



**Republic v Chepkwemoi (Criminal Case E001 of 2022)
[2024] KEHC 3862 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3862 (KLR)

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

DK KEMEL, J

APRIL 19, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

VELLA CHEPKWEMOI ACCUSED

JUDGMENT

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 was Geoffrey Masai Chepkenjo who testified that on the 5th January 2022 at around 9.00 pm while at his house 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 house. 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 found 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 frequent squabbles over the failure of the accused to bear him another child. He stated that he had heard the deceased exclaiming 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 insisted that at no point did the accused assault the deceased. He confirmed that it was possible that other people could have assaulted the deceased since accused was then at his house.



On re-examination, he reiterated that he could not tell if the accused was involved in the murder of the deceased and that he heard the deceased exclaiming as to why the accused assaulted him but he did not rush to the scene immediately until the following day. He insisted that he was not covering for the accused and that he could not comment if the accused was involved in the murder of the deceased.

4. PW2 was Abigael Samoror Ndiema who testified that the accused herein is her sister-in-law. According to her, 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 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 confirmed that the incident occurred on 4th January 2022 and that she stated that she heard screams from one male person and that was the husband of the accused person. According to her, the accused and deceased had frequent fights in which the accused was getting assaulted forcing her to seek refuge at her house. She testified that when the accused arrived at her house, he was sweating and had one shoe showing that she must have been running and/or struggling. According to her, the accused did not inform her as to what the strangers who had accompanied the deceased had 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. He also told the Court that the deceased had injuries on his forehead and rear of the head inflicted by a blunt object.

On cross-examination, he confirmed that the body was taken to a mortuary in Kimilili area.

6. PW4 was NO. 61362, Sgt Kibet Kosilei who 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. He also established that during the incident no screams were heard by the neighbours and that he was not the investigating officer.

7. PW5 was No. 77098 Cpl Geoffrey Too who 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 they did not get any 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 another suspect, one Boniface, who was later released for lack of evidence as was the case with the other suspects. 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 was Dr. Jemimah Muia who testified that she performed the autopsy on the body of the deceased on 13th January 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 dated 13th January 2022 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. The prosecution then closed its case. A prima facie case was later established to have been made and that the accused was placed on her offence. She opted to tender a sworn testimony.

10. Vella Chepkwemoi is the accused herein. Her case is that on the material date the deceased who was her husband, gave her school fees of Kshs. 15,000/= to take to their child, Derrick Kiprotich's school. She returned later to find him herding cows and two of their other children were at home. The deceased sent her money via her phone directing her to escort the two children to Chwele from where they were to head to their respective schools. When she got back home she found the deceased who proposed one of the bulls to be sold so as to clear the pending school fees for their eldest son. They got two prospective buyers who gave the deceased Kshs. 10,000/= with the promise to clear the balance the next day. She complained of a headache prompting the deceased to rush her to the hospital and at 9.00 pm while asleep she heard screams from the deceased saying "why are you assaulting me?". Out of fear for her life, she did not approach the noise and also due the fact that the deceased used to assault her for failing to conceive another child for him. She decided to leave for her brother's (PW1) house who lived about 100 metres away from her. She found him and the wife taking supper and on explaining to them everything about her fears they allowed her to stay with them. The following morning, she left for her house to find her sitting room door ajar and then she headed into the kitchen to fetch some water then proceeded to the main house where she noticed the solar battery was missing and that the bedroom door was opened. She found the deceased lying on his back while holding some grass. She attempted to call him twice but he was unresponsive. His shoes and trousers were muddy and his jacket had weeds. She touched him and felt his body was cold prompting her to scream. This attracted the attention of the villagers and that PW1 took her to the police station to make a report. She was later arrested. She refused the allegation that she hired one Evans Marangu to kill her husband.

On cross-examination, she told the Court that she was blessed with three children with the deceased and that they had a peaceful marriage up until the deceased started assaulting her. She told the Court that she used to seek refuge at the house of PW1 or at her neighbours and/or maize plantation. She testified that she heard her husband screaming and asking his attackers why they were assaulting him. She confirmed that the deceased had assaulted her eight days prior to the incident and that she persevered for the sake of her children. She refuted the claims that she abandoned her husband as she was simply seeking refuge at PW1's house and that she admitted that she did not urge him to go and help the deceased. She admitted that she did not do anything about the incident until the following day and that the deceased had gone to take alcohol at 4.00 pm.

On re-examination, she reiterated that PW1 and PW2 did not intervene as it was a norm for the deceased to assault her and that her mother's home was not far from hers.

11. At the close of the defence hearing, the Court directed that submissions be filed and exchanged by the parties.



12. Vide submissions dated 28th March 2024, Counsel for the accused submitted that the essential ingredients of any crime constitute the actus reus and mens rea. The same must be proved to enable the Court to convict the accused person. According to Counsel, the evidence of PW1 to PW6 does not even attempt to prove that any of the ingredients of a crime existed in this matter. PW5, the investigating officer testified that he found no evidence to place the accused at the scene of the crime and neither did he avail any eye witness before the Court. He submitted that no murder weapon was found and no forensic analysis was conducted and report availed linking the accused to the murder.
13. Counsel submitted that the evidence by the Prosecution failed to prove both the actus reus and mens rea with regard to the accused person thus did not prove beyond reasonable doubt that the accused murdered the deceased. Counsel urged this Court to acquit the accused under section 215 of the Criminal Procedure Code.
14. On perusal of the Court record, it is noted that the Prosecution did not file their respective written submissions.
15. Having considered the evidence on record and the submission of the defence, the issue for determination is whether the prosecution proved its case to the required standard of proof. It is trite that the burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all instances save for a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. (See *Miller V Minister of Pensions* (1947) ALL ER 372.) In discharging the burden cast upon it by law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since she does not have the burden to prove her innocence or justify her alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.
16. If there is a strong doubt as to the guilt of the accused, it should be resolved in his/her favour. Hence, an accused must not be convicted because he/she has put up a weak defence but rather that the prosecution's case strongly incriminates him/her and that there is no other hypothesis than the fact that the accused person committed the alleged crime. See *Woolmington V DPP* (1935) AC 462.
17. The offence of murder is defined by section 203 of the [penal code](#) as:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

Section 206 of the [Penal Code](#) provides as follows:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- c. an intent to commit a felony;



- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
18. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under Section 206 of the *Penal Code* are as follows:
 - i. That the deceased is dead;
 - ii. That the death was caused unlawfully;
 - iii. That there was malice aforethought; and
 - iv. That the accused person directly or indirectly participated in the commission of the alleged offence.
19. The post mortem report on the examination of the body of the deceased was duly produced as no objection was raised by the defence. Dr. Jemimah Muia (PW6) who conducted the post mortem confirmed the presence of deep cut wounds on the head of the deceased; bruise about 4 cm diameter on the forehead; deep cut wound on the neck, left side of the neck above the clavicle and bruises on the knees. She confirmed that the head of the deceased had multiple bruises and deep cut wounds with epidural hematoma on the frontal region. She formed the opinion that the cause of death was head injury secondary to assault. To that extent, the first ingredient of the offence has been proved.
20. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic V Boniface Isawa Makodi* (2016) EKLK that referred to the case of *Guzambizi Wesonga V Republic* (1948) 15 EACA 65 where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defense or in defence of property.”
21. The deceased herein was found to have died from a head injury secondary to assault as there were multiple bruises and deep cut wounds with epidural hematoma on the frontal region. There is therefore certainty as to the cause of death. Given the nature of injuries suffered by the deceased that resulted in his death as indicated in the post-mortem report, it can safely be concluded that death was the desired outcome of whoever the assailant was. This then settles the second ingredient of the offence.
22. As regards the third ingredient, in the case before me, no single witness gave evidence to having seen anyone inflict upon the deceased the deep cut wounds on the head of the deceased; bruise about 4 cm diameter on the forehead; deep cut wound on the neck, left side of the neck above the clavicle and bruises on the knees. Rather, there was a direct witness who heard the pleas of the deceased person asking the accused why she was assaulting him. Being direct when a witness testifies to what he saw, heard or felt regarding the man or principal offender.
23. PW1 testified that it was a norm for the accused person and the deceased to fight and she would usually seek refuge in his house. He told the Court that that was the core reason why he allowed her to spend the night at his house. According to him, he learnt of the death of the deceased the next day while at the farm. He confirmed that the accused and the deceased had frequent squabbles over the failure of the accused to bear the deceased another child. He also stated that on that fateful night he heard the deceased exclaiming why the accused was assaulting him. On cross-examination he confirmed that the accused and the deceased had frequent squabbles where the deceased would assault the accused person.



24. There clearly was a pattern of violence in the relationship of the accused and the deceased. During her defence hearing, the accused alleged that on that fateful night she heard the deceased screaming from their bedroom where she was sleeping and that she did not run to his aide out of fear that he would assault her as he used to. She opted to run to PW1's house and spent the night there and did not divulge to him that her husband was being assaulted.
25. From the evidence of PW1 and PW6, it is clear that the accused was placed at the scene of crime. Indeed, the accused herself confirmed in her evidence that she was the last one to be with the deceased at the time of the incident. The accused also confirmed that she and the deceased always had frequent squabbles about her inability to give him another child.
26. This is so because PW1 clearly placed the accused at the scene of incident assaulting the deceased while that of PW2 confirmed that she was aware of deceased's assaults towards the wife and that of PW1 and PW2 confirming the pre-existing squabbles and fights between the accused and the deceased. That evidence was not shaken by the defence. The Prosecution was under duty to ensure that the allegation that the accused assaulted the deceased was with malice aforethought and not excusable. From the evidence of PW1, the same proved that the accused assaulted the deceased. The next issue for determination is whether the said assault was with malice aforethought.
27. PW2's evidence attested to the constant squabbles and fights between the accused and the deceased. All these provided the requisite malice aforethought in this offence. Hence, the accused's claim that nothing happened between her and the deceased on the fateful night is not convincing considering the fact that being aware that the deceased was being assaulted she rushed to PW1's house for refuge and failed to mention the apparent attackers. The issue of motive was dealt with by the Court of Appeal in the case of *Libambula v Republic* [2003] KLR 683, when it held as follows:
- “We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of person. See section 8 of the *Evidence Act* Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime”.
28. Learned counsel for the defence has submitted that the prosecution did not establish the element of mens rea on the part of the accused and that nobody witnessed the accused assaulting the deceased. However, the fact that PW1 heard the deceased exclaiming why the accused was assaulting him and the evidence by PW6 opining that the cause of death was head injury secondary to assault left no doubt that she was involved in the death of the deceased. The evidence of PW1, PW2 and PW6 perfectly established the motive (malice aforethought) for the assault.
29. Even if there is no other material evidence to corroborate the evidence adduced before this court as suggested by defence counsel, there are no co-existing circumstances which could weaken or destroy the inference of the guilt of the accused as the assailant as there is no escape from a conclusion that the crime was committed by the accused and nobody else. In the case of *R v Kippering Arap Koske & Another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa held as follows:
- “In order to justify 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 is guilt. The burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any 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.”

30. From the above authorities, the evidence of the key prosecution witnesses (PW1 and PW2) corroborated the existence of squabbles and fights between the accused and the deceased and further, PW1 heard the deceased cry out asking why the accused person was assaulting him and the post mortem report as presented by PW6 corroborated the evidence of PW1 that indeed the accused was assaulted and which led to his death. This left no doubt that there are no co-existing circumstances which could weaken or destroy the inference of guilt of the accused since she was placed at the scene of crime.
31. The accused must have been angered by the actions of the deceased who according to her constantly assaulted her for her failure to give him another child thereby viciously attacked him. I find the accused had the requisite malice aforethought since from the injuries inflicted, it can be discerned that the assailant intended to achieve desired result namely death of the deceased. Even if the deceased might have been attacked by other persons as suggested by the accused, the fact that she assaulted the deceased and PW1 heard the deceased question the accused as to why she was assaulting him with PW2 confirming the pre-existing squabbles and fights between her and the deceased, then she was placed at the scene of crime and must therefore be held responsible for the crime. The actions of the accused in assaulting the deceased were not warranted since the alleged constant assault by the deceased could have been reported by the accused to her in-laws or to the clan elders for action. The killing of the deceased was therefore not justified in the circumstances. Further, the evidence of the investigating officer is to the effect that some suspects who were arrested and subsequently escaped from lawful custody had implicated the accused as having hired them to eliminate the deceased. The conduct of the accused in running away to spend the night at her brother’s house while she had knowledge that the deceased was being attacked left no doubt that she was involved in the murder of the deceased. In fact this was quite clear the following day when her sister in law (Pw2) accompanied her to the scene only for the accused to decline to enter her house. This was evidence that she knew what had transpired the previous night. The accused feigned ignorance on how her husband had died. It was discovered that the body of the deceased had some signs that he had been killed outside at the farm and body placed in the bedroom. As the accused confirmed that certain persons had attacked her husband, she did not explain why she opted not to raise alarm and alert her relatives (PW1 and Pw2) but just went to their home and sought to spend the night there. It was clear that the accused knew what she had done but kept it to herself. I am satisfied that she had the motive to eliminate and or get rid of her husband who had become a thorn in the flesh due to the frequent beatings for failing to bear him another child. The deceased did not deserve to die in the manner he did as the accused ought to have resorted to other channels of redress. I find that the prosecution did place her at the scene of crime and proved both the mens rea and actus reus of the offence herein.
32. In the result, it is my finding that the prosecution has proved the charge of murder against the accused herein Vella Chepkwemoi beyond reasonable doubt. I find her guilty of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and she is accordingly convicted therefor.

It is so ordered.

Dated and delivered at Bungoma this 19TH day

Of April 2024

D. Kemei

Judge



In the presence of:-

Vella Chepkwemoi Accused

Miss Wanyama for Mechi for Accused

Miss Kibet for prosecution

Kizito Court Assistant

