



**Republic v Cheruiyot (Criminal Case 35 of 2019)
[2022] KEHC 15609 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 35 OF 2019
TM MATHEKA, J
NOVEMBER 22, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

BIDEN KIPLANGAT CHERUIYOT ACCUSED

JUDGMENT

1. Boaz Wendot Kaptum was the 14 year old son of Isaac Yego Kaptum (PW2). However, in 2019, he was living with the family of Agnes Chebet Langat (PW4) and Paul Kiprono Chepkwony (PW6) at Mserekwa Vilage, Nessuit, Njoro Sub County. According to the PW2, Boaz was just assisting Chepkwony's family. It was evident from the testimonies I heard that the boy was a herdsboy for the family.
2. The Chepkwony family had an Mpesa business at the local market, Nessuit which was operated by Gideon Kiptoo Rono, their son, and PW1.
3. The Mutai's were the neighbours of the Chepkwony family. Their nephew Biden Kiplangat Cheruiyot alias Lawi (the accused person) whose family lives in Bomet was also living with them, and from the evidence, working for them. He and PW1 were friends. And Boaz was known to him.
4. PW1 worked at the Mpesa agent every day, and every evening Boaz would go to Nessuit at around 6.30 – 6.50 pm to come back home with him. It was some kind of security arrangement as PW1 would be carrying the proceeds from the Mpesa business.
5. On July 23, 2019, PW1 left for work at 10:30 am. He passed by the Mutai's home, and Lawi saw him and invited him in for a cup of tea. They took the tea and he left for work. By 6:30 pm, Boaz had not arrived. He waited until he could not wait anymore. He then walked home with some other boys getting there about 7:40 pm. He found his mother (PW4) and his siblings, however Boaz was



- not at home. They all wondered where he could be. Then PW6 came home. He also asked about the whereabouts of Boaz, but no one knew.
6. PW6 rang PW1, the father of Boaz and asked whether Boaz had gone home. PW1 who was still at the shopping centre told him that he would check when he got home. On reaching home he enquired from the other children but no one had seen Boaz. He told the court that he thought that Boaz may have left PW6's place for home and gone to visit friend enroute.
 7. At PW6's home, they had supper and went to sleep. Boaz would sleep in PW1's house. By 10:00 pm. he had not come home and PW1 took his kid brother one I K and they went to sleep. At PW1's compound, he fed the dog and let it out. They went to into the house, got into bed. PW1 told the court he played games on his phone for about 40 minutes, then went out for a short call. Upon his return, he noticed that the sofa seat that was normally pushed against the wall, appeared to have been moved. He was a bit scared but he directed the torch he had at the sofa. He saw a person lying under the sofa on his side, holding a 'nut' (this is a rungu or a wooden club, made with a metal nut at its head.) The person responded to the light by saying 'ni mimi Lawi'; it is me, Lawi. He asked him what he was doing there, he told him he had ran away from Mutai's family. That there had been a disagreement and Mutai's sons had beaten him. He showed him his torn trouser. Kisa na maana for the beating? that the Mutai's daughter had disappeared from home. That she had spoken to him on phone. The family became aware of the phone call, and they suspected that he knew where she was and was hiding the information from them.
 8. PW1 noted the torn trousers. He also noted that they were wet below the knee. PW1 told him that they could sleep. However he was not comfortable with the situation. He went and called his father PW6. He also handed over the Mpesa phone and the money he had to his father. He went back. A few minutes later, PW6 went to PW1's house. In his testimony he said he felt that Lawi had ill motives. He went, knocked on the door, it was opened by PW1. He spoke to Lawi. Lawi told him he had been chased away by his aunt from Mutai's home who was PW6's neighbour. PW6 told him to sleep and they would deal with the issue the next day. He left.
 9. Lawi then took PW1's phone and sent a 'please call me text'. A lady called. They spoke, PW1 could hear that there was a plan to meet in Nakuru the following day. About 4:30 am. Lawi woke up and left.
 10. PW6 told the court that he was in his house waiting for PW1 and Lawi to come for breakfast so they could talk about the disagreement with the Mutai's. PW1 told him that Lawi had left at 4:30 am. PW1 told the court that PW6 told him to take tea and go by the Mutai's to see whether Lawi had returned there. He did so, found them in the shamba weeding onions. They told him he had left at about 6:00 pm. the previous day and had not returned.
 11. PW6 told the court he too went to Mutai's home and spoke to Lawi's aunt. She confirmed he had left the previous day. On that 24th he reported the Lawi incident and the missing Boaz to *nyumba kumi*. *Nyumba kumi* Daniel Kibet Simbole, PW3 told him that since Lawi had done nothing except sleep under the sofa, to leave it. Boaz was still missing. PW6 kept communication with the father of Boaz, PW1.
 12. PW1 told the court that on July 26, 2019 while at a graduation ceremony in Nairobi he received a phone call from one Robert, who asked him where he was. He told him he was in Nairobi. Robert then told him that he had heard that a person had been killed near the river. He (PW1) told him he had not heard. He rang his father PW6, and enquired, he too had not heard the story. He rang his mother PW4, she was also not aware of the story. It was then that he rang a certain forester whose name he gave as Jacob Kiluwa. He asked him about 'the dead person at the river near the forest.' He said Kiluwa told him it was the body of a young man who appeared to have been killed 'juzi' (the day before the day



- before). PW1 said he began to wonder, because even Boaz had disappeared 'juzi'. He asked Kiluwa for a photo of the dead person on WhatsApp and when he received the photo he saw that it was Boaz who was wearing his (PW1's) white jumper. It is then that he recalled that he had had breakfast with Boaz on July 23, 2019, and Boaz had left to take the goats and cows to the forest.
13. On the same date, PW6 and another mzee went to the village elder PW4 and told them about the body that had been found. Together they went to the home of PW1 and father of Boaz, they later went to the police, were referred to the mortuary where they identified the body of Boaz. They said he had a cut at his neck.
 14. How was the body found? The prosecution called PW9 Joseph Kipsang Yegon whose testimony was that he is the Nyumba Kumi for Kalyangat. On July 26, 2019 at 11:00 am. He received a report from one Vivian Cheruiyot that she had gone to bathe at the river and had found a body there. He called another person by the name Fundi. They went to the scene. He saw a person he did not know lying face down, outside the river. Police came around 11:00am. They turned over the body. He saw a neck injury like the person had been cut with a knife. He said there was a plastic knife handle blue in colour and belt. He accompanied police to Njoro Police Station and recorded a statement.
 15. According to PW7 No 67817 PC Tsanga Tunje, he was at Njoro DCI on July 26, 2019, when at 3:00pm. they received report that a body had been found at Sigaon area at Kalyangat river, Nessuit location. Together with colleagues he went to the scene, found a male African body in black jeans, water logged covered in soil, injury round the neck. They also found a black knife handle.
 16. On August 5, 2019 Dr Ngulungu Titus conducted the post mortem examination at the county mortuary. The body had a slash wound at the front of the neck about 170x20mm, cause of death, injury to structures of the neck causing enormous blood loss leading to hypertension as a result of sharp trauma to the neck, in lay language, the person was slaughtered. He said he took fingernails for DNA match. He said the body was fresh, no sign of decomposition, it had no signs it had been found in a swampy area. That that kind of injury would cause a lot of blood loss as the jugular vein, carotid arteries, oesophagus and vagus nerves were severed leading to immediate death. He said such a cut would lead to all the blood pouring out of the body. He could not tell the time of death as the body was well preserved.
 17. According to PW7 investigations commenced from July 27, 2019 Lawi and Gideon became the immediate suspects. Why? According to the mother of Gideon PW4 it was because someone took lies to the police, and for Lawi because a knife blade was found in the house of Gideon, and the knife handle found at the scene which was connected to Lawi by his having been found under the sofa in Gideon's house .
 18. Agnes Ntetia Kusa PW5 told the court how on July 19, 2019 she was called to Mutai's home to slaughter the head of a cow that had been slaughtered there together with Mutai's sons. She said there were two (2) knives. One with a blue handle, the other with a black handle. That Lawi told the boys to sharpen the knives, she did her work and left.
 19. Then on a Friday, a date she could not recall, a child told her that a person had been killed at Kalyangat river. She proceeded there and found a crowd. Then, as she was walking, a woman asked her whether she had seen the handle of a knife, she answered, no, then the woman said 'look!'. She turned, she saw a handle that looked like the one she had used at Mutai's place to skin the head of the cow.
 20. PW4, the mother to PW1 told the court that on July 30, 2019, she went to clear PW1's house because since the incident so many people had come to see where Lawi had been hiding. She said she found



- a knife blade under the bed. It did not have a handle. It had blood stains. On finding it, she rang her husband, PW6 who told her to give it to Simbole, *nyumba kumi*, PW3.
21. She said she suspected that it was the knife Lawi had used to kill Boaz and left it in her son's house. She said that she suspected Lawi had intended to rob her son of the Mpesa money, had killed Boaz, and had come to finish her son Gideon. On the other hand her husband PW6 told the court that she found the knife, on August 5, 2019 under the bed and it had blood stains. He said the knife was identified by the neighbours as Lawi's knife. He was categorical that his wife found the knife blade on August 5, 2019.
 22. According to the investigating officer, it is upon the identification of the knife, the handle, coupled with Lawi's breaking into the house of Gideon, that both Lawi and Gideon were arrested as suspects.
 23. Gideon was later released and Lawi charged with murder contrary to section 203 as read with 204 of the *Penal Code*. It is alleged that on July 23, 2019 at Sigoan village, Njoro Sub County within Nakuru County jointly with others not before court, he murdered Boaz Wendot Kaptum.
 24. Lawi took plea on August 8, 2019 and pleaded not guilty to the charge.
 25. On the basis of circumstantial evidence, placed before court Lawi was put on his defence, and led by his counsel Ms. Sabaya, he gave sworn testimony on October 11, 2022.
 26. He told the court that he was living with his aunt, the Mutais and was doing farm work there. By the time of this incident he had been there for nearly four (4) months.
 27. On July 23, 2019, Gideon PW1 passed by the home, going to work. He asked him how come he was going late, and Gideon told him that he had been washing his clothes. He invited him from 10:00 O'clock tea, they took tea, then he escorted Gideon to the road and went back to work, till 1:00 pm when he went home for lunch.
 28. While waiting for lunch he received the phone call that was the beginning of the events that led to these charge against him. It was his cousin Maureen Chemwa, a daughter of the Mutais who had ran away from home. She told him she was in Kericho but she did not want her family to know, so if asked he was to say she was in Nakuru. When he went to wash his hands so as to each lunch, he came back to find his aunt scrolling through his phone. She demanded to know whether he was communicating with her daughter and not telling them. An argument ensued. He left for his house where he stayed till about 5.00 pm when he was told to collect the cattle for milking. He went and brought the cattle from the forest, he milked the cattle, and tea was made. They took tea. It was drizzling. After the drizzle he went and tied up the cattle.
 29. It was now going to 7:00pm His cousin one Aaron arrived from school, his mother told him that 'Lawi knows where Maureen is and he is keeping quiet.' Aaron asked him, he told him that she had rang him. Aaron slapped him. A fracas ensued. He said he tried 'kujitetea' or defend himself but the family were many against him. He found himself on the ground, he picked himself up and went to his house, picked his 'nut' wore a jumper and left. It was dark, he went to a nearby shop, bought soda and cake, he realized he could not go back at his aunt's house.
 30. He went through the shamba to PW1's home. There was no one. The house was not locked he let himself in. He sat on the sofa, for 10 – 15 minutes. He heard people talking, thought it was his aunt and cousins looking for him. He hid under the sofa. When Gideon came in, he said he is the one who greeted him. He explained about the quarrel at the Mutai's. He requested for a place to sleep till next day when he would go home. Gideon said it was ok. He even called his father, who came and told him they would resolve the issue the next day. He told him he would leave for home the next day.



31. At about 4:00 – 4:30 am he woke up Gideon, told him he was leaving for home. He said Gideon gave him Kshs. 200/=. When he reached Njoro about 7:00 am he rang his cousin who met him in Nakuru, and paid fare for him to go to Bomet. While in the matatu he rang his mother and told her he was going home.
32. At home he engaged in the day to day chores. On July 27, 2019, while coming from church with his siblings, he met his parents who had been left at home and uncle who told him that a call had come from his aunt’s village elder, and he was required to go to the police to record a statement on how he had come home, that a person had been found killed, and he was the suspect.
33. He went with his parents to Chebole police station, from there he was escorted to Sotik police station and PC Tunje from Njoro police station collected him. At Njoro police station he found Gideon, PW1 in the cells, Gideon told him about the death of Boaz. The police sought more time for investigations. In the end it was he who was charged. He denied the offence and said he did not know anything about it.
34. On cross examination he told the court that a cow had died in Mutai’s home and it was slaughtered. That he had been given five (5) knives to sharpen, and some had been borrowed from neighbours. That on the material night he left Mutai’s home about 7:00 pm and passed through the shamba because he feared they were looking for him. That his clothes became wet. That he had known Boaz for 2 – 3 months. That he was running away because of the quarrel they had with the Mutai’s not because he had killed Boaz.
35. At the close of both the prosecution and defence case, is there evidence to support the murder charge against the accused person to warrant a finding of guilty and a conviction?
36. It is always the onus on the part of the prosecution to prove the charge against the accused person beyond a reasonable doubt. *Pius Arap Maina vs Republic [2013] eKLR (Criminal Appeal No 247 of 2011)*, court noted that;

‘ It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.’
37. For murder the prosecution must establish the ingredients of the offence. In *Anthony Ndegwa Ngariv Republic [2014] eKLR*, the elements of the offence of murder were listed as follows:-
 - (a) The death of the deceased occurred;
 - (b) That the accused committed the unlawful act which caused the death of the deceased; and
 - (c) That the accused had malice aforethought
38. On whether there was the death of a person; In this case it is not in doubt that Boaz Wendoh Kaptum died. The death was not by natural causes, it is evident from the post mortem report, evidence of the pathologist that the deceased’s death was not caused by natural causes. His neck was cut in the manner the pathologist described as slaughter. All the main vessels and neck were cut, leading to loss of all the blood in the body and immediate death.
39. On whether it is the accused who killed Boaz , the prosecution must then establish that indeed the accused caused the death and that he had malice aforethought. In this case PW1 and the accused person Biden Kiplang’at alias Lawi were the suspects. The accused was charged.



40. The prosecution's theory is that the accused's motive was to rob Gideon. He killed Boaz as the first step towards achieving this goal. They worked backwards from the point the accused entered Gideon's house and hid under the sofa. That some days later a blood stained knife blade was found hidden under the mattress in Gideon's house and a knife handle was found where the body was found. That the blade and the handle were identified as belonging to the accused, and that the accused had run away after killing Boaz.
41. The accused admits to breaking and entering the house of PW1 on the material night to get a place to sleep because he had nowhere else to go that night.
42. He admits that a week earlier a cow had been slaughtered at the Mutai's. He was living and working there and it was he who was told to sharpen the knives that were used to slaughter the cow. Some of them borrowed from neighbours.
43. He had left the Mutais because they had disagreed and he had gone home. He had handed himself over to the police the moment he was required to.
44. On the motive: It has been alleged that his motive was to steal from Gideon the Mpesa money he had that night. That he had killed Boaz so as to enable him rob Gideon. Looking at the evidence of the investigating officer it is clear that he did not conduct any investigations to establish the alleged motive. No evidence was given that Gideon was carrying out the business of Mpesa agent, no evidence that he had any money that day or that the accused person had done anything that could lead one in that direction.
45. Boaz was a 14 year old child. The investigating officer did not make any effort to connect the child to Gideon's alleged Mpesa business, the accused and this child's death. When the investigating officer was asked about the Mpesa money he said it had nothing to do with this case.
46. The accused person entered Gideon's house in his absence. There is no evidence that he ransacked the house before Gideon came in, or he was aware of Gideon keeping any money in his house.
47. Gideon and his brother were not scared of him, neither did Gideon's father express any fears. All of them allowed him to sleep.
48. This evidence by the accused is corroborated by PW1, PW6 and the prosecution did not produce any other evidence to controvert his defence. At the outset it is believable and not challenged.
49. On the knife and the blade, the prosecution did nothing to connect the said knife with the killing of Boaz. The witnesses said it was blood stained . No forensics were done to confirm whether or not the blood seen by prosecution witnesses belonged to the deceased.
50. The recovery and identification of these exhibits was problematic. The PW4 mother to Gideon said she recovered it on July 30, 2019 yet her husband PW6 was categorical it was recovered on August 5, 2019. The handle was even more problematic. Was it recovered by the investigating officer or PW5 the elderly lady who was asked to skin the cow head at the Mutais? Was it blue or black? the investigating officer insisted that he found the handle and PW5 identified later yet PW5 said she found it at the scene. This evidence falls far short of credibility.
51. The investigating officer was quick to charge the accused yet the knife was found in Gideon's house. Not a single neighbor was called to say that the knife belonged to the accused. PW5 simply stated that she used the knife at the Mutais. The Mutais were not called to testify that accused had that knife while in their home.



52. The investigating officer did not investigate his own leads. He said that it appears that the boy was killed elsewhere then brought to the river. The pathologist testified that the manner of killing was such that all the blood poured out of the boy's body. There was no blood at the scene. The accused's clothes were not blood stained, but on the morning of the day Boaz was missing Gideon was late to work because he was washing his clothes. This issue as to where the killing took place and where the deceased's blood poured out is at the centre of this murder. The prosecution did nothing to place the accused wherever this was as the investigating officer chose not to investigate this. This issue puts the family of PW1 in the picture as persons of interest.
53. When the investigating officer sought an extension of time to detain the suspects to enable him carry out investigations, but there is absolutely no evidence of that investigation. There is no evidence that he visited the scene or did anything beyond collecting the body, arresting the accused and recording witness statements. It is one thing to seek that time and it is another to account for the time. It is necessary that any investigating officer who makes that application should be able to account for the time the accused was held in custody beyond the allowed 24 hours.
54. Has the prosecution proved any malice aforethought or any reason as to why the accused would kill the child? there is no evidence that amounts to proof of malice aforethought.
55. The *Court of Appeal in David Mwangi Monica vs Republic [2020] eKLR* stated;
In regard to the issue of malice aforethought, section 206 of the *Penal Code* defines malice aforethought as follows:-
- ' 206. Malice aforethought
- 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;
 - (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.'
56. True, the accused when he was found in the house of PW1 he had a rungu. It was evident it was not for any criminal purpose. He did not threaten the PW1 or any one. There was nothing placed before the court to show that he had formed any intention to harm Boaz or anyone else. Hence even for this ingredient the prosecution failed.
57. The prosecution only placed the accused in the house of PW1 on the material night but did not produce evidence of the place where Boaz was killed. Neither were they able to establish when exactly Boaz was killed.



58. In the upshot it is evident that though the two incidents of the accused being found in the house of the PW1 and Boaz not returning home coincided, after consideration of the case for the prosecution and the accused person's statement of defence, they were unrelated.
59. The prosecution's case is filled with gaps which raises doubt the benefit of which must go to the accused.
60. The charge against the accused is dismissed and the accused is acquitted. He is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF NOVEMBER 2022.

MUMBUA T MATHEKA,

JUDGE.

CA Jennifer

Accused present virtually

Ms Sabaya for Accused

Ms Murunga for State

