



**Republic v Tuwei (Criminal Case E031 of 2021)  
[2023] KEHC 27276 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27276 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CRIMINAL CASE E031 OF 2021  
JR KARANJA, J  
DECEMBER 19, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JULIUS KIPLAGAT TUWEI ..... ACCUSED**

**JUDGMENT**

1. The Republic of Kenya through the Director of Public Prosecutions informed this court vide the information dated 3<sup>rd</sup> December 2013, that the Accused, Julius Kiplagat Tuwei, was charged with murder, contrary to Section 203 as read with Section 204 of the *Penal Code*.  
It was alleged that on the 18<sup>th</sup> November 2013 at Kolong Village, Kamobo Location of Nandi County, the Accused jointly with others not before the court, murdered Christopher Bitok Korir (Deceased).
2. It was the prosecution case that on the material night at about 7.30pm, Daniel Kirwa Bitok (PW1), brother to the deceased was at his home when a Village Elder called Barnabas (PW4) arrived there and informed him that the deceased had been assaulted and was in hospital at Kapsabet.  
On the Elder's prompting, he (PW1) proceeded with the elder to Kapsabet Police Station to record a statement. It was while there that the elder informed him that the deceased been killed and that his body was lying at the Kapsabet Mortuary.
3. Accompanied by police officers Daniel (PW1) proceeded to the scene of the assault and saw some fencing sticks know as droppers which had allegedly been used to assault the deceased. The sticks were inside a kitchen at the deceased's home. Thereafter, the group proceeded to the mortuary where the deceased's body was viewed by Daniel who then noted some injuries on the head, hand and ribs. He was told by the elder that the deceased had been assaulted by one Kiplagat, a person he had not previously known.



4. The deceased's wife Rebecca Mutai (PW2) was at the material time at home with the deceased and their children. She was cooking when the accused's wife, Mercy Chepkoech arrived at the home to borrow some salt. Immediately thereafter, her child Benjamin came to call her back and in the process the Accused arrived and chased her away but failed to catch up with her.
5. The Accused then returned to the deceased's home and pulled the deceased out. The two engaged in a duel (fight) outside the house using fencing sticks. The Deceased's wife (PW2) screamed and attracted neighbouring villagers to the scene. These included the accused's brothers Robert Kimutai and Edward Kiprotich who then joined the accused in assaulting the deceased using the sticks. A son of the Accused named Mathew Kiptoo, aged about 13 years old arrived at the scene armed with an axe which he used to cut the deceased while he was down on the ground.
6. Helpful neighbours assisted to have the injured deceased taken to hospital. The deceased's son, Daniel Kiprop (PW3), was at the scene at the material time. He saw the Accused come to their home and confront the deceased before the two engaged in a fight. In the process, the Accused assaulted the deceased with a piece of wood before he was joined by his brothers and son to further assault the deceased. He (PW3) confirmed that the Accused's son, Mathew, arrived at the scene with an axe which he used against the deceased while he was down on the ground and which led to the deceased suffering a serious head injury thereby causing the assailants to escape from the scene.
7. The Village Elder, Barnaba Kemboi (PW4), was informed of a fight between some villagers and when he made enquiries learnt from the deceased that he had been beaten. He (PW4) noted a split on the deceased forehead. The Deceased could not at the time talk. He was rushed to hospital by the elder and succumbed to his injuries before being treated.
8. Edwin Kibet (PW5), a neighbour of the deceased was at the material time at the deceased's homestead when he saw the Accused arrive there and chased his wife before turning back and picking a fight with the deceased. In the process, the Accused was joined by his brothers and son to further assault the deceased using the droppers stick while his son used an axe to cut the deceased on the head before running away with it.
9. After the incident was reported to the police, Sgt. John Zuka (PW6), carried out the necessary investigations and gathered in the process that the deceased had been seriously assaulted by a known person including the Accused, he (PW6) went in search of the Accused but he surrendered himself to the police. The Officer later obtained the alleged weapons used by the assailants including droppers and broken firewood sticks (P. Exhibit 1 a – b and Exhibit 2).
10. A post mortem was carried out on the body of the deceased after which the necessary post mortem report (P. Exhibit 3) was compiled and signed by a Dr. Michael Limo on whose behalf it was produced and tendered in evidence by his colleague, Dr. Wangeba Wanyonyi (PW7), indicating that the Deceased died from severe head injury with resultant intracranial/ intracerebral hemorrhage.
11. The Accused's defence was a denial of having committed the offence and a contention that he had been with the deceased on the material date splitting wood for posts up to 3:00pm when he returned to his home and drank illicit liquor ("changa"). The Deceased was a neighbour and he (Accused) decided to take a short cut through his farm while drunk heading to his mother's house. While nearing the deceased's house his (Accused's) child asked him to tell their mother (his wife) to give them some keys. She (wife) was taking beer at the Deceased's homestead.
12. The Accused contended further that the wife on seeing him took off to escape from the scene. She however, fell down about five (5) metres away from the deceased's home. He approached her for the keys but was followed by the Deceased from behind he fell down and the deceased attacked him. While



he was down. He (Deceased) told some children to leave him (Accused) alone as he was drunk. He found himself at the police station having been arrested.

13. From the totality of the evidence by both the prosecution and the defence, no contest emerged with regard to the fact that the deceased was indeed attacked and fatally assaulted by a group of individuals. The cause of death was also not contested. This was found to be mainly intracranial and intracerebral hemorrhage occasioned by severe head injury.
14. This clearly meant that in the course of the unlawful criminal act of assault against the deceased he received a fatal blow to his head. The evidence by the prosecution through the deceased's wife (PW2), son (PW3) and neighbour (PW5) clearly, credibly, corroboratively and cogently indicated that the fatal blow was administered upon the Deceased with the aid of an axe used by one of the assailants.
15. The same evidence also indicated that the assailants were the deceased's own neighbours and that their criminal transactions against the deceased was prompted by the presence of the accused's wife at the deceased's homestead. Further that, the transaction was a joint venture started by one of the assailants with the common intention of causing bodily harm to the deceased. Unfortunately, the force used was too excessive that it proved fatal.
16. The evidence by the three key witnesses (PW2, PW3 and PW5) further indicated that even though the fatal blow to the Deceased's head was caused by an axe, the deceased was also assaulted with sticks, pieces of wood and fencing sticks (droppers).  
The degree of the assault and the manner in which it was executed left no doubt that the assailants intended to cause grievous harm to the deceased.
17. Such, is an ingredient of malice aforethought in terms of Section 206(a) of the Penal Code which provides that: -

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

- a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person, actually killed or not.”

18. It was thus the common intention of the assailants to do grievous harm to the Deceased and it was as a result of that harm that the deceased succumbed to his injuries.

The legal perspective of common intention may be deciphered from Section 21 of the Penal Code which provides that: -

“When two or more person” form a common intention to prosecute on unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

19. The evidence by the prosecution key witnesses indicated that it is not that the assailants sat down or held a round table meeting to assault the deceased, but that they developed a common intention in the process of carrying out the unlawful act of assault which was started by one of them with the rest joining in to further the intention of the leader becoming part of it at that juncture.
20. In essence, common intention must not be a pre-arranged plan, it can develop in the course of the unlawful event though it might not have existed from the very beginning like it happened in this case.



In those circumstances, it would be of no consequences that the fatal blow was administered by one of the assailants whether or not he was the instigator of the Criminal transaction.

21. Although the Accused denied any involvement in the offence and appeared to suggest that he was intoxicated at the material time and a victim of the deceased's brutality when he fell down and was attacked while on the ground, the prosecution evidence against him especially through the aforementioned key witnesses was credibly overwhelming in establishing beyond reasonable doubt that he was the investigator and main actor in the unlawful criminal act. Of assault and indeed murder of the deceased.
22. The Accused appeared to have held the Deceased responsible for the presence of his wife at his (deceased's) homestead. He was driven by misplaced suspicion and decided as it were, to "discipline" the deceased his neighbour, for his "misbehavior". Unfortunately, he went too far and must now bear the consequences of his unlawful action in conjunction with his two brothers and son who answered the deceased's wife screams or distress calls by rushing to the scene. But, instead of helping and rescuing the Deceased from the murderous attitude of their brother and father they joined him in executing his criminal mission which ended up with the death of an innocent soul.
23. It is therefore the finding of this court that apart from disproving and rebutting the defence raised by the Accused, the prosecution succeeded in establishing and proving the material ingredients of the charge of murder against the Accused.

In sum, the prosecution proved its case beyond any reasonable doubt such that the Accused must and is hereby found **GUILTY** as charged and is hereby convicted accordingly.

**DELIVERED AND DATED THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023**

**J. R. KARANJAH,**

**JUDGE**

