Republic v Chitende (Criminal Case E108 of 2021) [2023] KEHC 2759 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL CASE E108 OF 2021

WM MUSYOKA, J

MARCH 24, 2023

BETWEEN

REPUBLIC .... PROSECUTION

AND

ALEX OKONJI CHITENDE .... ACCUSED

RULING

1. In this case, the deceased was found dead on February 21, 2021, in a ditch. The accused, his son, made a report of the death to the police. He was arrested and charged with his murder.

2. The case by the prosecution was largely built on suspicion, for none of the witnesses saw the accused person assault or injure or do anything to the deceased, that would have caused his death. PW1, a relative and neighbour, did not hear anything untoward, on the night the deceased died. The utility of her evidence was that the deceased and the accused were not on good terms. PW2, was another close relative, who lived in the same compound with the accused. She last saw him a day before it came to light that the deceased had been killed. The import of her evidence was that the accused was in the habit of saying he would kill or cut someone. PW3, was another relative. She gave food to the deceased on the evening of the day he died. The only remarkable thing was that he had a yellow lamp, similar to one that was allegedly found at the house of the accused. PW4, the investigating officer, highlighted on the things that led him to treat the accused as a suspect, being the yellow lamp, an axe found at the fence with blood stains, the fact that the report of death was not made at the nearest police station, and the narrative by the accused that he was led to the body of the deceased by a trail of blood stains from his house.

3. From the testimonies, none of the witnesses were eyewitnesses to any altercation between the deceased and the accused, where the deceased suffered the fatal injuries. The case is founded on suspicion, anchored on the allegations made by the relatives that the deceased and the accused were on bad terms, and that the accused frequently said he would kill someone; and those by the investigating officer. The

fact that the accused was on bad terms and often talked of killing someone, alone, are not adequate proof of his complicity. The relatives who testified on that did not see the accused do anything to the deceased that could have caused his death, none of them found him in any compromising situation, and none of them found him with any incriminating material.

4. Regarding the lamp that PW3 and PW4 talked about, PW4 did not provide proof that he prepared an inventory of what he recovered from the accused or from his compound. Preparation of inventories of recovery is a requirement under police regulations. It may not be mandatory that such evidence be provided, and that non-production of it is fatal to the case, but the preparation is critical. It is principally intended to aid the police with investigations, but it is also an accounting tool. So that where the police claim that they recovered some item from a suspect, which is proposed to be placed before a court as evidence, then there would be need for the prosecution to account for that recovery. The word of the detective or other persons present at the recovery would not be adequate, and preparation of a document, signed by those present, including the suspect, would authenticate the exercise, and lend it critical credence or credibility. In this case, the lamp was alleged seen by PW3, allegedly in possession of the deceased, and was allegedly recovered by PW4 from the house of the accused. Firstly, PW3 was not shown the said lamp, when she testified, and asked to identify it. It was presented in court for the first time when PW4 took to the stand. The other witnesses were not confronted with it, to gauge whether they were familiar with it, and to confirm whether it was an item associated with the deceased. When confronted with his investigation diary, PW4 was unable to pinpoint any entry which captured the alleged recovery. As PW4 sought to use the lamp to incriminate the accused person, he was obliged to account for its recovery, by way of production of an inventory. Of course, such lamps are common items, and it would have been critical for the witnesses to pick out features on it which made it unique or peculiar to the deceased.

5. On the axe, the same principles apply. It was allegedly recovered from the compound of the accused, allegedly hidden in the fence or in a thicket. To authenticate the finding of the axe, PW4 ought to have prepared and presented to court an inventory of the recovery. The standard of proof in criminal cases is beyond reasonable doubt. There was a duty to prove beyond reasonable doubt that the axe was found on the accused or within the bounds of his residence, to demonstrate that it was under his control or his possession. Proof of possession always shifts the evidential burden to the accused person. To prove beyond reasonable doubt that the axe was found in his compound and was under his control or possession, the prosecution ought to have prepared an inventory, and had it signed by the witnesses, including the accused, before the same could be placed in evidence. The evidential burden, to explain the presence of that axe within his compound, could not shift to the accused, before the prosecution established beyond reasonable doubt, that it was found there, which could only be proved through production of a proper inventory or through proper entries in the investigation diary. It was alleged that it had blood stains. The aspect of blood stains was not subjected to forensics, and, therefore, it was not connected to the death of the deceased, and the complicity of the accused to that death. I note too that the pathologist harvested samples from the body of the deceased, at autopsy, being a nail bed or plate, for deoxyribonucleic acid (DNA) analysis, to establish whether the same had residue of tissue from the person who attacked the deceased. It would appear that the samples were not subjected to forensics, and the prosecution was contented to rely on word of mouth, as evidence, as opposed to reliance on scientific material, which is more superior and reliable, particularly in a case where there was weak direct evidence.

6. On the accused choosing to report the death at Butere rather than at Khwisero, which was nearer, and which had jurisdiction, my finding is that that alone, without any other evidence, cannot be basis for founding a conviction. The accused discharged his civic duty, of reporting a death that, no doubt, occurred in suspicious circumstances, which suggested foul play. I do not think much should turn on

or should be read from this. There is also the issue of a blood trail from the compound, which allegedly led to where the body was found. PW4 attributed that narrative to the accused. He did not, himself, testify as to whether he noted any such trail of blood, during his investigations. None of the other witnesses, who testified, talked of seeing any such trail.

7. There is nothing, in the recorded evidence, linking the accused person directly to the death. The circumstantial evidence is also very weak. As stated elsewhere, the case is largely based on suspicion. I, therefore, find that there is no basis to call upon him to defend himself. It is my finding and holding, therefore, that the prosecution has not established a *prima facie* case to warrant that the accused person be put on his defence. I find that he has no case to answer, and I accordingly discharge and acquit him. He shall be set free from remand custody, if he is still being so held there, unless he is otherwise lawfully held.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24 TH DAY OF MARCH 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Ongoya, Advocate for the accused person.