



**Republic v Odhiambo (Criminal Case E002 of 2023)
[2024] KEHC 8183 (KLR) (9 July 2024) (Ruling)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E002 OF 2023
RN NYAKUNDI, J
JULY 9, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JACKSON ODHIAMBO ALIAS LIZER ACCUSED

RULING

1. The Accused was charged with the offence of murder contrary to section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that between the night of 31st December, 2022 and 3rd January, 2023 at Noble Breeze Apartments in Chebisaas area, Moiben Sub-County in Uasin Gishu County within the Republic of Kenya, Jacktone Odhiambo alias Lizer murdered Edwin Kiprotich Kiptoo alias Chiloba.
2. The Accused person in this case was arraigned before this court, pleaded not guilty placing the prosecution to disprove his innocence as provided for in Art 50(2)(a) of the *Constitution*. The lead counsel for the Prosecution was, Mr. Mark Mugun and the accused person was represented by Legal Counsel Mr. Mathai.
3. The prosecution summoned twenty three witnesses to discharge the burden of proof beyond reasonable doubt. Their summary of evidence is as follows:
4. PW1 Ramsey Chebwao Simbiri testified that he is a high school student and that he is the accused's cousin. On 23rd December, 2022 the accused called him and requested for his help in moving household items to a place that he was relocating. He was directed to a place called Noble Breeze apartments in Chebisaas area where he found the accused with his girlfriend and their baby. He helped them load the household goods onto a lorry that had been parked there. They left behind certain items at the behest of the accused.



5. On 22nd January, 2023, the accused came to their home while driving a white Toyota Fielder. In the morning, he was requested to once again help the accused to move other household goods. The accused asked him to solicit help from a friend, which he agreed to and asked Emmanuel Omondi. The accused drove them to Noble Breeze apartment and when the door to his house was opened, the house had a putrid odour. The accused instructed them to carry a dark green metallic box. It was then that he noticed that the rancid smell came from inside the metallic box. When he asked the accused why the box smelled so rancid, the accused told him that it was because of dirty clothes and that the dog had defecated on the clothes. He loaded the metallic box inside the white Toyota Fielder and the accused drove off. Due to the stink coming from the box, they had to lower the windows as they drove off. The accused dropped them off at home saying that he was going to deliver the box to Chiloba, whom they had seen photos of and knew him to be the accused's friend. The accused came back home later in the evening without the car.
6. On 4th January, 2023, the accused yet again asked him to accompany him to his place so that they can move other things. Jean Ochieng, the accused's brother tagged along this time round. When they got to the house, he noticed that although the rancid smell was still there, it was not as strong as before. They loaded the things that had remained behind from the previous day on to a white pickup and took them home. Later, on the 7th January, 2023 he was escorted to Langas police station where he recorded a statement and was placed in custody. He identified a dark green metallic box as the one he had helped the accused load onto the white Toyota Fielder.
7. PW2: Emmanuel Omondi Alela testified that he is also a high school student. On the 3rd January, 2023, Ramsey Chebwao (PW1) informed him that the accused had wanted his help in moving household goods to a new house. Because he had known the accused from his childhood, he agreed to help. They boarded a white Toyota Fielder driven by the accused and headed to Chebisaas area to an apartment where the accused used to reside. The accused opened the house and he noticed there was a heavy stench coming from a dark green metallic box. When they inquired why it smelled so bad, the accused told them its because of dirty clothes that the dog had defecated on, alcohol and dirty shoes that he had kept inside the box. Although there were other things in the house, the accused instructed them to only carry away the metallic box. When they carried it, he noted that it was so heavy that at one point, they had to drag it down the stairs. They placed this metallic box inside the Toyota Fielder and the accused drove them back home. Inside the car, the heavy stench was so bad that even after the accused lowered the car windows, the smell would not go away. The accused told them that the metallic box belonged to his frined Chiloba and that he was going to deliver it to him in Maili Tisa. On 7th January, 2023 police officers came looking for him, found him, placed him in custody and interrogated over the murder of Chiloba. He identified the dark greenish metallic box as the very same one that he had helped the accused load onto the white Toyota Fielder.
8. PW3: Jean Ochieng Ooko testified that he is the accused's younger brother. On 3rd January, 2023 he came back from their rural home in Siaya. He noticed that there was a lot of household goods that he had not left at home before he went to Siaya. He was informed that the accused had brought them home. In the morning of 4th January, 2023, the accused asked him and their cousin Ramsey (PW1) for help in moving other household goods. They escorted him to a place where he hired a pick-up and left for the accused's house in Chebisaas area. The accused led them to his house and when he opened the door, he noticed there was a stench coming from the house. The accused told them that it was a dead rat. They then emptied the house and acting on the accused's instructions, cleaned the house and went back home. They offloaded the household goods at their parent's home then had supper. On 7th January, 2023 police officers came to their home to inquire about the household goods. They were asked to visit Langas Police Station the following day together with Ramsey. When they honored those



- summons, the police recorded his statement and released him but detained Ramsey in custody. He also confirmed that he had known the late Chiloba as the accused's friend and had even seen pictures of him on his phone.
9. PW4: Patricia Nyambura Ndegwa testified that she was a student at Eldoret University. The deceased was her classmate who also lived a short distance away from where she lived. She had known him to be dating the accused and would occasionally find them together in his (the deceased's) house. On the night of 31st December, 2022, she went to Tamasha Bar & Lounge together with her boyfriend Dennis. The first people they met were the deceased in the company of the accused. The deceased was dressed in a Nigerian hat, black leather coat, red long trousers, black laced top and black high-heeled boots. After a night of merry-making, they decided to leave the club together with the accused and deceased and split the taxi bill. The accused hailed a taxi and sat on the Co-driver's seat while she sat on the back seat together with the deceased and her boyfriend. The deceased appeared to have been overwhelmed by booze because he slept all the way home. They were the first ones to arrive at Canaan B, where she lived with her boyfriend, and left the accused to go home with the deceased. He has assured them that despite the fact that the deceased had blacked out, he would get him home. They sent him their half of the taxi bill and went to sleep.
 10. The following morning, i.e. 1st January, 2023 around midmorning, the accused came to their house inquiring whether they had seen his phone. She noticed that he was bleeding but could not tell whence the bleeding came from. She asked him to wash off the blood at the sink, which he did. She noticed that the accused had the deceased's phone and charger which, upon inquiry, the accused said that Chiloba was still blacked out from the previous night's drinking. He further told them that he was hoping to charge the phone at their place because of a power black-out at his place then call the taxi driver to inquire whether the deceased had left his phone in the taxi. After charging the deceased's phone, the accused scrolled through the phone and left in a hurry. She left for her parent's place that evening.
 11. On the 5th January, 2023, Dennis (PW5) here boyfriend, called her to inform her that he had seen photographs of the deceased trending online, saying that he was found murdered and was dressed in the very same clothes that he wore on the night of 31st December, 2022. She went online and confirmed it to be true. She was later asked to record her statement with the police.
 12. PW6: Dennis Baraza Ochieng testimony was similar to that of PW5 in that on 31st December, 2022 he went out partying with his girlfriend. They met with the accused and the deceased at Tamasha. He noticed that the deceased was flamboyantly dressed in red trousers, long sleeve meshy black shirt, a Nigerian cap and black boots. He confirmed that he is a teetotaler and, on the night, he only partook of soft drinks as the rest drank alcohol. At around 03:00am, they decided to go back home and agreed to split the taxi bill. PW5 and him were the first ones to be dropped off at Canaan B which is about 100m away from Noble Breeze Apartments. By this time, he had noted that Chiloba had blacked out from the alcohol while the accused appeared tipsy. The morning after, the accused came to their house while bleeding. He gave him a piece of tissue to wipe the blood and apply pressure on the wound. He told them that Chiloba, the deceased was still sleeping off the alcohol from the previous night's drinking. The accused had the deceased's mobile phone and charger and requested to charge the phone. After charging he left hurriedly. He left for Nairobi with PW5. On 5th January, 2023 he saw pictures of the deceased dressed in the same way he had when he last saw him. He notified PW5 about the trending pictures of Chiloba, who was said to have been murdered and dumped inside a metallic box.
 13. PW7: Whitney Kavinya Kaloki told the court that she is a student at the University of Eldoret and was a classmate of the deceased. The deceased had disclosed to her that he was dating the accused and she was aware that they lived together in the house at Noble Breeze Apartments. On 23rd December, 2022 in the afternoon, she was visiting a friend at Noble Breeze where she hung out with Walter Ogilo and Steve



- Odumbe (PW14) watching TV. The accused came with other people and started moving household goods from Chiloba's house. Baffled by that on-goings, she tried to notify Chiloba about what was happening but was unable to raise him on phone. The accused, who was there with his girlfriend and baby, informed her that they were only but moving out a few of the things. When Chiloba finally rang her back, he confirmed that he had not authorized the accused to take away his property. He appeared cross with the accused but later agreed to the property being moved out after the accused told him that he was moving them to a bigger, more spacious two-bedroomed house.
14. On the night of 31st December, 2023, she went to Tamasha Lounge to usher in the new year. She saw the deceased and the accused making their way into the club. She took note of his dressing; a Nigerian cap with a golden ribbon, a black leather trench coat, a black net top with shiny pearls. Due to the crowding at the club, she decided to go to another location for the night.
 15. On the 3rd day of January 2022, she happened to be together with Steve Odumbe and Walter in their house at Noble Breeze Apartments. She heard some noises like something metallic being dragged along the stairs and peeped outside. He saw the accused and another carrying a dark green metallic box down the stairs. From the way they were carrying it, the box appeared to be too heavy. She did not bother the accused because on the 23rd December, 2022, Chiloba had confirmed that he had changed his mind and was ok with the accused moving his things out of that house.
 16. On 5th January, a friend notified her that Chiloba had been found murdered and his body dumped inside a dark green metallic box. She went online and confirmed that the trending news was indeed true. She noted that the deceased was dressed in the very same manner that he had on the night of 31st December when she saw him in Tamasha Lounge. She later went to the DCI Langas to record a statement over the murder.
 17. PW8: Alex Nyamweya Morimbocho told the court that he was the caretaker of Noble Breeze Apartments located in Chebisaas area. He knew the deceased as one of his tenants. The deceased would call him from Tel No. 0716765054 whenever he had any issues with the house. The accused later moved into the deceased's house. On 23/12/2022 he was made aware that the accused had moved some of the household goods from the house. On 4/1/2023 the accused called him from Chiloba's phone and notified him that they intended to move out of the house. He asked urgently for the keys to the gate and even offered to cater for the cost of the boda-boda ride.
 18. When he arrived at the premises, he found that some things had been moved from Chiloba's house. When he went inside the house, he noticed that there was a pungent stench which the accused initially informed him to be due to the dirty stagnant water outside. However, when he went back downstairs the stench was still there particularly on the couch where flies had started hovering around. The accused told him that the smell was possibly from a dead rat that he had thrown away. Before the accused drove off with the goods, he agreed with him that he would send the deposit after inspecting the house. A new tenant took possession of Chiloba's house, cleaned it and later moved out after it emerged that the house could be a crime scene.
 19. PW9: Obadiah Otieno Ochieng testified that he was a metal-work fabricator, that he made metallic boxes amongst other items. On the 3/1/2023 at around 07:30 the accused, who was a stranger then, approached him to procure a metallic box. He was unsatisfied with the boxes that the witness had, which he said were too small. He took the accused to another stall and showed him bigger boxes but the accused was still unsatisfied saying he wanted a large box. He then took him to another shop and the accused pointed at a size 24 box which he said was large enough for him. As soon as he pointed at the box, the accused left saying he was going to get a vehicle to carry the box. This struck the witness as highly odd because usually his customers would ask an negotiate a price before getting means of



transport. The accused came back with a white Toyota Fielder and ordered that the box be loaded on the vehicle. The witness protested that he could not comply unless his price was met. They finally agreed at a price of Kshs. 7,500/= which the accused sent to his Mpesa account from Mpesa account No. 0716765064 registered in the name of Edwin Kiptoo. As they were negotiating, he noted that the accused appeared uneasy, desperate and confused so much that he was unable to open the car boot. He called someone to ask how the boot opens, was given directions but could still not open the boot. It was at this juncture that he advised the accused to fold the rear seats and they were then able to push the box inside the car. The accused insisted that he wanted the box placed in the boot because he would carry two other passengers. They obliged and, in the process, tore a piece of the car roof, something which the accused seemed not to have notice because he was absent minded. He then drove off.

20. The witness identified a dark-green metallic box as the one he had personally made. To demonstrate that the box was indeed a product of his hands, under intense cross-exam he showed the court where he had painted over the box from its initial blue color to the dark green color. He also identified the accused as the man he had sold the box to. He similarly identified the white Toyota Fielder as the very same car he saw the accused driving away.
21. PW10: Francis Were Miriasi testified that he operates a taxi within Eldoret and its environs although he sometimes offers the cars for hire. On 02/01/2023 the accused contacted him from a stranger number, introduced himself as the son of Julius Ooko and asked for car for hire. The car had been booked by another client but later, that client brought the car back earlier than expected. He later took the car to Nyathiru areas and handed it over to the accused. That car was a white Toyota Fielder registration No. KCL 299L. The accused then sent him money, Kshs. 3,500/= to his Mpesa account from Mpesa account 0716765064 registered in the name of Edwin Chiloba. The accused told him that he had registered the number using his friend's identity card.
22. When the accused eventually returned the car the following day at around 1700Hrs, he noticed that it had a putrid smell and when he inquired from the accused why the car smelled so terribly, the accused told him that he had carried fish. The accused sent him a further Kshs. 300 to cater for the car wash and buy air freshener for the car. He was then summoned by the police to present the car because it has been used to dump a dead body.
23. He offered the car tracking details to officers who impounded the vehicle. He insisted that he had known the family of the accused for too long that he did not hesitate to hand over the vehicle to him.
24. PW11: Peter Pfaltzgraff told the court that he is from the USA doing missionary work in Mumias. He came to know the deceased through an online page where the deceased advertised his clothes and designs for sale. He came to learn that the deceased had an interest in pursuing further studies in fashion and design but did not have anyone to pay the university fees. He and his wife offered to sponsor his education and subsequently, the deceased matriculated at University of Eldoret. They would also send him a stipend to cater for his living expenses and rent. This money was always sent from their US Bank account to the deceased's Mpesa account on 1716765664. Sometime in mid- 2022, the deceased introduced the accused as his friend and roommate.
25. In December 2022, the deceased visited them in Mumias with the intention of spending Christmas holidays with them. On 23/12/22 Chiloba received a phone call that the accused was moving things out of his house, something which seem to upset him so much because he had neither known about it nor had he authorized it. He told the court that he had to personally intervene to ask why the accused did that, to which the accused answered that he gotten a new two-bedroomed house and had intended to surprise the deceased. After his intervention, Chiloba calmed down and allowed the accused to move some of the household goods. The issue was put to rest when the accused went to Mumias to visit



- them. The accused left for his father's rural home and came back on 28th December, 2022. They all stayed together till 31st December, 2022 when Chiloba and the accused left for Eldoret. He sent him KShs. 123,800 to his Mpesa account to cater for his fees, supplies and usual stipend. He also sent KShs. 1528 to the accused to cater for their fare to Eldoret. He dropped them off at a bus stage and later that night, Chiloba called to notify him that they had arrived safely.
26. On 1st January, 2023 at about 0631Hrs, he got a WhatsApp message from Chiloba's number wishing him a happy new year and informing him that Jack's (the accused's) surprise was successful and the new premises was pretty. Because he was expecting a video from Chiloba that he would use for promotional video for the missionary work, he called back. The accused answered and told him that the deceased had gone to the shop and left the phone with him. He was also told that Chiloba and the accused would be going for a party that night.
 27. On 2nd January, 2023 at about 05:42 P.M he missed a call from Chiloba's number and when he called back, the accused picked the call and told him that Chiloba had come back home the party they went to the previous night. When asked why he still had Chiloba's phone, the accused answered that they had changed phones at the party. He called yet again at around 10:09 p.m. and the accused told him that Chiloba and not yet come home and incase he did not come home that night; he would report the matter with the police the following day.
 28. On 3rd January, 2023 at around 08:39 a.m., he called to ask if the accused reported the matter, to which the accused confirmed that he would be doing so in the course of the day. At around 01:29 p.m. he called to get an update on whether the accused had reported the matter, to which the accused said he was at the police station booking that report. He promised to send the OB but never did.
 29. On 4th January, 2023 at around 08:19 a.m. he called the accused, still on Edwin's phone number, to ask for an update. The accused promised to call him back from his (the accused's phone number) but never did so. By this time, he had grown so concerned by the lack of concern from the accused that he contacted a friend and asked him to accompany the accused to the police station to book a report. He then sent his friend's no to the accused and asked that they link up to report the matter.
 30. On 5th January, 2023 he confirmed from his friend that the accused had not called to do as requested. When he called the accused, still on Chiloba's phone number, he said that he was on his way to meet up with his friend. Later at around 07:32 p.m. the accused called to say that Chiloba had been murdered and stuffed in a metallic box. He then sent pictures. On 6th January, 2023, he travelled to Eldoret, went to the morgue to view Chiloba's body. He was greatly disturbed that the accused did not go with them to view the body. They went to Langas Police Station where the accused was detained as suspect. He confirmed that the police recovered the deceased's phone from the accused.
 31. PW12: Sammy Kibet Chomangei testified that he hailed from Kaptinga village within Kapseret sub-county. On 3rd January, 2023 at around 01:00pm, he was sent home when his son called him to inform him that there was a dark-greenish metallic box that had been dumped by the road and had foul smell. He went to the scene and confirmed that indeed there was a terrible smell coming from the box. He called the village elder asking him to notify the police of the discovery. The police arrived shortly thereafter and when the box was opened, they saw a body of a man dressed in female clothes stuffed inside. Officers from DCI Langas were informed and they came to document the scene.
 32. PW13: Faith Toroitich testified that she was a cashier at Tamasha Lounge. She was also the deceased's half sister. On the night of 31/12/2022 she went to work and received a call from Chiloba. He told her that he would be coming to Tamasha to usher in the new year from there. He requested that she reserves seats for them. The deceased came at around 2200hrs and introduced the accused to her. She



- took note of his dressing. After a short conversation, she left them to enjoy themselves as she went back to work. She said that Chiloba came to her work-station about 3 times and although he was inebriated, he seemed to be unhappy and aloof. She could not sustain a conversation with him because she was still on duty. Before he left, Chiloba bade her goodbye and they wished each other a happy new year. On 5th January, 2023, she learned that a body of a man had been found stashed inside a metallic box. She noticed that the man bore an uncanny resemblance to her brother and was even dressed the same way as he was when she last saw him. She confirmed it to be him the following day when they identified the body at MTRH morgue.
33. PW14: Steve Odumber testified that he was friends with the accused and the deceased. He was aware that the two were dating. His testimony was similar to that of Whitney Kaloki (PW7) in that on 23/12/22 they were together at Walter Ogilo's house in when he saw the accused moving the household goods belonging to the deceased. The deceased was notified and although was annoyed at that revelation, he later agreed for the household goods to be moved. Of particular interest with his testimony was that on the night of 31st December, 2022 at about 03:00 a.m. he was playing video games at the home of Walter. He heard banging from the gate and a few moments later heard footsteps of people going upstairs. Chiloba was wearing a red trouser and a black shirt with pearls. Shortly thereafter, he heard Chiloba crying briefly then went quiet. That cry sounded like a desperate cry for help. Then the deceased suddenly went quiet. Because he heard him crying several times before, he did not pay much attention to what was going on but promised himself that he would inquire from him what caused him to cry the next time they meet.
34. On 3rd January, 2023 he was in the house with Whitney (PW7) when they heard a loud bang from the stairs. When they checked, they saw that it was the accused in the company of another man carrying a dark-green metallic box down stairs. The box seemed to be heavy from the way they were carrying it. On 5th January, 2023 he learned that Chiloba had been found murdered and his body stashed inside a metallic box, quite similar to the one he had seen the accused carrying down the stairs. Chiloba's body was dressed the very same was as he had last seen him walking up the stairs.
35. PW15: Jane Waya testified that she is a government analyst working with the toxicology department. She testified that their lab received a request from the DCI requesting for a toxicological analysis from bio samples sent to them. She conducted the analysis and found no traces of toxins in the samples provided. She produced her government analyst report as Exh 4A and the accompanying Exhibit Memo form as Exh 4B.
36. PW16 Chief Inspector Irungu testified that he helped to process photographs taken at the scene where the body was recovered, at Noble Breeze Apartments and in the morgue prior to and during the post mortem. He produced those pictures together with the certificate of photographic enlargement as Exh No. 3A, 3B, 3C, 3D and 3E
37. PW17: PC Jonatha Limo testified that he is a police liaison officer working with Safaricom. He received a request from DCI Hq together with a court order authorizing him to release call data records and a print out of M-pesa statement for mobile no. 0716765064 which he confirmed to have been registered under the name of Edwin Kiprotich Kiptoo and 0759632389 registered in the name of Jacktone Odhiambo. Of particular interest to this case are transactions on 3/01/2023 at 08:15:03 under the transaction code No. RA35KP7607 where Kshs. 7,500 was sent to Obadiah Ochieng (PW9) from the deceased's account. Also, of interest is the transaction of 02/01/2023 under transaction code no RA22KBG00K and RA33MFV5S7 done on 03/01/2023 where Kshs. 3,500 and 300 were sent to Francis Miraasi (PW10).



38. Regarding the call date records, show the accused person's phone was off between 01/01/23 – 03/01/23 when he acquired a new mobile phone. His movements can also be traced using the call data records.
39. PW18: Pauline Ephy Anyango testified that she works as a masseuse. On 02/01/2023 a client was referred to her by a colleague. Shortly thereafter, that client called from mobile no. 0716765064 to ask whether she would come to his location and she responded in the negative. That client came for her in a taxi and they went together to an Airbnb place near Kings-Square homes in Kapseret. That client wanted a massage, which she offered and later demanded for sex, which she also acquiesced to. He paid her using the same mobile number on which showed his name as Edwin Kiptoo.
40. PW19 testified that he works with Trail my car Ltd which offers car-tracking services to their clients. He received a request from DCI to give them vehicle movements of motor vehicle reg no KCL 299L. He complied with the request and gave them coordinates of the motor vehicle from 31st December, 2022 to 04/01/2023. He explained the time difference in the report as something that arose from the GPS locator which was set in Chinese time zone. Looking at his report, the vehicle was used on the road where the metallic box was found at the time it was alleged to have been dumped there, He produced the vehicle movement report, letter requesting for vehicle movement, certificate of installation as Exh 9A, 9B and 9.
41. PW20: CPL Mercy Kathure testified that on 03/01/2023 she was on standby duties. She was then notified that a metallic box had been dumped in Simat/Hurlingham area. She rushed to the scene and found a crowd had formed around a dark greenish metallic box which had a foul smell. She opened the box and found that it contained a male human body that was dressed in red trousers and a black jacket. Covering the mouth was a jean trouser that appeared to have been tied tightly. Covering the body were clothes, a duvet, dirty blue jeans and sweater. They found nothing to identify the body. She took photographs of the body as found at the scene and escorted the body to MTRH morgue. She took the metallic box to their office to be kept as exhibit. It later emerged that the deceased was called Edwin Kiprotich Kiptoo alias Chiloba, a 4th year student at University of Eldoret. She caused the arrest of the accused after recording statements of witnesses who confirmed to her that the last time the deceased was seen alive, he was dressed in the very same manner that his body was found. She also interviewed PW1-PW3 who told her that they had helped the accused carry a dark-greenish metallic box with a foul smell. Her investigations also revealed that the accused had used motor vehicle registration No. KCL 299L, white fielder, to transport the metallic box containing the deceased's body to the place where it was dumped. Her counterparts from the Homicide division of the DCI took over the investigations.
42. PW21: Dr. Johansen Oduor testified that he is the chief government pathologist. He conducted the post-mortem on the body of the deceased. On external appearance, he found that one side of a jeans trouser had been tied tightly around the mouth and nose. There were also three socks stuffed one after the other, down the deceased's throat. There was bruising on the upper and lower lips and a bruising on the inner part of the left side of the tongue. These injuries according to him, were ante-mortem injuries. He extracted anal swabs and other bio samples for further forensic analysis. In his professional opinion, the cause of death was asphyxia due to smothering. He produced the Post-Mortem report as Exh 6.
43. PW22: Polycarp Lutta Kweyu testified that he is a Principal Government Analyst and the in-charge of DNA section in the Kisumu Lab. The lab received 27 items for sampling on the 11/01/2023 and 19/01/2023. He was able to ascertain that the stains on the anal swab, boxer, red trousers and purple bed cover tested positive for seminal fluid which matched with the accused's DNA. The stains from the boxer, red trouser, white bedsheets, piece of canvas, piece of sack, swabs from wheel chamber, torn green face towel, swabs from the box, grey trouser and shoe laces all tested positive for human blood



which was a match with the samples of the deceased. He produced his report and the accompanying exhibit memo form as Exh7A, 7B and 7C.

44. PW23: PC Martin Mwangi testified that on 6th January, 2023 he was in the office when they were tipped off that the person last seen with the deceased was within the precincts of the police station. They detained the accused person and he admitted that he was in possession of the deceased's mobile phone. He led them to Noble Breeze Apartment but unfortunately, they found that the house had been cleaned. He then took them to his parent's home in Huruma where they were able to recover the deceased's ID card, Grey iPhone, 4 wall portraits and assorted clothes. He signed an inventory of the items collected. Upon further interrogation on what happened, the accused wove a tale of how they were accosted by two people who sodomized the deceased, tied his hands and legs. He also said that he was hit on the head causing him to pass out and when he regained consciousness, he found that the men had killed the deceased. He then decided to dispose off the body using a car he had hired. He disclosed the particulars of the vehicle he used and it matched with the reports he had obtained from his investigations i.e. a white Toyota Fielder. The vehicle was impounded and the hirer detained in custody awaiting further investigations. The accused later confessed to committing the murder. He produced the grey iPhone, deceased's ID card, Redmi Phone and inventory of recovered items as Exhibits 2A, 2B, 2C and 2D.
45. At the close of the prosecution case the court is mandated under Section 306 of CPC to determine whether a prima facie case has been established to warrant the accused being put on his defence

The decision

46. The *Criminal Procedure Code* under Section 306 provides as follows:

- “(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 recording 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 on his own behalf or make unsworn statement and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether is intended to call any witness as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”

47. As guided by the law in relation to the parameters set out in Section 306 of the *CPC*, it is incumbent for the trial court to bear in mind the following guiding principles. In the case of *May v O'Sullivan* (1955) 92 CLR 654 the court remarked that:

“When, at the close of the case of the prosecution, a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands, he could lawfully be convicted. This is really a question of law.”

Moreover the “question whether there is a case to answer, arising as it does at the end of the prosecution's evidence in chief, is simply the question of law whether the defendant



could lawfully be convicted on the evidence as it stands, whether that is to say, there is with respect to every element of the offence some evidence, which, if accepted, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely every element of the offence is established to the satisfaction of the tribunal of fact beyond reasonable doubt.”

Simply stated the test is whether there is evidence capable of proving each of the elements of the offence beyond reasonable doubt.”

48. The Court of Appeal of Eastern Africa reinforced the position in the celebrated case of *R.T. Bhatt v Republic* (1957) EA 332-334 & 335 to define what constitutes a prima facie case at the close of the prosecution case.

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on fully consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. 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 worthless discredited evidence.”

49. What the law requires at this stage is to determine whether the prosecution had made out a prima facie case. It is not to evaluate evidence or consider the credibility of witnesses. For clarity purposes, a prima facie case is not the same as prove which comes later when the court is to make a finding of guilt of the accused. It is evidence on the face of it which can demonstrate that the elements of the offence as framed in the charge sheet indicates some sufficiency to prove that the accused ought to answer or give evidence in rebuttal. The reason why commenting on the evidence is restricted is mainly because at this stage of the proceedings is only one side which has made attempts to present evidence in support of their position in the proceedings. It will be more prejudicial if the court was to import a language to the decision which is likely to be prejudicial to the defence case in the final analysis. The court must be as brief as it can and leave the rest for a full hearing on both sides without making a conclusive observation of the facts.

50. Having set out the evidence and the guiding principles in *R.T. Bhatt v Republic* (Supra) the evidence available led by the prosecution on the offence charged, the prosecution has made out a case against the accused person which requires him to enter a defence.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 9TH DAY OF JULY 2024.

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R. NYAKUNDI

JUDGE

