



**Republic v Kibowen (Criminal Case 61 of 2017)
[2022] KEHC 14508 (KLR) (27 October 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 61 OF 2017
WK KORIR, J
OCTOBER 27, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

DANIEL KIPKURUI KIBOWEN ACCUSED

JUDGMENT

1. The accused, Daniel Kipkurui Kibowen, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). He is accused of murdering one Joseph Kamau Kuria on August 21, 2016 at Maji Mazuri Location in Koibatek Sub-County within Baringo County. The accused pleaded not guilty to the charge and the matter proceeded to full hearing.
2. The prosecution called seven witnesses. PW1 Margaret Nyambura stated that Joseph Kamau Kuria (hereinafter simply referred to as the deceased) was her younger brother. She testified that on August 21, 2016 at about 5.00pm she was at Korogocho when the deceased called her and told her to go to the scene where her son, James Kinyanjui, was being assaulted. When she arrived at the scene, she found a group of boys including Paul and Kemboi. When she asked them whether they had seen her son, they told her that he had gone to the river. While still at the scene, Paul held her by the neck and the accused kicked her on the legs. The deceased came and asked her attackers why they were assaulting her. A crowd formed and separated her and the deceased from the accused and Paul. She then went home and left the deceased at the scene. Upon reaching home, she received a call from her son, James Kinyanjui, informing her that the deceased had been stabbed. Her son requested her to provide money for taking the deceased to hospital. She gave money to her other son called Francis Kinyanjui to take to James Kinyanjui. She then went to Mercy Hospital at Eldama Ravine where she found the deceased who had a deep cut on the head, which exposed the skull, had succumbed to the injury. She also testified that she witnessed postmortem on the body of the deceased.



3. Upon cross-examination, PW1 refuted the claim that she is the one who separated the deceased and the accused. She also stated that she had gone to the scene to stop the fight involving her son after the deceased notified her of the fight.
4. PW2 Anthony Kamau Chege testified that on August 21, 2016 at about 6:00 p.m. he was at his home with the deceased who was his best friend when the deceased received a call that his sister was being assaulted. They proceeded to the scene at Korogocho where they found the sister of the deceased being assaulted by about seven boys. They told the sister of the deceased to go home. Thereafter, they walked home using a different route. As they left the scene, a rowdy group of people followed them and he took refuge in a nearby homestead while the deceased kept walking on the road. After a few minutes he heard a scream and when he went to check, he found that the deceased had been cut on the head. It was about 7:00 p.m. and it was getting dark. The deceased was alone. He then looked for transport and took the deceased to Mercy Hospital at Eldama Ravine where they were informed that he had died. He also testified that he did not see the accused who is a youth from Maji Mazuri on the date of the incident and that he was not present when the accused was arrested.
5. On cross-examination, PW2 testified that it was already getting dark when they arrived at the scene and he did not identify any of the people who were assaulting the sister of the deceased.
6. PW3 Regina Muthoni testified that the deceased was her brother.
She attended the postmortem at Eldama Ravine Sub-County Hospital accompanied by her sister and a police officer. She identified the body of the deceased which had a single cut on the top of his head. On cross-examination she testified that the panga cut run from left to right across the head and that the cut was not at the back of the head.
7. PW4 James Kinyanjui Ndirangu testified that the deceased was his uncle while the accused comes from his neighborhood at Maji Mazuri. He recalled that on the fateful day at about 4:00 p.m. while on his way home from his aunt's place, he came across 5 or 6 people beating one Otieno who was his neighbour. He separated them and it was then that they turned on him and assaulted him. His mother and uncle got wind of the attack and went to his rescue.
8. PW4 further testified that after he was rescued he left for the shopping centre. Later, he received information that the people had cut his uncle. He went back to the scene and found that his uncle had been cut. He assisted in taking him to hospital where he died while receiving treatment. PW4 stated that he proceeded to Maji Mazuri AP Camp with his friend, Anthony Chege, where they reported the incident. They then led the police officers to the scene. They also led the police officers to the home of the accused. The accused was arrested and a panga recovered. The witness identified the recovered panga. He testified that the accused admitted at the time of his arrest that he was the one who cut the deceased.
9. On cross-examination, PW4 stated that he was beaten when he went to stop the accused and his friends from beating Otieno. He testified that neither he nor Otieno received serious injuries after the beatings by the accused and his friends. He also stated that his mother and the deceased arrived after he had left the scene. It was also his testimony that he was helped by Anthony and other good Samaritans to carry the deceased to the roadside from where they took him to hospital. He stated that the deceased had been cut once on top of his head and that the wound had been covered with a black jacket.
10. PW4 testified that upon being informed that the deceased had succumbed to the injury they went to report the matter at the police post together with his mother and Anthony. He further stated that when they went to the accused's house, the police officers used two rechargeable torches as there was no light



in the house. The witness conceded that he had not recorded in his statement to the police that the accused admitted cutting the deceased.

11. PW5 Dr Philip Wainaina Kamau testified that on August 25, 2016 he conducted a postmortem on the body of Joseph Kamau Kuria upon the request of Makutano Police Station. The body had a linear cut on the scalp of about 15 centimeters which extended from the frontal skull to the vertex exposing bone and brain matter. The cut severed major vessels. All the other systems were normal. He formed the opinion that the cause of death was extra cranium hemorrhage due to fatal cut with a sharp object. He produced the postmortem report in Court as an exhibit.
12. Upon cross-examination, PW5 stated that he was not a specialist in pathology. He also stated that he did not indicate whether the cut was on the left or right parietal and neither did he measure the depth of the cut. He further stated that when he removed the scalp, he was able to see the depth of the cut.
13. On re-examination, PW5 testified that he used to conduct postmortems on a daily basis previously but not at the time of his testimony.
14. PW6 APC Dennis Mwangi Mwanyule testified that on August 21, 2016 at about 7:30 p.m. while at the Maji Mazuri AP Camp one Jared Maina reported that there was a friend of his who had been attacked by four youths whose names he did not know. As Jared made the report, there were other villagers on the opposite side of the Camp trying to help victim to take the victim to hospital. Later at about 10:30 p.m., Anthony Kamau Chege and Amos Mungai Nganga came and reported that the injured person by the name Joseph Kamau Kuria had died. He informed his in-charge who reported the incident to the OCS, Makutano Police Station. Officers from Makutano Police Station came and together they proceeded to the scene at Korogocho area within Maji Mazuri. At the scene, the villagers who were still there informed them that the attacker could still be in the area. They searched for the attacker in three different homes. They arrested the accused in the third home and recovered a panga which they suspected was used to assault the deceased. They took the accused and the panga to Makutano Police Station.
15. On cross-examination, PW6 stated that the first person to make the report was named Gerald and he reported that his friend had been attacked by around four people. He further stated that when Gerald made the report, he was also seeking a motor vehicle to take the victim to the hospital at Eldama Ravine which is about 7 kilometers away. He also stated that he did not see the deceased at the time the report was made. He stated that the panga that was retrieved from the house in which the accused was sleeping was rusty and had blood stains.
16. Sergeant Jessie Nyamwega attached to Makutano Police Station testified as PW7. He was the investigating officer. His evidence was that on August 21, 2016 at about 10:30 p.m. he received a phone call from Corporal Ochieng of Maji Mazuri AP Camp informing him of a report of a person who had succumbed to injuries after being assaulted. He proceeded to the scene together with Police Constable Lemayan, PW6 and those who had reported the crime. PW4 showed them the scene. There were blood stains but they did not recover any weapon. Together with Police Constable Lemayan, they identified one house where the suspect was thought to be living in. They surrounded the house and asked the occupants to come out and they complied. The house had two people. One of them was the accused who was identified as the person who had cut the deceased. They searched the house and recovered a blood stained panga. They arrested the accused and took the panga as an exhibit. On further inquiry, he established that the accused who was playing games with others had disagreed over payment. He produced the panga as an exhibit.
17. On cross-examination, PW7 said that he found the blood stained panga beside the bed inside the single room. He stated that the bed was visible from outside the house and there was nothing else in the house.



He told the Court that he used a spotlight to see the panga which was not hidden. He confirmed that they were led to the house by PW2. The panga had blood stains at the sharp end but he did not subject it to analysis by the government chemist. He also stated that the deceased had a cut on the head above the face but he did not take photographs.

18. When placed on his defence, the accused gave sworn testimony as DW1. His case was that he was a casual labourer engaged in clearing of bushes, farms and roads using a panga or a slasher. He stated that he knew the deceased as they lived in the same locality. He testified that on August 21, 2016 he went to take chang'aa at 8:00a.m. and was drunk the whole day. At night, his door was knocked and upon opening it he found police officers who arrested him. They also took a panga from his house. The police arrested him after he accepted that he was Dan and they left behind one Biwott who was in the house. He refuted the claim by PW2 that he gambled on that day.
19. On cross-examination, the accused stated that he took chang'aa early in the morning and that he could not remember where he was the whole day. He also denied coming across the deceased or being present when the deceased was injured. In re- examination, he stated that he took chang'aa from 8:00 a.m. to 9:00 a.m. and he had no ability to chase any person.
20. The defence filed submissions dated April 19, 2022. In summary, the defence submits that the prosecution failed to link the accused to the crime. The defence points out that despite the alleged murder weapon being found, it was not linked to the accused. The defence also questions why the youths who were allegedly gambling with the accused were not called as witnesses so as to place him at the scene. The defence further submitted that the prosecution did not establish any motive that could have led the accused to kill the deceased. The defence has also faulted the evidence of PW5 and the postmortem report for not meeting professional standards. The defence relies on the case of *Okethi Okale & others v Republic* [1965] 1 EA 555 to submit that this Court should acquit the accused for lack of evidence.
21. The prosecution filed submissions dated May 5, 2022. The prosecution submits that the evidence on record is corroborated, consistent and watertight hence the charge against the accused has been proved to the required standard. The prosecution urges this Court to find the accused guilty of the offence as charged in light of the circumstantial evidence on record. The prosecution submits that circumstantial evidence is reliable evidence. This statement is supported by reference to the case of *Republic v GNK* [2017] eKLR.
22. What is needed to be determined in this judgement is whether the prosecution has linked the death of Joseph Kamau Kuria to the accused, and if so, whether in killing the deceased the accused had malice aforethought.
23. The accused faces the charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Section 203 defines the offence whereas Section 204 provides the punishment to be imposed upon conviction. Section 203 states that:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
24. It is evident from the definition of the offence that in order for a conviction to occur, the prosecution must prove that the deceased died as a result of the unlawful act or omission of the accused and that the accused had malice aforethought. In a murder case, the easiest task of the prosecution is to establish the death of the deceased through an unlawful act or omission. In this case, however, the defence appears to dispute the cause of the death of the deceased.



25. Counsel for the accused zeroes in on two statements in the postmortem report which he claims are contradictory hence creating doubt as to the actual cause of death. Counsel submits that PW5 upon examining the head of the deceased he observed that the “skull has a linear cut exposing brain matter which is cut linearly (approximately) 10cm and major blood vessels severed.” According to counsel the said observation is contrary to the conclusion that the cause of death was “extra cranial hemorrhage due to fatal cut with sharp object.” It is argued by the defence counsel that the two comments are inconsistent with each other for the reason that the former comment conveys the message that the deceased suffered either a depressed or compound fracture to the frontal bone and both left and right parietal bones in order to allow exposure of brain matter. Counsel submits that in the latter comment PW5 concludes that a cut by a sharp object was bleeding outside the cranium.
26. The defence faults PW5 for not conducting a proper postmortem on the body of the deceased by failing to explore the base of the head or the spinal column; failing to dissect the skull cavity and the brain in order to rule out any possible underlying injuries; and failing to subject the body to x-ray or CT scan. These arguments are supported by several medical opinions.
27. In answering the question as to what caused the death of the deceased, this Court will defer to the unchallenged medical evidence on record. Although the defence suggests that the postmortem was not conducted in a professional manner, no alternative professional opinion was placed before the Court to suggest that the deceased did not die as a result of the cut to the head. The cut to the head is therefore what caused the death of the deceased. Nowhere has it been opined by the defence that the injury to the deceased was lawful. In the circumstances, I am convinced by the prosecution that the deceased died as a result of an unlawful act. The question that remains is whether the unlawful act was caused by the accused and whether he had a predetermined intention to kill the deceased.
28. From the evidence of both the prosecution and the defence, there was no eyewitness to the killing of the deceased. The evidence before this Court in relation to the actual cutting of the deceased is therefore circumstantial in nature. On the place of circumstantial evidence in criminal cases, I only need to cite the decision of the Court of Appeal in [*Abamad Abolfathi Mohammed & another v Republic \[2018\] eKLR*](#) that:

“However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in *R v Taylor, Weaver & Donovan [1928] CR App Tulo v Republic Cr App No 30 of 2013*).

Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In [*Abanga alias Onyango v Republic*](#), Cr App No 32 of 1990 this Court set out the conditions 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 unerringly 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 none else.”



(See also *Sawe v Republic* (supra) and [*GMI v Republic, Cr App No 308 of 2011*](#).)

In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.”

29. The law as summarized above is what I will apply to the evidence adduced before this Court in order to determine the innocence or otherwise of the accused. PW4 testified that on his way home from his aunt’s place, he came across the accused and others assaulting one Otieno. When he intervened, the accused and his group turned on him.
30. The evidence of PW1 is that she received a phone call from the deceased informing her that PW4 was being assaulted by a group of youths at Korogocho. She went to the scene and upon asking about her son, one Paul held her by the neck while the accused kicked her. Soon thereafter, she saw the deceased approach and an argument ensued between the deceased and the accused. She then went home and left the deceased at the scene.
31. On his part, PW2 testified that after the deceased informed him of an assault on the deceased’s sister, they proceeded to the scene where they intervened and told the deceased’s sister to go home. As they were walking home with the deceased, he heard noise from behind and he ducked into a homestead by the roadside. The deceased kept walking and shortly thereafter he heard him scream. When he went to check he found the deceased had been cut on the head. He, however, did not see the attackers. He also did not identify the people they had found beating the deceased’s sister.
32. The evidence of PW1 and PW4 places the accused at the scene where young men assaulted them and one Otieno. The evidence of PW1 also shows that the accused had an argument with the deceased after the deceased questioned why he was assaulting PW1. The accused also assaulted PW4 who is a nephew to the deceased and the son of PW1.
33. The accused on his part testified that on the material day he took chang’aa from 8:00 a.m. to 9:00 a.m. He, however, fails to give evidence establishing his whereabouts between 6:30 p.m. and 8:00 p.m. when the squabbles and the killing occurred. Indeed, the accused claims he was inebriated to the extent that he could not make any comment about PW1’s testimony that he was gambling with other young men. The evidence, however, shows that the accused was well known to PW1 and PW4 and their identification of him at the place of the fights cannot be mistaken. Shortly thereafter, the deceased was cut and although nobody saw the attackers, there was a connection between the fights that the accused had engaged in and the killing of the deceased.
34. Still on the link between the killing of the deceased and the accused, I note that according to PW7, the report concerning the death of the deceased was made by PW4 and one Amos Mungai Ng’ang’a. It is also the evidence of PW6 and PW7 that they were led to the house of the accused by PW4 and Ng’ang’a. PW4, PW6 and PW7 all testified that a panga was recovered from the house of the accused. They all stated that the panga had blood. Unfortunately, no analysis was done on the panga in order to determine if the blood on it matched that of the deceased. Although the accused acknowledged owning the recovered panga, he hinted that as a casual labourer, he used either a panga or slasher for his work.
35. In [*Joan Chebichii Sawe v Republic \[2003\] eKLR*](#), the Court of Appeal stated:

“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 upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other



reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

36. The question is whether there was a break in the chain of events that can lead to the conclusion that the accused is innocent. As already stated, the deceased was cut shortly after rescuing PW1 who was being attacked by the accused and his group. A few hours after the incident, the accused was arrested in a house where a blood stained panga was recovered. He never offered any explanation on the origin of the blood stains.
37. Even when cross-examining PW4, PW6 and PW7, the defence never challenged the existence of blood stains on the panga. It therefore remains a fact that the panga was indeed blood stained. As I have already stated, the accused was a casual labourer. The scope of his work, as per his own evidence, did not relate to interaction with blood but soil and plants. Further, it was the accused’s evidence that he did not go to work that day and therefore his panga was not used. No explanation whatsoever was offered in respect to the blood on the recovered panga.
38. The prosecution on the other hand adduced evidence which confirmed that the deceased bled as a result of the cut. There is also evidence that the deceased had a confrontation with the accused immediately prior to being attacked. The facts placed before this Court leads to the inevitable conclusion that it was the accused who cut the deceased using the panga that was recovered by police officers from his house. The facts as laid down by the prosecution and the defence lead to one irresistible conclusion, that the accused and no one else committed the crime.
39. The evidence placed before the Court shows that it was the accused who committed the unlawful act that led to the death of the deceased. The question that remains is whether the prosecution established malice aforethought. As was held by the Court of Appeal in *Roba Galma Wario v Republic* [2015] eKLR, a conviction for the offence of murder can only arise where the prosecution establishes malice aforethought. I quote the Court: “For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
40. In the case of *Bonaya Tutu Ipu & another v Republic* [2015] eKLR, the Court of Appeal held that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, CR APP No 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”
41. As clearly revealed by the evidence before this Court, there was a melee involving PW1, PW2, PW4 and the deceased on the one hand and the accused and others on the other hand. This happened shortly before the deceased was attacked and killed by the accused. The killing of the deceased cannot therefore be said to have been intentional. The fight may have resulted in the provocation of the accused. There is also the accused’s own evidence that he was tipsy. All these factors can only lead to the conclusion that the killing of the deceased was not intentional. The charge of murder cannot stand in such circumstances.
42. From the evidence on record, the lesser charge of manslaughter contrary to Section 202(1) as read with Section 205 of the *Penal Code* has been established by the prosecution. I therefore substitute the



charge of murder with the lesser charge of manslaughter. I consequently find the accused guilty of manslaughter and convict him under Section 322(1) of the *Criminal Procedure Code*.

DATED AND SIGNED AT NAKURU THIS 24TH OF OCTOBER, 2022.

W Korir, Judge

DATED, COUNTERSIGNED AND DELIVERED AT KABARNET THIS 27TH DAY OF OCTOBER, 2022.

H K Chemitei, Judge

