



**Republic v Kiprop (Criminal Case 86 of 2014)
[2022] KEHC 10646 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 86 OF 2014**

SM GITHINJI, J

APRIL 26, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

KELVIN KIPROTICH KIPROP ACCUSED

JUDGMENT

1. Kelvin Kiprotich Kiprop is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of this offence being that on December 4, 2014 at Yemit Shopping Centre, within Elgeyo Marakwet County, the accused herein murdered Silvanous Kipruto alias Kipkokei.
3. The prosecution called eight witnesses and their case is that on December 4, 2014 at Yemit village, Elgeyo Marakwet County, one Morris Koech invited neighbours to assist him make a road to his place. Pw-1 and the accused person were among the men who were invited and turned up. In total there were about 15 men who heeded to the call. The work commenced in the morning hours and at about 4.00 pm they were through. Morris Koech invited the team to his house for lunch and busaa beer. They proceeded there and had lunch and *busaa*. After the drink Pw-1 and the accused person quarreled. They held on each other and grappled. They were however separated. Pw-3 who is a neighbor was at that time on the road walking. He heard of the fight and went to the house of Morris. He found the two fighting and was among those who separated the two. Pw-1, Pw-3 and the deceased left the place together. The accused had left a moment earlier and had taken a different path from that taken by Pw-1, Pw-3 and the deceased. Ahead, the deceased offered to buy Pw-1 and Pw-3 tea. They headed towards the hotel of Pw-4. Pw-3 was left slightly behind as he answered to a call of nature.
4. The hotel owner was not present at the time as he had gone to milk a cow for his landlady. When Pw-1 and the deceased entered, they found the accused person therein. Pw-1 and the accused picked a quarrel



- once more and grappled. They were pushed outside. When Pw-1 turned behind, he saw the accused armed with a stick(dropper) and aiming to hit the deceased. Pw-1 pushed the deceased away and Pw-1 was hit on the back prompting him to fall down. As he tried to rise, he saw the deceased falling down. The accused hit Pw-1 again and he lost consciousness.
5. Pw-3 who was present witnessed as the accused hit Pw-3 twice with a stick. When he tried to rescue him, he was punched and fell down screaming. The deceased was hit once on the head with the stick by the accused.
 6. Pw-2 at the time had sent her daughter (Pw-5) to go and get milk in the house of Anne Mutai. When Pw-5 got to the hotel of Pw-4, she found four men fighting. They were Kimoitich, Wesley, Kiprotich and Kipkoge. One had a stick and hit the deceased with it. The deceased fell down. She went and told Pw-2 about the fight. She told her Kipkoge was hit on the head and did not rise but Kimoitich was hit and rose. They were hit with a “*dropper*” outside Samuel’s hotel.
 7. When Pw-4 returned to his hotel, he saw 4 young men. They had sticks. They were Kelvin, Kiprotich, Wesley, Kipkoge and King’etich. They all had sticks. The accused hit the deceased with the stick prompting him to fall down. Pw-4 held the accused and led him towards the outer door. The accused said he wanted to kill someone and Pw-4 told him he was not certain those he had hit will rise.
 8. Pw-2 rushed to the scene when she got report about the fight from Pw-5. She found the deceased on the ground. Food was oozing from the mouth and nostrils. Kimoitich and Wesley were there crying. She asked hem who had hit the deceased and Kimoitich said it was Kiprotich (the accused). The accused was not there then. Pw-2 noted the deceased who is his nephew, was dead. She also cried as she went to inform his mother. He found the mother and told her. They went to the scene, got a motor bike and rushed the deceased to Cheptongei hospital. It was confirmed there that he was dead. He was taken to Kapsowar.
 9. On December 10, 2014 the postmortem was done on the body of the deceased. Pw-7 and his brother Kimutai identified the body for postmortem. Both are brothers to the deceased. Dr Kimosop K Wilfred conducted the postmortem. He noted that there was a frontal depressed skull fracture. The cause of death was opined to be severe head injury due to blunt trauma.
 10. The accused was traced, arrested and charged with the offence.
 11. The accused who gave a sworn statement and called one witness stated in his defence that he was among those helping to make a road for Morris Kipkoech. They were about 20 men. At about 2.00 pm they were through and went to Morris home where they had lunch and *busaa* beer. Wesley Kiptoo and Silvanous Kipkoge are brothers. Nathan Kimwetich Yego is their cousin. They joined the team though they were not involved in making of the road.
 12. Nathan Kimwetich Yego got drunk and quarreled people. The accused told him to stop quarreling. He turned against the accused. The accused decided to leave the place. He went to vision hotel. He met therein Silvanous Kipkoech, Lawrence Kiptoo, Anderson Kitoo and Allan Cheruiyot. They deliberated. The deceased also entered and picked a physical quarrel with him. The accused pushed him towards the fire place. The two were led outside. Silvanous Kipkoge and Wesley Kiptoo had sticks. They attacked him. The hotel owner went and separated them. The accused went home. He had no stick. On his way home he heard people screaming saying the deceased had died. He slept in the house of Ruto, away from home. On December 5, 2014 he notified the area chief, the chief later led to his arrest.
 13. Dw-2 stated that on the material day and time he was in the hotel with Allan Kiprimo, Anderson Kiptoo and Lawrence Kiptoo. Kelvin Kipro entered. Nathan Kimwetich got to the kitchen. He



held Kelvin Kiprotich and alleged that they were looking for him. He started beating him. The two were pushed outside. Wesley Kiptoo and Silvanous were with Kelvin. Those outside had sticks. Three persons attacked Kelvin. Samuel tried to separate them. Kelvin left. Samuel asked them why they had affected his business.

14. At this point the court must determine as to whether the offence against the accused is proved by the prosecution beyond reasonable doubt.

15. The offence of murder is defined under section 203 of the [Penal Code](#) in the following terms; -

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

16. The ingredients for the offence of murder are thus; -

1. Death of the victim.
2. Malice aforethought on part of the accused.
3. Death be as a result of unlawful act or omission on the part of the accused.

Section 206 of the [Penal Code](#) defines malice aforethought as follows; -

- 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;
- b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.
- c) An intent to commit a felony.
- d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

17. Applying the foregoing ingredients to the facts of this case, there is no doubt that Silvanous Kipruto alais Kipkoei died on December 4, 2014. The evidence of Pw-1 and Pw-3, who are both eye witnesses are firm and explicit that it is the accused person who hit the deceased once with a stick (*dropper*) on the head, causing his death. The accused denial of the same is just being evasive as he does not state how the deceased met his death and neither does his witness. The issue for determination therefore, is whether he was of malice aforethought. There is evidence that both accused and the deceased had taken Busaa at Morris home. They were not therefore very sober. A quarrel started there between them and were separated. They left the place. However, out of mere coincidence they met again in the hotel of Samuel and picked up the quarrel. Prosecution evidence is not clear on how many people were involved in the quarrel and whether all were armed with sticks or droppers. Pw-1, Pw-3 and Pw-5 says only accused was armed and attacked both the deceased and Pw-1. However, Pw-4 the hotel owner alleges the quarrel involved Kelvin, Kiprotich, Wesley, Kipkokei and Kimngetich and all were armed with sticks. Pw-1, Pw-2, Pw-3 and Pw-5 are related to the deceased. Pw-4 is not, and is rather a more independent witness in that regard. The discrepancy between his evidence and that of other prosecution witnesses was not resolved by the time of close of the prosecution case. While the evidence of Pw-4 would suggest as submitted by the defence that the accused if at all he is the one who killed the deceased did so in self defence, it's noticeable that the evidence shows he injured Pw-1 and the deceased and he himself suffered no injury at all.



18. Allegation that his action was in self defence is in doubt given that there is no evidence that he had no opportunity to escape. The circumstances weighed as a whole leads to the facts that he killed the deceased in a fight and while drunk. In relation to malice aforethought, the circumstances do not show that he had intention to kill or cause grievous harm to the deceased, save for allegation by Pw-4 that he alleged that he wanted to kill someone. Such is not corroborated by any other evidence, and given that the accused was not sober then, even if he said so, it's doubtful whether he meant it.
19. The flow of the foregoing analysis of the evidence lead us to an offence of manslaughter under section 202 (1) of the *Penal Code*. This being a lesser offence than that of murder, and having found it established by the prosecution against the accused beyond reasonable doubt, I do convict the accused of the same.

JUDGMENT FOR ELDORET READ AND SIGNED AT MALINDI IN THE OPEN COURT TO PARTIES WHO APPEARS VIRTUALLY, WHO ARE; -MR ISIJI FOR THE ACCUSED PERSON AND M/S LIMO FOR THE STATE, THIS 26TH DAY OF APRIL, 2022.

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S M GITHINJI

JUDGE

Prosecutor – We have no records. He's a first offender.

Mr Isiji – I pray for a presentence report before we mitigate.

Court – We can have the mitigation first.

Mr Isiji – We pray for leniency. The accused never intended to kill. He was under influence of alcohol. We pray for a noncustodial sentence. The offence was committed in a fight.

Court – A presentence report be prepared by a Probation Officer.

Mention on 26/5/2022.

The DR to follow up on the report.

HON S M GITHINJI

JUDGE

26/4/2022

Bond is extended.

HON S M GITHINJI

JUDGE

26/4/2022

