Republic v Kiprop & another (Criminal Case E005 of 2022)
[2025] KEHC 1804 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E005 OF 2022

RN NYAKUNDI, J

FEBRUARY 14, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

OLIVER KIPROP ..... 1ST ACCUSED

BRIAN KIPRUTO ..... 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 6th January, 2022 at Emgoin village, Osorongai Location, Turbo Sub-County within Uasin Gishu County in the Republic of Kenya jointly with others not before court murdered Dennis Kiplimo.

2. The accused persons were arraigned before court and a plea of not guilty was entered, leaving the Prosecution to discharge its burden of proof beyond reasonable doubt. The Persecution was under the leadership of Senior Prosecution Counsel Mr. Mark Mugun whereas the 1st accused person was represented by Learned Counsel Mr. Oburu while the 2nd accused was represented by learned Counsel Mr. Ngala.

The summary of the prosecution case

3. PW1: S Busienei testified that she is a clinical officer based at Turbo sub-county hospital. She further told the court that on 10th January 2022, Dennis Kiplimo (the deceased herein) came to the facility for treatment. He presented a medical history of being assaulted by 8 people well known to him due to unknown reasons to him and sustained bodily injury. The deceased had bruises and swelling on the head, face and neck. He had bruises and swelling on the abdomen and at the back. The upper limbs similarly had bruises and swelling and burns on the right shoulder. The lower limbs had generalized

bruises on both limbs. She approximated the age of the injuries to be 2 days old and possibly caused by blunt object which she said could have been sticks and fore. She produced the P3 Form as Exh 1.

4. PW2: Philomena Jesang testified that Dennis Kiplimo is her late son. On the night of 6th January 2022 at around 2330HRS, she was asleep when she heard people knocking her kitchen door where the deceased used to sleep. By the time she got there, a group of about 8 people had already forced open the kitchen door and dragged her son, the deceased, outside. They started beating him, dragged him outside the house then frog-matched him to the road and continued beating him while demanding that he shows them school uniform, shoes, school bag, cash and a battery. She implored with the men to stop beating her son but they ignored her pleas. She recognized the people assaulting her son as Oliver Kiprop, Kiptoo, Kipchirchir, Kipruto, Kiplagat, Brian, Allan, Obi and Josiah Mutai. Her recognition was made easier because there was sufficient light from the moon, a security light and the torches that the accused persons were using. She noted that the suspects were armed with sticks that they were using to rough up the deceased. When she screamed for help and neighbors responded, Josiah Mutai and his nephews (the accused persons) cautioned the neighbors not to intervene as they were dealing with a thief. She then saw Kiptoo take a piece of plastic, burn it and dropped the molten plastic on her son while demanding that he confesses to stealing the property. They then left the deceased writhing in pain. She took him to the house and to the hospital at the crack of dawn. He was treated and on 10/01/2022 she accompanied him to Kipkaren Police Station to report the matter. She was aware that her son recorded a statement after resubmitting s duly filled P3 Form. On 16/01/22, the deceased's condition worsened to which, she rushed him to MTRH. He was treated but succumbed to the injuries on 17/01/22 at around 0300HRS. She identified the people who had occasioned mob "justice" on her son as the accused persons in the dock. She told the court that she had known them for a long time as relatives of her neighbor, Josiah Mutai. She also notified the court that they had sent emissaries to her relatives to seek for forgiveness and that they initiate a cleansing ceremony.

5. PW3: Sarah Chemesunde testified that on the night of 07/01/2022 at around 0005HRS, she as asleep at home when she was awoken by someone screaming for help. She went outside to confirm what was happening and found the deceased being subjected to a thorough mob justice beating. She was able to identify the people beating the deceased as Josiah Mutai together with his 3 sons namely Kipruto Brian, Collins Kiplagat and Oliver Kiprop. The others were Kipchirchir, Allan, Obi and Kiptoo. Just like PW2, her recognition of the assailants was made easier because of the moonlight, security light and the torches that they were using. This light was so clear that she was able to tell that Josiah had a wooden stick and a panga while the rest had rungus, sticks and pangas. She implored with them not to harm the deceased but they ignored her. They kept torturing the deceased to confess that he had stolen school uniform, books and a battery but the deceased maintained his innocence. She noted that the beating went on for about 3 hours. She found it too heart-wrenching when she saw the accused persons melting a piece of plastic then dropping the molten plastic on the deceased. She then left the scene. She was later informed that the deceased had died on 17/01/22 from the injuries sustained in the mob justice beating.

6. PW4: PC David Killi Kamuren testified that he was the officer tasked to investigate this matter. His investigations started on 10/01/22 when the deceased, under the escort of his mum (PW2) went to the station to report that he had been subjected to mob justice beating on the night of 06-07/01/22. The deceased informed him that the people who had assaulted him were his neighbors who had accused him of stealing school uniform, books, a bag and a battery. Because the deceased appeared to be managing his injuries well, he treated it as a case of assault and consequently issued him with a P3 Form. On 13/01/22 the deceased recorded his statement. He considered this statement as the deceased's dying declaration and produced it as Exh 3. He was notified that the deceased's condition had gravely deteriorated leading to hospitalization at MTRH. He was later notified that the deceased

had fallen to the injuries. This was confirmed by the Post-Mortem report. The accused were tracked down and arrested to face the offence of murder. Because the cause and fact of death were not in dispute, PC Kamuren produced the Post-Mortem Form as Exh 2.

7. At the close of the prosecution case, each of the accused person was placed on his defense under Section 306 as read with Section 307 of the *Penal Code*.

8. In buttressing the evidence, Learned Senior Prosecution Counsel canvassed the arguments in support of guilt and conviction by way of written submissions with the following highlights:

9. Learned Counsel submitted that the defense made certain concessions in this matter that limit the issues for determination to two questions; positive identification of the accused and whether they acted with malice aforethought. In considering whether those issues were sufficiently proved, counsel also submitted on common intention.

10. Learned Counsel submitted on the question of causation and relied on the case of Thomas Chengo Mwambire v Republic [2024] KECA 865. He urged the court to find that the accused persons were positively identified. On this he cited the decision in Reuben Taabu Anjononi v Republic [1980] eKLR.

11. In support of the arguments relating to the offence of murder, counsel cited the following decisions:

    a. Tubere s/o Ochen v Republic [1945] 12 EACA 63

    b. Republic v. Lucy Nyokabi Maura [2015]

    c. Republic v Simon Ikunza Lusuli [KEHC] 1761 (KLR)

12. In conclusion, counsel opined that the evidence puts the accused persons right in the middle of the mob justice beating not only as the instigators but also as active participants. Motivated by the desire to avenge themselves for the loss of Accused 1's property, they tortured the deceased for over 3 hours hoping to extract a confession from him.

The Defense Case Summary

13. DW1: Brian Kipruto stated that on 05/01/22 at night, he was staying at his aunt's place in Emgoin village. He saw the deceased being subjected to a mob justice beating over Accused 1's property. He distanced himself from the mob and stated that his uncle, Josiah Mutai was the ring leader. He said that the mob used sticks to assault the deceased. He was later notified that the deceased had passed on. According to him, he was arrested because he used to live in the same compound as Josiah Mutai and Oliver (Accused 1) who's property was stolen.

14. DW2: Oliver Kiprop testified that on 05/01/22 at night, he went to school but was sent back home over fee arrears. At night, he went to Josiah Mutai's (his uncle) place to have his dinner and when he went back to his room, he discovered that his school bag, uniform, battery and shoes had been stolen. He notified his uncle of this theft and was instructed to go rest as private investigations were initiated. His uncle later told him that they had narrowed in on the thief and he should accompany them. He declined owing to a problem with his leg. Shortly thereafter, he heard screams from his neighbor's place. He went outside to confirm what was going on but was unable to because the people were moving too fast for him to catch up with them. He therefore went back to bed and the following day, he learned that the deceased had been apprehended then tortured to confess that he was the thief. He also learned later on that the deceased had succumbed to injuries arising from the beating. He denied being someone familiar to the deceased's mother (PW2) because he was a boarder in school.

Analysis and Determination.

15. Having analyzed the evidence as adduced by the prosecution and the defense, the burden of proof in all the elements of offence against the accused persons lies with the prosecution. The provisions of Art. 50(2)(a) expressly state that every accused person is presumed innocent until the contrary is proved. It is settled in law that the existence or non-existence of the facts in issue or not in issue to secure a judgment over a given criminal case is essentially the burden of the prosecution on behalf of the estate. Conversely, there is no burden laid upon the accused persons to prove their innocence except in exceptional circumstances which may fall within the provisions of Section 111 of the *Evidence Act*. This doctrine on the standard and burden of proof found its way in the provisions of Section 107(1), 108 and 109 of the *Evidence Act*. In order to articulate it more succinctly given its origin in common law. The locus classicus case law articulates the standard and burden of proof in the following language: in the case of Woolmington –v- DPP (1935) AC 462 at pp 487 Viscount Sankey, L had this to say

> " But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.
>
> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception ..... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained ..... It is not the Law of England to say as was said in the summing up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident...."

16. In the case of Miller –v- Ministry of pensions (1947) 2 ALL ER 372 at 373 Denning, J buttressed the point as regards the burden of proof required when he stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

17. The accused persons who are facing the offence of murder contrary to section 203 of the *Penal Code* place a heavy burden on the prosecution to prove the following elements beyond reasonable doubt:

    a. The death of the deceased one Dennis Kiplimo

    b. The death was unlawfully caused

    c. The death was caused with malice aforethought

    d. The accused persons participated in or caused the death of the deceased.

18. The case is purely built on circumstantial evidence. In the case of R v Hillier (2007) 233 A.L.R 63, Shepherd v R (1991) LRC CRM 332 the courts observed that:

> "The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual stand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

19. Similarly, the Court of Appeal in Simon Musoke v R 1 EA 715 held that:

> "In a case depending exclusively upon circumstantial evidence, he (the judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt." (See also R V Kipkering Arap Koske 16 EACA 135, Musili Tulo v R (2014) eKLR).

20. As regards to the element on proof of death of the deceased, the prosecution's case is supported by the testimony of PW1 Sally Busienei testified as the clinical officer at Turbo Hospital on having examined the deceased who was brought to the facility with a history of being assaulted by a gang of 8 people. In this respect PW1 confirmed that the victim had suffered injuries to the neck, face, abdomen, upper limbs and the right shoulder. Additionally, PW4 Dr. Macharia who carried out the post mortem opined that the cause of death was acute respiratory distress syndrome due to extensive soft tissue injuries due to blunt force trauma. The defence also did not dispute the fact that the deceased Dennis Kiplimo is dead.

21. The second ingredient is on whether the cause of death of the deceased was unlawful. It is settled law that every homicide is unlawful unless excusable as stipulated in Art. 26(3) of *the Constitution*. The provisions of Section 213 of the *Penal Code* defines what constitutes causation issues in the offences against the person which includes murder, manslaughter or infanticide etc. The cause of death can be either through direct or circumstantial evidence. In settling this issue with finality, the prosecution placed reliance on the testimony of PW2 who told the court that on 6th January, 2022 at 11:30PM while in his house, 8 people entered his homestead and dragged his worker up to the road. The witness was able to see a gang armed with sticks and a panga. He also testified that the victim had stolen a long trouser which became a source of anger and subsequent cause of his death. The prosecution proceeded to summon the evidence of PW3, Sarah lelei who told the court on 7th January, 2022, she heard some screams and on responding to it, she recognized one Joseph assaulting Dennis while in company of seven other people. She also confirmed that the assailants were armed with sticks inflicting harm on the various parts of the deceased, she had no capacity to stop them from committing the unlawful act of assault.

22. It is also significant to highlight that unlawfulness of the offence is tested around the grounds of justification excusable, accidental or other natural causes. It is a requirement under the law of Kenya, for every crime in Kenya without exception, the element of unlawful act of omission as a condition precedent for criminal liability be established beyond reasonable doubt by the prosecution. As indicated above, and going by the principles of R V. Gusambiza S/o Wesonga (1948) 15 EACA

65, there is no cogent evidence in this murder incident the deceased's death falls within the exceptions contemplated in Art. 26(3) of *the Constitution* as notably read with Section 17, 207 and 208 of the *Penal Code*. In the final analysis it appears sustainable to find that there are no unanswered questions on the unlawful cause of the death of the deceased.

23. In all offences of murder, for an accused person to be found guilty, the fundamental element to be proven is that of Malice aforethought. As regard to proof of availability of malice aforethought in any indictment against an accused person, Section 206 of the *Penal Code* gives the following guidelines:

    (a). An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.

    (b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.

    (c). An intent to commit a felony.

    (d). An intention to facilitate the escape from custody of a person who has committed a felony.

24. In the matter at hand, the prosecution has entirely relied on circumstantial evidence. There is no witness who saw the accused persons cause the death of the deceased. All that was seen was a gang of individuals who were attacking Dennis Kiplimo. In establishing the presence of the elements of Malice aforethought, it is important to observe the injuries sustained and in the manner in which they were inflicted. PW4 Dr. Macharia who carried out the post mortem opined that the cause of death was acute respiratory distress syndrome due to extensive soft tissue injuries due to blunt force trauma. This is as evidenced by the autopsy report dated 25th January, 2022. It also came out from the testimonies of the prosecution witnesses that the deceased was dragged from his homestead with a gang of 8 people who were armed with sticks and panga. The facts of this case are in consonant with the principles in Tubere s/o Ochen v Republic [1945] 12 EACA 63

25. In assessing circumstantial evidence and the approach taken by the accused persons on the basis of what must have transpired leading to the death of the deceased, this court is definitely of the view that explanation given by the accused persons is not truthful nor convincing to controvert the testimony of PW2 and PW3. When the accused persons with others not before court set upon the deceased using various weapons some crude and inflicted multiple injuries, they must have known that the acts of causing grievous harm to the various limbs of the deceased will cause death or harm. I am therefore satisfied that malice aforethought as defined in terms of Section 206 has been established by the prosecution to bring this case within Section 203 of the *Penal Code*. The comparative dicta in S versus Rama, (1966) SA 395(A) Rumpff J.A. remarked:

> " In my opinion, there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.
>
> An accused's claim to the benefit of a doubt when it may be said to exist must not be deprived from speculation but must rest upon a reasonable and solid foundation created either by

positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

26. I have carefully considered the evidence by the prosecution and weighed it against the finer details of the defense given by the accused persons and it is difficult to reconcile that the unlawful acts of assault meted out against the deceased who was a suspect of theft of a school uniform was only meant to achieve a disciplinary outcome than the possibility of causing death as a possible consequence. There is no dispute that this was an offence committed within the locus in-quo of the surroundings in which both the assailants and the victim family are domiciled. The so called mob had the opportunity to call the clan elder, the assistant chief, the area chief or even the police to have the suspects investigated and prosecuted for the alleged offence. There can be no doubt in my view in the definition of legal intention, any assailant at the scene of the crime who took upon himself to engage in inflicting harm upon the deceased could have foreseen that either the illegal act could occasion grievous harm or the death of the victim. There physical injury was not improbable or remote.

27. In another tangent, the offence the accused persons are charged with, involved participation of more than one assailant. In the testimony of PW2 & PW3, they are emphatic that the gang numbered about 8 persons all known and identified by name and physical appearance. It therefore calls upon this court to discuss the doctrine of common intention under Section 21 of the *Penal Code*, which expressly provides:

> "When two or more persons from a common intention to prosecute an 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."

28. The provision squares well with the following passage in the case of Njoroge in the case of Njoroge Versus Republic 1983 KLR 197 and Solomon Munga Versus Republic 1965 EA 363 where both courts held as to the elements on the principle of common intention thus. "If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavors to effect the common object of the assembly."

29. In addition, the court is satisfied of the evidence against the appellants that their defense is regarded as being dislodged in line with the principles in the case of Republic Versus Cheya case 1973 EA. "The existence of common intention being the sole test of total responsibility it must be proved that the common intention was and that the common Act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under the section. It is only when a court can with some judicial certitude hold that a particular accused must have pre-conceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section can be applied." As correctly pointed out these decisions on common intention may be inferred from facts and or any circumstances of the particular case.

30. It is trite by the letter of the law that those who jointly embark on committing a felony intending to use some form of violence should share the consequences of the outcome. If the violence used proved to be greater than contemplated like in the instant case, it is my view that considerations of both equity and public protection, the law demands that when two or more persons are parties to the common design

for the use of unlawful violence and the victim is killed, each one of them should be held responsible for the crime and the same punishment should apply in equal measure. This crime of murder in question was done in furtherance of the common intention of all each of such persons as identified in the charge sheet and those still out there at large and this court has cogent evidence to hold each one of them liable for the offence. The accused persons have given an elaborate defense but by its nature and degree of the participation in the offence with others not before court does not exonerate them under the doctrine of common intention. It is also trite in our law on common intention; the mere presence and do nothing attitude to protect the infringement of the right to life under Art. 26 of *the Constitution* will not be sufficient as a defense. Generally speaking, fights in a gang do get out of hand and escalate but a man who starts the fight by punching the victim may get excited to continue inflicting harm and the rest on a trigger happy join in support of inflicting even more harm, the law contemplates that each one of them is guilty under the doctrine of common intention. It does not matter that one joined in belatedly and continued to participate before withdrawing from the incident. At the same time, it must be kept in mind that a common intention to commit a more serious crime than the one originally intended could arise in the cause of the commission of the offence itself as it happens in the instant case.

31. For the foregoing reasons, I hold the strong view in terms of the law and the facts of this case that the prosecution has established the charge of murder contrary to Section 203 of the *Penal Code* to find each of the accused persons jointly and severally guilty and in reference of it, both of them are convicted and liable to punishment under section 204 of the *Penal Code*.

RULING ON SENTENCING

32. The convicts, Oliver Kiprop and Brian Kipruto, have been convicted of murder contrary to section 203 punishable under Section 204 of the *Penal Code*. Following the Francis Muruatetu versus Republic decision of 2017, the mandatory death sentence has been outlawed and is now reserved only for the rarest of circumstances arising from aggravated homicide.

33. The court is guided by the fundamental purposes of sentencing as provided for in the sentencing policy guidelines of the Judiciary, 2023 which can be pursued by the court in applying one or more of the following eight objectives:

    a. Retribution: to punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

    d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

    e. Community protection: to protect the community by incapacitating the offender.

    f. Denunciation: to communicate the community's condemnation of the criminal conduct.

    g. Reconciliation: To mend the relationship between the offender, the victim and the community.

    h. Reintegration: To facilitate the re-entry of the offender into the society.

34. The pre-sentence reports all dated 13th December, 2024 reveal compelling mitigating circumstances. Both accused are young men, Oliver Kiprop was merely 16 years old at the time of the offense

while Brian Kipruto was 22. Neither had previous brushes with the law. Both have demonstrated genuine remorse and taken extraordinary steps toward reconciliation with the victim's family through traditional Kalenjin customs, including a cleansing ceremony and compensation of ten cows.

35. Notably, the victim's mother, Filomena Chesang, has expressed forgiveness and specifically pleaded for leniency. This reconciliation carries significant weight, particularly given the devastating loss of her firstborn son who was the family's primary hope. The community, including local administration and elders, have vouched for both accused persons' character and support their rehabilitation.

36. Their individual circumstances merit consideration. Oliver Kiprop, despite his troubled background, has shown academic promise at Segero Adventist National School where he maintains above-average performance. Brian Kipruto has demonstrated reformation by overcoming alcohol addiction and maintaining sobriety for four years. Both have strong family support systems committed to their rehabilitation.

37. However, these mitigating factors must be weighed against the gravity of the offense. The court cannot overlook the barbarity of the attack or the dangerous precedent of condoning vigilante justice. The sentencing must reflect society's condemnation of such actions while leaving room for reformation.

38. The probation officers have recommended non-custodial sentences, citing the accused persons' youth, remorse, and successful traditional reconciliation. However, given the serious nature of the offense, a custodial sentence is warranted, though moderated by the significant mitigating circumstances.

39. The Constitutional Court of South Africa in State v. Makwanyane (1995) CCT/3/94 remarked as follows on mitigation and aggravating factors in sentencing:

> " mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence."

40. *The Constitution* 2010 sets out certain fundamental rights and freedoms such as the right to life in Art. 26 which provides that no person shall be deprived of his life intentionally save in execution of the sentence in a court in respect of an offence under the law of Kenya of which he/she has been convicted. The combined sample of the evidence from the prosecution witnesses and the defense shows that the death of the deceased executed by the accused person was not justified or excusable in any of the exceptions stipulated in Section 17, 207 and 208 of the *Penal Code* on self-defense and provocation. In essence, there were no compelling or extenuating circumstances which can dissuade this court to exercise discretion to pass a non-custodial sentence as recommended in the Pre-sentence reports.

41. In R v Engert (1995) 84 A Crim R 67 at 68, Gleeson CJ observed:

> " Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of this facts and circumstances to the principles laid down by stature or established by the common law. The

principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment .....

In a given case, facts which point in one direction to one of the consideration to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance .....

It is therefore erroneous in principle to approach the law of sentencing as thought automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

42. I have considered all factors presented in mitigation by defense counsel for both accused persons, including their ages, demonstrated remorse, and rehabilitation efforts, alongside the severity of the offense. Taking into account relevant case law principles and the necessity for both deterrence and rehabilitation, I hereby sentence the accused as follows: Oliver Kiprop to 15 years' imprisonment and Brian Kipruto to 20 years' imprisonment. For both accused, the period spent in pre-trial custody shall be deducted from their respective sentences pursuant to Section 333(2) of the *Criminal Procedure Code*.

DATED AND SIGNED AT ELDORET THIS 14TH DAY OF FEBRUARY, 2025.

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R. NYAKUNDI

JUDGE