



**Republic v Toroitich (Criminal Case 33 of 2020)  
[2023] KEHC 2422 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2422 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 33 OF 2020  
TM MATHEKA, J  
MARCH 22, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ANTHONY KIPLAGAT TOROITICH ..... ACCUSED**

**RULING**

1. On the morning of August 24, 2020 – Pw3 Collins Kiprotich Cheruyoit was going to work. He was walking from Solai to Ogielgei. He saw a person lying on the roadside. He recognized her as his cousin Susan. He called her. She did not respond.
2. He rang one Mativo and reported to him what he had seen. He asked Mativo to come. Mativo came with many people including the *Nyumba Kumi* from Kwa Haji – Susan’s place and Pw2 Susan’s 14-year-old son. PW1 confirmed that his cousin used to take alcohol. He did not know the accused well.
3. According to KA Susan’s 14-year-old son he learnt of the death of his mother from Pw3 one Collins. He testified that Collins told him that his mother had been killed at Solai on the roadside. When he went there he noted that she had an injury on the head.
4. He testified that his mother and Alisay were friends – and Alisay would visit his home and sleep in his mother’s house. He said that he and his siblings slept in their grandmother’s house which was in the same compound.
5. That Alisay was coming to their home every evening. That on August 22, 2020 his mother and Alisay came home about 4:00 pm. They were not quarreling. That they had been together the previous night and there had been no quarrel. That they left together for Solai – only for him to learn from Collins that his mother had been killed. He said he heard that accused had killed his mother but did not say from who.



6. The mother to deceased and grandmother to KA Alice Gatumu Fadhili testified that she of her daughter's death when her neighbours visited her on August 23, 2020 and told her that her daughter Susan "was not there". She too said she heard that her daughter had been killed by the friend she was living with. She would not recall his home. She however, went to the mortuary and identified the body for post mortem examination. She observed that "*alikuwa amepigwa nut ya kichwa*". – That she had been hit on the head with that specific *rungu* that has a metallic nut fixed on its end. She confirmed that she had seen the two leaving home about 4:00pm pm together – and they were not quarrelling. She also confirmed that it was the accused who used to visit her daughter's house – and they were living together her house and that of Susan were so close one would hear when others were talking there.
7. Pw4 John Musyoka Fadhili's testimony was that he was living in te same homestead with his mother and Susan and sometimes slept on Susan's sofa. Susan Njeri Fadhili was his sister. On August 28, 2020 Susan and Alisay left home with leaving Susan's 8-year-old last born under his care. They told him they were coming back. Susan and Alisay did not return home that night and the following day, he heard about her death.
8. He added that Susan was previously married to someone else and the child he had been left with was of Susan and that other man. He testified too that Susan would sometimes visit the father of her children – one Cheboite. He did not know Cheboite's other name. he said he would sometimes hear Susan and Alisay disagreeing but he never told this to the police.
9. Patrick Kipngok, Pw5 was the Assistant Chief Arusto sub-location Ruyobei location, Rongai Sub-County. He learnt of the body by the roadside from the Mzee wa Nyumba Kumi on 24<sup>th</sup> /08/2020 a t 8:30 am. He went there – saw that the body was lying along the road - Arusto towards Sodom on the boundary between Rongai and Subukia. It was covered with a lessa and when the police uncovered and he saw an injury on the head. He said "it was said the deceased was in the company of Anthony Kiplangat Toroitich going towards Arus". He testified that on August 27, 2020 he learnt that Kiplangat had sold a goat and was planning to escape. He went, informed the police who mounted a road block along the Mogotio route where he was expected to pass by midnight. The ambush came up with nothing. Later he received a phone call from one Joseph Chelimo Pw6 that the accused person was in his home.
10. Joseph Chelimo testified that he lived at Solai Tuiyotich. On August 28, 2020 about 1:00 am a person just pushed the door to the house where he was, entered closed the door and sought his help – telling him that he was being chased by some people. He asked him to call the chief to escort him to the police station because there were people accusing him of killing a person.
11. Chelimo told the court that he rang the chief – and also gave the phone to the person to speak to the chief. They spoke. This was about 2:00am. The chief (Pw5) and the police arrived about 4:00 am and the person willingly left with them. Chelimo said the accused had only a torch and a *fimbo* – a stick. He denied that the accused had a bag. He said as they waited for the chief the accused fell asleep.
12. According to the chief Pw5 – when he arrived with the police it is the accused person who opened the door for them. He said he knew him as an aggressive person who at one time shot an arrow at a chief and disappeared for five years. He testified that accused had been charged with that offence.
13. On cross examination he said, "I was told that the accused and the deceased were seen heading towards Arus – Anthony's place. It was 5:00 pm. I was not told that they were seen fighting ...,"
14. He stated further that Anthony was hiding in the home of the deceased after committing the previous offence. That he had disappeared to Narok. All this evidence against the accused was not supported



- by even a charge sheet/an OB entry or anything to prove indeed that the accused had been a fugitive of the law before this offence was committed.
15. Dr Bonface Miringu from Nyahururu Referral Hospital conducted the postmortem of the body of 33-year-old African female and found Multiple bruises on forehead and hands, lower legs (no fractures) diffuse, (wide spread) blood clots under the skin on frontal part of head sides of head, back of head – depressed fracture, skull, front part of head, bone sunk into brain matter; blood clots covering the brain. Cause of death: bleeding of the head following severe blunt force trauma to the head. He said he took blood specimen for DNA. On cross examination he said that the injury could result from a fall – height (like 2<sup>nd</sup> floor) or a tree
  16. Pw8 Susan Wanjiru Ngugi a government analyst from the government chemist received specimens via exhibit memo from No xxxx Cpl Margaret Kamau on September 10, 2020; blood sample of Susan Njeri Fadhili, pair of black rubber shoes, a stone. She confirmed that the shoes and the stone were blood stained and the DNA profile from those items matched that of Susan Njoki Fadhili.
  17. The Investigation Officer was Pw9 – No xxxx Cpl Wilson Kiptum – attached to DCI Subukia testified that they received information that a person was killed at Sodom Kwa Haji on August 24, 2020, proceeded to the scene, found body of Susan Njeri Fadhili lying on the roadside, covered with a lessso, black rubber shoes beside the body.
  18. He said, “on investigation we were told that she had been seen with accused Anthony Kiplangat that people knew them as lovers” and were seen on that day headed for Solai. The Accused was looked for in vain in his village but was later arrested at Tuiyotich, - that PW6told them that the accused told the owner of the boma where he was arrested from that he was running away after having done something wrong.
  19. On cross examination the Investigating Officer told the court that he questioned witnesses and they told him they had seen the accused and the deceased together many times, and that the two were friends. He confirmed that he had recorded in his statement that witnesses had told him they had seen the accused and the deceased walking towards the house of the accused. He was asked to make specific reference to the statements of those witnesses. He mentioned Anne Gathumi and John Musyoka. None of the witness statements indicated that they had seen the two walking towards the house of the accused person. Asked about the statement of John Musyoka – he said he did not record that statement and was not aware that the deceased had another man, hence he did not investigate that angle. He also said that the chief told him on August 25, 2020 that the accused was trying to escape. He said he did not record the chief’s statement. He also said nothing was recovered from the accused. He also confirmed that the exhibit memo requested an analysis of the alcohol content on body of deceased but that test was abandoned.
  20. On the basis of the foregoing evidence the Republic through ODPP brought the charge of murder contrary to section 203 as read with section 204 of the *Penal Code* against Anthony Kiplangat Toroitich alias Alisay – the particulars of which were that: on 23/8/2020 at Kwa Haji Hill, Wei sub-location, Subukia sub-county within Nakuru County murdered Susan Njeri Fadhili.
  21. The accused person denied the charge – and the foregoing is the evidence the prosecution presented before court.
  22. Section 306 of the *Criminal Procedure Code* provides for what ought to happen at the close of the case for the prosecution – (1) either there is no evidence that the accused committed the offence – where then the court must enter a finding of not guilty or (2) where there is evidence and accused is put on his defence.



23. The counsel for accused filed written submissions – the state chose to rely on the evidence on record.
24. I have carefully considered all the evidence, the submissions – and the only issue is; has the prosecution established a *prima facie* case to warrant the accused being put to his defence? His counsel submits – No.
25. It is argued for the accused and that the case hinges on circumstantial evidence as there was no eye witness. None of the prosecution witnesses saw the accused inflict any injury on the deceased. That the burden of proof lies with the prosecution. Counsel relied on *Republic v Chege* [2006] eKLR where JB Ojwang J guiding the assessors stated:

“Whether proof of intentional killing of a person is done through direct or circumstantial evidence, it is the singular task of the State, i.e. the prosecution to discharge it; the accused does not have to prove anything and may, indeed, even choose to remain silent; the State must prove guilt, leaving no doubts at all in your minds, that nobody other than the accused has caused the death of the deceased, if there remains in your mind even a single doubt, as to who killed the deceased, then you must find the accused not guilty.”
26. In this case, the prosecution placed great weight on the fact that the deceased was seen with the accused that day at 4:00pm and later at allegedly 5:00 pm – evidently this cannot be the basis for a *prima facie* case. See what the assessors in the case above states:

“The fact that Pw7, Peter Nyoike Njuguna saw the deceased twice on the material day, on each occasion in the company of the deceased, does not by and of itself prove that it is the accused who killed the deceased; for both were using a public thoroughfare which was rather heavily used by others on that day, and any one of those others could have killed the deceased”.
27. In this case, it is stated that accused left home with deceased at 4:00 pm. Did anyone see them together later? The Investigating Officer alleged that there was evidence they were seen at 5:00 pm walking together – but no witness testified to that. In addition, there was no investigation as to whether the accused and the deceased went to the accused’s home – yet the police said they looked for accused at his home. What did they find? Where did the two either together or separately go that evening or that night – there is nothing from the investigators. There was also no investigation as to whether the deceased was killed at the scene or killed elsewhere and brought to that scene – or how she ended up nicely covered with a leso with her rubber shoes on her side as though she had decided to sleep there.
28. There was the issue of the 2<sup>nd</sup> man brought into the picture by her brother John Musyoka who said he was the father of the deceased’s 8-year-old son – and the relationship was not exactly over. For some unexplained reason this not investigated of early to rule out the possibility it presented hence creating a dent in the chain of circumstantial evidence.
29. The chief – pw5 clearly went out of his way to paint the accused as a criminal fugitive of the law – the Investigation Officer added by testifying that the accused “alikuwa ametenda maovu” in the community and he was known. In addition, the serious allegation of his hiding at home of the deceased after committing other offence was not taken beyond the mention of it and this court can only ignore it.
30. The accused basically surrendered to the authorities. He did not confess to committing the offence hence if he accused committed the offence it was the state to establish the same - if he confessed to the offence – then the state ought to have produced the confession in the right manner.



31. Classic *Bhatt v R* states what makes a prima facie case.
32. Authorities abound on the circumstantial case that can withstand those tests – the defence relied on Court of Appeal in *Julius Suvi Ndambu v R* [2016] e KLR
- “it follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-
- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
  - ii. Those circumstances should be of a definite
  - 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.
33. The evidence in this case as presented clearly established that Susan Njeri Fadhili did not die a natural death – that injuries were inflicted on her head and she died from them– but as to who did that – and specifically whether the accused person did that there is no evidence to connect that death to him. Yes – there is evidence that they lived together, they were friends and were together that on the material date. Nothing has been placed before this court to show that there was any reason for the accused person to inflict any injury on the deceased.
34. In the circumstances, I invoke the provisions of section 306(1) of the *Criminal Procedure Code* – and make a finding of not guilty.
35. The charge of murder is dismissed; the accused person be set at liberty unless otherwise legally held.
36. Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF MARCH 2023**

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**MUMBUA T. MATHEKA**

**JUDGE**

**CA Wanjohi**

**Ms. Murunga for State**

**Ms. Mungai holding brief for Mr. Orege for the Accused**

**Accused present**

**Ruling(at close of case for prosecution) Page 3**

