it is hardly unbelievable that in the unique circumstances of this case and where a suspect admits to committing an offence and even leads the police to recover some exhibits, still no confession is recorded. A proper recording of a confession in this case would have easily settled many issues.



52. There is still another issue. PW1 stated that she had been called severally by the accused and asked about the deceased. Again, nothing was done to prove such a cardinal fact which would have gone a long way in demonstrating motive on the part of the accused. The police would have readily obtained the parties' phone records.
53. This Court opts to end this discussion here with a rider that despite the body of the deceased having not been found, there still was the possibility of sealing all loopholes and getting to the core of the one who was culpable.
54. With the prevailing state of the record, this Court is not persuaded that the prevailing circumstances in this matter taken cumulatively 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.
55. This is a case where the investigations were grossly incomplete and that the accused was charged merely on suspicion. However, as was held by the Court of Appeal in *Sawe v Rep* [2003] KLR 364: -
- Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.
56. In *Mary Wanjiku Gichira s. Republic*, Criminal Appeal No 17 of 1998, the same Court held that: -
- ... suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.
57. A similar view was expressed by the Tanzania Court of Appeal in *R vs. Ally* (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 where it was held that: -
- Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.
58. Therefore, whereas there may be some serious pointers to the accused's culpability which were not addressed, the prevailing suspicion that the accused may have been involved in the disappearance and alleged death of the accused, however strong, cannot form a basis of conviction in a criminal case. It remains the cardinal duty of the prosecution to prove every element of the offence.
59. The prosecution, therefore, failed to prove that the accused was responsible for the death of the deceased in any way whatsoever.
60. Having found as such, this Court now reverts to the issue of the proof of the death and cause thereof. Had the Court found that the circumstances hold the accused culpable, then it would have presumed that the accused must have killed the deceased and/or thrown his body or the boy alive into River Sabwani. In that case, this Court would have settled the proof of death and the cause thereof as possible assault/strangulation/drowning or any other cause as the case may be.
61. The upshot is, hence, that neither the proof of death nor its cause was proved.

Disposition:

62. Deriving from the foregoing discussion, this Court returns the verdict that the accused is found not guilty of the murder of the deceased.



63. Consequently, the accused is hereby acquitted pursuant to Section 322(1) of the Criminal Procedure Code. He is hereby set at liberty unless otherwise lawfully held.

64. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF MARCH, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court in the presence of:

Mr. Khisa, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

