



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Chemorei & 2 others (Criminal Case E007 of 2021)
[2023] KEHC 17545 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E007 OF 2021**

DK KEMEL, J

MAY 22, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

KENNEDY JUMA CHEMOREI 1ST ACCUSED

PETER OSUGOL ALIAS ODEA 2ND ACCUSED

DAVID NDIWA ALIAS SIRO 3RD ACCUSED

RULING

1. The accused persons, Kennedy Juma Chemorei, Peter Obugol alias Odea and David Ndiwa alias Siro, were charged with the offence of murder contrary to sections 203 as read with section 204 of the [Penal Code](#). It is alleged that on the night of 21st January 2021 to 22nd January 2021, at Sirikanyi Village, Ngachi sub location in Cheptais sub-County within Bungoma County, they jointly murdered Bramwel Boiyo Wananda.
2. The accused herein denied the charge and that the prosecution presented six witnesses in support of its case. The defence is represented by Ms. Natwati whilst the prosecution is represented by Ms. Mukangu.
3. The Prosecution was under a duty prove the guilt of the accused persons and in doing so, it had to prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 203 as read with section 204 of the Penal Code are: -
 - i. That the deceased is dead;
 - ii. That the death was caused unlawfully;
 - iii. That there was malice aforethought; and



- iv. That the accused persons directly or indirectly participated in the commission of the alleged offence.
4. PW1 was Grace Naliaka Imobus who testified that she is a resident of Cheptais where she is a peasant farming. According to her, she recalled on 21st January 2021 at around midnight while outside her house to answer a call of nature, the accused persons passed by her door while carrying fence posts. They were drunk and making noise while claiming that they were out to finish the school watchman. She recognized them as they were her neighbours. She testified that they were armed with three fencing posts and that she saw them heading towards the school. She retired to bed and at around 5.00 AM, she heard the daughter of the deceased, Naomi, claiming that her father had been killed. She rushed outside heading towards the school where she saw the body of the deceased. She observed that the deceased had been tied on both hands and legs with a wire and that his face was covered with a white paper. The teachers arrived at the scene as the three accused persons joined the villagers in demanding to know the person who had killed the school watchman. She told the Court that the 3rd accused has been threatening her over her action to testify in this case. It was her testimony that all the accused persons are from her village. She recalled earlier in 2015, her son was killed while in the house of the 3rd accused and referred to him as a notorious alcohol brewer. She told the Court that she is not fabricating things against him since she saw him, clearly, while he was in company of the 1st and 2nd accused during the night the deceased was murdered. She told the Court that the deceased was called Bramwel Boiyo who hailed from her village and that he had served as the area youth wing and also the watchman at Chapatis primary school. He used to be an informer and would liaise with the authorities over crime in the area. According to her, the accused were accusing the deceased for betraying them to the authorities over alcohol brewing in the area.

On cross-examination, she told the Court that she was outside when she saw the accused passing near her house which is close to the roadside. She had gone out to answer a call of nature and was heading back to her house from the toilet. She elaborated that her toilet is near the roadside and that she stood next to the toilet and saw each accused armed with one fencing post and that they were drunk and making noise. She testified that her husband and family members were still asleep and that there was no electricity in her compound and that all this occurred at night. She testified that she recognized the accused's voices as she was well familiar with their voices and that it is the 3rd accused who made the threats. She told the Court that her home is close to the school compound and that there are other villages who live close to the school but she is the closest. She testified that the accused come from her village and that it seemed they emerged from the house of the 3rd accused and that the three are friends. She testified that she did not alert her neighbours or authorities on what she had heard and seen that night. She did not hear any screams from the deceased as she had remained outside for about ten minutes. She told the Court that she did not witness the killing of deceased and that she had already lodged her complaint over threats issued by the 3rd accused in this matter.

On re-examination, she told the Court that there was moonlight and she was able to see the accused who are well known to her and that she is familiar with their voices.

5. PW2 was Alice Boiyo who testified that she is a resident of Cheptais near Cheptais Primary School and that she sells bananas in the area. According to her, the deceased herein was her husband and a night guard at Cheptais primary school. She recalled on 21st January 2021 around 7.00 PM her husband left for work. She woke up the following morning and went in search of bananas and on her return, one of the teachers from his place of work alerted her that her husband had been severely injured and tied up with wires. She rushed to the scene and found her husband tied up with wires on his legs and hands whilst lying on the ground outside the school offices. He was rushed to Cheptais health center and then



to Bungoma but he passed on afterwards. According to her, her husband had enemies as she recalled on 24th April 2020 the deceased arrived home claiming that the 2nd and 3rd accused had stoned him and he lodged report with the police. Subsequently, in November 2020 she met the 2nd accused who threatened that he would lynch her husband but she ignored the threats. Again, at around 5.00 PM the same day the 2nd accused met her and issued similar threats which she duly relayed to her husband. According to her, the deceased was one of the community policing members in the area and that the 1st accused was well known to her as he used to refer to the deceased as his grandfather. The 2nd accused was also a neighbour and likewise the 3rd accused. She told the Court that she did not witness the post mortem examination on the body of the deceased.

On cross examination, she told the Court that she received the report on the incident around 7.00 AM and that her husband used to come back from his work station around 5.00 AM. She left the house at six in the morning. According to her, when she got to the scene she found her deceased husband lying facing down and his whole body was covered except his face but that she never witnessed the incident. The police officers were called to the scene. She reiterated that the 2nd and 3rd accused had earlier issued threats against her husband and that she did not hear any screams that night.

6. PW3 was Timothy Kones Chumbe who testified that he is from Cheptais and is the head teacher of S.A Primary School. He told the Court that the deceased was the school night guard and that he found him there when he reported to the school. He told the Court that the school has a fence but prior to the incident some of the fencing posts had been stolen and that there was a public road of access which goes around the school fence. He recalled on 22nd January 2021 at around 6.45 AM he received a call from one of the parents, Nickson Kirwa, who alerted him of the incident involving the deceased. He rushed to the scene and found the office locks had been broken and that the three offices door were ajar. He established that nothing had been stolen but that the deceased had been tied with a wire on both his hands and legs and tethered onto a bench. His mouth had been stifed with soil and there was blood on his head. He alerted the chief and the police as the deceased was rushed to Cheptais hospital where he was referred to Life Care Hospital Bungoma but he passed on at around 5.00 PM. He told the Court that it was only the doors that were interfered with since the offices and stationary were left intact and that he knew the 1st accused herein as he is a nephew. The 2nd accused was a parent at the school and likewise the 3rd accused. He told the Court that the 2nd accused was among the villagers who thronged the scene.

On cross examination, he told the Court that at the time of the incident part of the fence was not intact and that he is not always in school at night. He confirmed that nothing was stolen from his office but the padlocks were damaged and that the weapons used by the night guard are well known to him. He testified that he was not aware of the type of weapons the deceased used while guarding the school.

7. PW4 was Nancy Jemutai who testified that she is a resident of Cheptais and sell fruits within the market. She recalled on 22nd January 2021 while at the market at around 8.00 AM, the 1st accused turned up and claimed three times that he had hit his grandfather (babu) as he went his way as she proceeded on with her business. She told the Court that the deceased was her younger uncle while the 1st accused referred to him as his grandfather. Later in the evening, she alerted her sister, Rosemary Yego, about what she had heard from the 1st accused.

On cross examination, she told the Court that the 1st accused claimed that he had hit the deceased and that she did not know the identity of those who were around her when the 1st accused uttered those words. She told the Court that she did not know the cause of death of the deceased.

8. PW5 was No. 93768PC Johnson Wanjohi who testified that he is currently attached at Langata DCI Nairobi but in January 2021 he was stationed at the DCI Cheptais Sub County. He told the Court that



he investigated the matter and did recall on 22nd January 2021 at around 7.00 AM he received a report from his DCIO that he should proceed to Cheptais Primary School where it was alleged that the school offices had been broken into and the night guard severely injured. On arrival, he established that the guard, one Bramwel Boiyo, had been rushed to a nearby hospital for treatment. On further enquiry, he found out that the headteacher's office and staff room had been broken into and the teachers confirmed that none of the teaching materials were stolen. He learnt that the night guard had been found lying on to a seat outside the staff room with both his hands and legs tied with a wire, which he found at the scene. He commenced investigations and visited the hospital where he found the guard being given first aid. He observed that he was not in a position to be interrogated. The deceased was later transferred to Life Care Hospital for further treatment but he succumbed to his injuries. He proceeded to record statements of witnesses and established that on the night prior to the incident around 1.00 AM, a neighbour who was outside her house attending to a call of nature managed to see three people whom she recognized and who were carrying fencing posts. He followed the said leads and after a few days the accused persons were apprehended by members of public and escorted to Cheptais police station. On 29th January 2021, he visited Bungoma referral hospital where a post mortem was conducted on the body of the deceased. The doctor established that the cause of death was severe head injury due to blunt force trauma inflicted by a blunt object. He later escorted the suspects to the hospital for mental assessment. He told the Court that they recovered some of the old fencing posts and a piece of barbed wire. He produced the recovered items in Court as follows: - Exhibit 1A & B - Two old fencing posts and Exhibit 2 - One piece of barbed wire.

On cross-examination, he told the Court that he arrived at the school compound around 6.45 - 700 AM and found teachers, pupils and members of public. He did not find the deceased at the scene as he had already been rushed to the hospital by the headteacher. He told the Court that he observed that the school compound was fenced but not fully as there were several gaps in which anybody could gain access easily. He told the Court that the key witness lived as a neighbour to the school about 200 meters away and that the compound of the witness is near the road. Further, he believed the witness and that he found the two old fencing posts on the ground outside the staff room. He told the Court that the recovered fencing posts were the murder weapons even though there were no blood stains on them and that he had nothing to show that the fencing posts were the murder weapons. He also testified that he found the barbed wire tied on the seat but lacked evidence showing that the barbed wire was tied round the seat. He testified that he relied on the testimony of his key witness and that he did not receive a confession from the accused persons. He told the Court that he had wrapped up on his investigations before he was transferred and that none of the witnesses saw the deceased being attacked.

9. PW6 was Dr Ombongi Haron who testified that he is based at Bungoma County Referral. He told the Court that he conducted a post mortem examination on the body of deceased on 29th January 2021 where he observed a swelling on the left side of his head measuring approximately 4cm. He noted that there was an obvious depression on the same site indicating a skull fracture. On the internal examination of the body, he established a depressed skull and that there was internal hemorrhage. He opined that the cause of death was severe head injury due to assault by blunt objects. Samples of blood were collected for DNA analysis. He produced the post mortem report dated 29th January 2021 in Court marked as Exhibit 3.

On cross examination, he told the Court that there was only one injury on body of deceased while the other parts were normal and that the assault on the deceased's body was done only once.

10. Thereafter, Prosecution closed its case and parties opted to rely on the evidence on record on the question whether the prosecution has made out a prima facie case against the accused persons at this stage of the proceedings.



11. It is trite law that prior to placing an accused on his/her defence, the prosecution is required to have established a prima facie case against such accused. It is now a well-established principle that a prima facie case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind to the law and evidence would convict an accused, if no evidence or explanation was set up by the defence to the contrary. See *Ramanlal.T. Bhatt v R* [1957] E.A 332, where the East African Court of Appeal held that a prima facie case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited Prosecution evidence.
12. Also, in the case of *State v. Rajhnath Ramdhan, Amoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul*. H.C. A No. S. 104/1997, J.P. Moosali while quoting Lord Parker C.J.in *Sanjit Chaittal v The State* [1985] 39. WLR. 925 stated that:
- “ A submission that there is no case to answer may properly be made and upheld:
- (a) when there has been no evidence adduced by the Prosecution to prove an essential element in the alleged Offence;
 - (b) when the evidence adduced by the Prosecution has been so discredited that no reasonable tribunal could safely convict on it...”
13. I have carefully evaluated the prosecution’s evidence. I find that, in the absence of any explanation to the contrary from the defence, the prosecution evidence does establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death and the cause could be established. On the question of the accused persons participation, this Court finds that, in the absence of any evidence to the contrary, the evidence of PW1, PW2 and PW4 does establish participation of the accused persons in the assault leading to death of the deceased with the evidence of PW2 establishing that they had on different occasions threatened to deal with the deceased and the evidence of PW1 who heard and saw them carrying the fence posts towards the school where the deceased was on duty as a night guard. It is also essential to note that according to the evidence of PW5, he found two old fence posts at the scene of the crime. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof beyond reasonable doubt as required of a fully-fledged criminal trial. Rather, what is essential is such evidence which if taken literally or on the face of it would establish the essential ingredients of the offence of murder, as well as the accuseds’ participation and intentions therein. From the evidence so far adduced, the same places the three accused herein at the scene of crime and hence the accused persons must offer an explanation as to how the deceased met his death since were they to remain silent in defence, the evidence tendered at this stage of the proceedings is sufficient to sustain a conviction against them.
14. For those reasons, I find the prosecution has established a prima facie case against the three accused persons to warrant them to be called upon to make a defence. Consequently, I find each accused has a case to answer and are now called upon to elect to conduct their defence in accordance with the provisions of section 306(2) of the [Criminal Procedure Code](#).

It is hereby ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2023

D. KEMEI

JUDGE

In the presence of:

Kennedy Juma Chemorei 1st Accused



Peter Osigoi 2nd Accused

Davi Ndiwa 3rd Accused

Wekesa for Natwati for all Accused

Mukangu for Prosecution

Kizito Court Assistant

