



**Republic v Barchiba (Criminal Case 63 of 2017)
[2023] KEHC 20918 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 63 OF 2017
RB NGETICH, J
JULY 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID KIPROTICH BARCHIBA ACCUSED

JUDGMENT

1. The accused person has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the charge being that the accused on the night of 21st and 22nd August, 2015 at Olkokwe village in Mogotio Sub- County within Baringo County murdered Samuel Kibiwott.
2. The accused pleaded not guilty to the charge and the matter was set down for full trial where the prosecution summoned a total of 9 witnesses in support of the charge preferred against the accused.

Prosecution evidence

3. PW1 Alice Kenei testified that the deceased was her neighbour at Olkokwe in Mogotio where he lived with his wife. She stated that on the 21.08.15, at about 7:00p.m, she was at home with her children when the deceased visited her neighbor saying that he was going to see someone. In the morning while going to fetch water, she saw a neighbor's nephew running and on enquiring why he was running, he learnt from him that there was a person who had been injured.
4. She said she accompanied the child to the scene and was able to recognize the injured person as the deceased. She said the deceased was lying on the ground facing up; that the deceased had an injury on the head. She saw blood on the head, the hand and on the mouth. She called for help and Samuel Tologoi, Margaret Cheruiyot and other neighbors she cannot recall responded.



5. She further stated that the deceased told him it is his neighbor Kiprotich Barchiba who injured him. He said Kiprotich among the neighbours who came to help the deceased. She sent a child to call the deceased's family; the deceased's child and his brother went to the scene and took him to Olkokwe dispensary using motorcycle. She stated that she accompanied them to Olkokwe dispensary where the deceased was referred to Nakuru Hospital but she did not go. She later learned that he died before reaching the hospital.
6. PW2 Daniel Kipkaos testified that on the 21.08.2015 at 5: 00p.m, he went to his neighbor one Margaret Cheruiyot to borrow empty granary bags for charcoal. He said he found 3 people in the home drinking busaa when the accused who is also a neighbor came in and asked Margaret for Busaa but was told it was finished. He stayed for some time then then left leaving him behind at Margaret's house and later slept in the house of Stephen Cheruiyot who is Margaret's inlaw.
7. He said when he woke up at 6.00 a.m, he heard people talking at Margaret's place and shortly a lady one Ellis Tuitoek ran to inform them that the deceased had been injured. They went to the deceased and found that he had been injured and had blood oozing from a wound behind the right ear.
8. He said the deceased told them he had been injured by Kipenge and Kipenge is the nickname for the accused. They recovered 90 shilling in coins at the scene. They send for deceased's family and deceased's son Kipkurui arrived and took his father to hospital.
9. PW3 Margaret Teriki Komen was stood down on the 5.03.20 for the defence counsel to be supplied with her statement.
10. PW4 Evans Chebii Kipkiyai testified that he lives in Olkokwe and that on 22.08.15, at about 6: 00a.m he was asked by Mama Chepkoech to go and inform deceased's family that the deceased had been injured.
11. PW5 Evans Kipkorir a son to the testified that on 22.8.2015, at 7: 00a.m he was informed that his father had been injured. He went to the scene and found his father in a pathway near the forest with blood on his head. He said when he was taking his father to hospital, he told him that Kipenge beaten him. He reported the matter to Olkokwe where the police who visited the scene. He said he knows accused as David Kiprotich Barchiba nicknamed Kipenge and they are neighbors.
12. PW6 Lina Biwott a wife to the deceased testified that on the 22.8.2015 at 6:45 a.m, a young man called Ken went to her house and informed that her husband had been injured. She sent her son PW5 to go and find out what had happened.
13. She later went to Olkokwe Hospital where her husband had been taken and saw injuries on his forehead, the mouth and the side of the head. She said the deceased died while being transferred to Mogotio. The body was taken to Nakuru Municipality Hospital and on 28.8.15, postmortem was conducted by a doctor.
14. PW7 Dr. Anthony Wainaina testified that on 28.8.15 at Nakuru County Public mortuary he examined the body of the deceased and found that the cause of death was severe head injury with skull fracture following multiple blows by blunt object or objects in keeping with homicide. He produced the postmortem report in court as exhibit.
15. PW8 Samuel Kiplagat a retired Chief testified that on the 22.8.2015 at 10:50 a.m, he was called and informed that the deceased Samuel Biwott had been found injured in the bush by Kipenga nickname for David Kiprotich Barchiba. He confirmed that the deceased died while being taken to Eldama Ravine Hospital. He mobilized people at around 5: 00p.m to go to accused's home but they did not find him and on 23.8.15, he got information from Mochongoi that the accused had been seen there



taking tea in the morning and had gone to another Centre called Muthengera/Kipagenge bordering Laikipia and Baringo.

16. on 24th August 2015 someone from Keneroi Centre he was called and informed that the accused had been seen there, they went there but they did not find him. Later on 25th August 2015 he was informed that accused was seen at Muthitu Centre and 26th August, the Assistant Chief of Muthitu informed him that accused had been arrested at a Centre called Ngenylel. They called police from Mochongoi police station who came to Kongasis Centre and took him to Ngenylel. He was re-arrested by the police from the forest guards who had arrested him after rescuing him from members of public and escorted to Muchongoi police before being taken to Mogotio police station.
17. PW9 no xxxx PC Kipkurui Kimetto testified that he took over investigations from no xxxx PC Justus Musaango who resigned from the National Police service in July, 2019.
18. He told the court that he discussed the matter with him and he has also read the file. That on 22.8.15, at around 11:00a.m, a witness by the name Erick was coming from the homestead of his neighbour when he heard a sound from a nearby bush. He was being called and before he saw what was going on, he met Alice and they both proceeded to the source of the sound. They found Samuel Kibiwott was assaulted and that Alice sent her son Kenneth to go and inform the family of the victim, that the incident occurred at Oldebes. That a few minutes later, the son of the victim came and confirmed that he was indeed his father. He organized for the deceased to be taken to Hospital and as they were taking the deceased to the Hospital, the deceased informed his son that the person who had attacked him was one Kipenge who was well known in Olkokwe location.
19. He testified that at Olkokwe dispensary, the deceased was referred to Eldama Ravine sub-county Hospital, that the deceased kept mentioning the name Kipenga and that the deceased died on the way to hospital. He told the court that one Amos said he was with the accused on 22.8.15 in the morning and the accused appeared restless and on the same day Amos was later called to Olkokwe police station and he led the officers to the home of the accused and upon searching the house, they found a grey blood stained trouser, which was recovered by the police officers and Amos who led the police officers to the scene, he produced the blood stained trouser in court. He stated that the suspect went missing but was later traced to Mochongoi where he was arrested.
20. He proceeded to state that on 28.8.15 postmortem was performed on the body of the deceased at Eldama Ravine sub-county hospital and the doctor confirmed that the cause of death was due to head injury. The accused was arrested by the members of the public and the assistant chief. He was later charged in court. The evidence of the investigations officer marked the close of the prosecution's case.
21. Upon the closure of the prosecution case, the court rendered a ruling on whether the accused had a case to answer or not and on its ruling delivered on the 28th day of March, 2023 where it found that the prosecution had established a *prima facie* case against the accused and he was placed on his defence in accordance with Section 306(2) of the [criminal procedure code](#).

Accused's defence

22. The accused gave sworn evidence in his defence. He denied killing the deceased on 21.8.2015. He admitted going to the home of a lady called Margaret at around 11:00a.m to drink busaa, with a friend one Kipkulei. He said he left the home at 6.p.m and went to his home which is across the road and went to Mochongoi in the morning.
23. He confirmed that the deceased was not in Margaret's home and denied meeting him on 21.08.2015. He denied being called Kipenga. He said anyone can be called that name while playing because it is



a saying meaning last. He said he recorded his statement on 28th August, 2015 and he did not admit killing the deceased.

24. He said the deceased is a neighbor and his brother in-law and had no grudge against him. He said he went to Ngenyilel to work and he did not know where the trouser produced in court was brought from and no samples were extracted from him to match with blood in the trouser. He said witnesses who testified in court did not adduce consistent evidence and that he had disagreed with Kipkulei in the year 2007 and charges were fabricated against him.
25. He said Margaret was selling illicit brew on the day of the incident and he normally leaves the drinking place early.

Accused's written submissions

26. The defence counsel filed written submissions dated 8th June, 2023 and submits that the death of the deceased is not disputed; that PW7 confirmed that the deceased died and the cause of death of the deceased is severe head injury with skull fracture following multiple blows by blunt objects in keeping with Homicide.
27. He further submits that the prosecution has failed to prove beyond reasonable doubt that the accused committed the unlawful act which caused the death of the deceased; that during cross examination PW1 informed court that the deceased said only two words- that he had been injured by a person "ni mtu"; and in examination he said the deceased mentioned the names of the accused while in his statement to the police while recording statement where he said he did not know who assaulted Kilonzo.
28. Counsel further submitted that PW2 informed court that Mwalimu Korios asked the deceased what happened and he said he had been injured by Kipenge. However, Mwalimu Korios was not called to testify.
29. Counsel submitted that that PW4 testified that he could not tell what happened and did not see who beat the deceased; that he does not know how injuries on the deceased accrued.
30. Further that PW6 said the deceased did not talk to her and did not tell her that he was beaten by the accused; that the deceased was not talking when he reached the hospital.
31. Further in cross examination, PW5 testified that he was with two other people on the motorbike taking the deceased to hospital, surprisingly no one else on the motor bike heard the deceased tell him that it was the accused who had injured him.
32. Counsel further submitted that in cross examination, PW7 said the deceased's injury was a fracture of the skull which may cause a concussion on the brain and the injuries can affect speech and memory together with a possibility of confusion meaning the deceased could not logically put things in perspective raising doubt as to the true version of events by the deceased.
33. Counsel submits that PW9 testified that the trouser recovered was not taken to the government analyst and could not tell if the stains on the trouser were blood stains thus raising numerous questions as to the evidence tendered before this court. That PW9 relied on what Amos told him but the said Amos was called to testify; that PW9 did not conduct any further investigations before charging the accused. He did not collect or present any material evidence before this court to prove the accused committed the offence or take the trouser for forensic examination to link the accused with the offence.



34. The defence counsel submitted that the investigations were poorly conducted and incomplete and the evidence tendered before court is not sufficient enough to prove beyond reasonable doubt that the accused committed the offence of murder.
35. In conclusion defence counsel submitted that there is no evidence to prove that the accused caused the death of the deceased; there is no evidence that the accused quarreled or fought with the deceased, or had a disagreement with the deceased prior to his death; and none of the prosecution witnesses have testified that the deceased had strained relationship with the accused or actually caused the death of the deceased or that the accused had planned to kill the deceased.
36. That the investigations officer left a very crucial stage in his investigations, forensic analysis of the stains on the clothes recovered; that there was no eye witness to the incident and the arrest of the accused was solely based on suspicion. That positive identification was not proved in this case. It is highly contested that by mentioning Kipenga, the deceased really identified his assailant in view of the fact that it was at night and was under the influence of alcohol.
37. It is submitted that no evidence has been brought before this court placing the accused at the scene of crime. That PW9 testified that a grey blood stained trouser was recovered and it was alleged belonged to the accused. In cross examination, PW9 confirmed that the trouser was not taken to the government analyst and could not tell if the stains on the trouser were blood stains. That the accused testified in his defence that no extracts were taken from his body to merge with the alleged blood stains of the found trouser.
38. Counsel submits that the arrest of the accused was solely based on the suspicion that the accused was indeed the only Kipenga allegedly mentioned by the deceased but there is no satisfactory corroboration to safely find the accused was placed at the scene considering the deceased was injured was at night.
39. Further that there are glaring contradictions in the testimonies of the prosecution witnesses; that the accused was not placed at the scene, the offence was allegedly committed at night in the absence of light or any eye witness; that the ingredients proving murder have not been proved to the required standard.

Analysis and determination

40. I have considered evidence adduced and submissions by defence counsel I wish to consider whether the ingredients of the charge of manslaughter have been proved. The ingredients being proof of death, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
41. On proof of death of victim, it is not in dispute that the deceased died, all the prosecution witnesses confirmed that the deceased died on the 22.08.15. PW7 Dr. Anthony Wainaina produced postmortem report in court as exhibit. The issue of determination is whether accused is the one who caused the death of the deceased with malice aforethought.
42. What follows is whether there is direct or circumstantial evidence linking the accused to the death of the deceased. From the evidence tendered by the prosecution, there was no eye witness to the occurrence leading to the death of the deceased herein. I wish to consider whether there is circumstantial evidence linking accused to the offence.
43. The evidence by PW1 is that on the 21st August, 2015, said the deceased passed by her home looking for someone else in the neighborhood. The next Moring, she learnt he had been injured when she was alerted by a child looking for help. At the scene she realized the deceased had injuries on the head, he



- had blood on the head and on the mouth. Together with Samuel Tologoi and Margaret Cheruiyot they asked deceased who had injured him and he mentioned the accused.
44. PW2 who had been drinking with deceased in the house of Margaret the previous evening said the deceased mentioned Kipenge when asked who injured him. He said Kipenge was accused's nickname.
45. PW5 a son to deceased also confirm that his father mentioned accused as the person who injured him while on their way to hospital. PW8 the area assistant chief confirmed that the accused was mentioned by deceased as the person who injured him. He mounted search and accused was arrested on 26th August 2015. PW9 the investigations officer corroborated the evidence of all the prosecution witnesses and stated that the deceased mentioned the accused as the one who committed the offence. He stated that a search was mounted on the house of the accused which led to the recovery of a blood stained trouser which he produced as exhibit in court.
46. In *Chege v Republic* 1985 KLR 1 the Court of Appeal stated as follows:-
- “The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful consideration to tell the truth.
47. A dying declaration need to be corroborated to find a conviction. Caution is necessary in relying on declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.
48. The Court of Appeal in *Sawe v Republic* (2003) KLR It was held:
- “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any hypothesis other than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances relied on. The burden of proving facts which justify the drawing into this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubts”.
49. Further in the case of *Abanga alias Onyango v Republic* Criminal Appeal no 32/1990 UR. The court of appeal stated as follows
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: -
- (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 tendency, unerring pointing towards guilt of the accused.
 - (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 no one else”.



50. From evidence adduced, PW-1, PW2 and PW3 who found the deceased at the scene heard him say he was injured by Kipenga and all admitted that the accused is a neighbor and his nickname was Kipenga. They did not have any doubt as to who the deceased referred to when he said Kipenga
51. Further evidence of PW2 testified that the previous evening accused went to house of Margaret where they were drinking busaa though he never drunk with them as he was told busaa was finished. He said the accused remained in the home for a while. This places the accused at the scene. The deceased was found injured within the vicinity. Incidentally the accused moved away from the locality immediately after the incident and was found 5 days after the incident.
52. Evidence adduced places accused at the scene and witness who found the deceased injured at the said all said accused injured him and injuries mentioned by the witness were consistent with injuries found by the doctor PW7 having caused the death of the deceased
53. Accused has not explained how he left the scene and went into hiding from 21st to 26th of August 2015 when he was arrested. The credible explanation was attempt to evade arrest after commission of the offence. I find dying declarations by the deceased are admissible.
54. In respect to proof of malice aforethought. The prosecution is required to prove that the accused while inflicting injuring leading to death of victim, he had intentions of killing him. No explanation has been given by accused on injuries inflicted on the deceased. The injuries were also serious and, in his mind, he must have known that the injuries would lead to death of the deceased. Further, there is no indication that he was under influence of alcohol as PW2 said he was not given drinks when he arrived at drinking spree. Evidence points at presence of malice aforethought.
55. Final Orders: -
 - i. I hereby find accused of the offence of murder contrary to section 203 as read with section 204 of the penal code and convict him accordingly.
 - ii. Right of appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 27TH DAY OF JULY 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Mr. Kipkulei for accused.

