



**Republic v Mutai & another (Criminal Case E018 of 2021)  
[2025] KEHC 2928 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2928 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E018 OF 2021  
MS SHARIFF, J  
MARCH 3, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**GEOFFREY KIPYEGON MUTAI ..... 1<sup>ST</sup> ACCUSED**

**ROBERT KIPYEGON KORIR ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The Accused persons herein, Geoffrey Kipyegon Mutai And Robert Kipyegon Korir, are charged with the offence of murder contrary to Section 203 as read with section 204 of the [Penal Code](#). The particulars are that on the 5<sup>th</sup> day of June 2021, in the evening hours at Kadinda/Kambeje village in Sigoti Location, Nyakach Sub-County, within Kisumu County, jointly murdered Dennis Kiplangat Rono.
2. The Accused persons denied the charge and Prosecution presented Seven (7) witness in support of its case. The defence was initially represented by Mr. Green Morgan Odera and when the latter joined the bench Mr Omondi T was appointed as their pro bono advocate.
3. PW1 Hillary Kipkemoi Tanui testified that he resides in Kadida, Nandi County. It was his testimony that on 5<sup>th</sup> June 2021 by 6 pm he was at Luo land across the river at the house of one Owour while in the company of the Accused persons and the deceased herein. PW1 told that Court that the father of the deceased one Mr Andrew, had on the material day sent them to deliver some local brew; chang'aa, to Mzee Owour. That upon delivery of the local brew to Mr Owuor, the latter gave the deceased Ksh 900 which was the price of the brew for onward delivery to Mr Andrew. PW1 said that Mzee Owuor then gave them a cup of the local brew to share and as they indulged a disagreement occurred over money between the Accused persons and the deceased herein. He told the Court that he then left and proceeded to his home and found out the next day that the deceased had been attacked on his way



- home and he had blood. He told the court that the accused persons and himself hired rider and took the deceased person to Sifa hospital and that they were later informed by Reuben a brother to the deceased that his condition had worsened.
4. PW1 identified the persons who were with him at Owour's residence as the Accused persons before the Court and told the Court that they were friends and he knew them for about 2 years.
  5. On cross-examination, he told the Court that he was at the residence of Owour at 6.00 p.m. and that he was present when the Accused persons and the deceased were engaged in an exchange of words but he did not witness them fighting. He told the Court that on 6<sup>th</sup> June 2021 at 6.00 a.m. the deceased's brother called him requesting his assistance to take the deceased to the hospital.
  6. PW2 Reuben Kipyegon testified he hails from Tabaita and that on 5<sup>th</sup> June 2021 he went to herd cattle and on returning home by 9.00 p.m. he noticed that the deceased was not at home. The next day at 6.00 a.m. he went out to look for the police and he found the deceased by the roadside naked. He rushed home and summoned the assistance of his relatives and other villagers and on his return, he found the deceased could not talk. They rushed him to the hospital and he later died. He told the Court that he lodged a report with the police and arrests were made. He identified the persons who were arrested as the Accused persons before the Court.
  7. On cross-examination, he told the Court that on 5<sup>th</sup> June 2021, he did not see the deceased anywhere and that the deceased and Accused persons were friends.
  8. PW3 Andrew Kiprono Mosonik testified that on 5<sup>th</sup> June 2021, while at his home with his sons until noon he gave the deceased herein some local brew to take to Mr. Owour. As he was not feeling well he slept in and woke up at 8.00 p.m. and made dinner. He sent for the deceased person to come and take his share but he never showed up. The next day PW2 showed up at his home very early asking why he was sleeping and the deceased was hurt. They rushed back to where the deceased had been seen and found out that the deceased had been injured. They quickly took a motor bike to take the deceased to the hospital and he returned home to look for persons who had been with the deceased the previous day. That while he was on his way to lodge a report at the police station PW2 notified him of the death of the deceased person. The Accused persons were apprehended. He identified the Accused persons as the ones before the Court and that he knew them from their childhood.
  9. On cross-examination, he told the Court that he had given the deceased chang'aa to deliver to Mr. Owour and that the deceased was to bring him back the money he realized from the sale. According to him, they found the deceased naked with his clothes beside him. He told the Court that he did not witness the Accused persons and the deceased fighting but his children briefed him of the same.
  10. On re-examination, he told the Court that after giving the deceased the local brew to take to Mr. Owour he never saw him alive again.
  11. PW4 Walter Owour testified that he hails from Koguta East Sub Location, Sigoti Location, Kambeche village and that on 5<sup>th</sup> June 2021, at around 5 p.m. four young men showed up at his residence and they had brought with them 10 litre jerrycan of chang'aa. He told the Court that he gave the deceased Kshs. 800/= and the Accused persons and deceased started arguing over Kshs. 200/=. The deceased gave the 1<sup>st</sup> Accused person Kshs. 200/= and he gave them the brew and they later left. According to him, after 30 minutes while on his way to the shop he found the deceased lying on the ground oozing blood and the Accused persons were standing besides him, but he did not see them while heading back home from the shop. He testified that he knew the persons who were with the deceased and that he has know them for several years. He identified them as the Accused persons before this Court.



12. On cross-examination, he told the Court that after paying the deceased his Kshs. 800/= and giving them a cup of the local brew, they left together and that the deceased gave the 1<sup>st</sup> Accused person Kshs. 200/=. He told the Court that they had taken the brew but they were not drunk and that at around 6.00 p.m. while heading to buy milk he saw the deceased lying on the ground oozing blood while the Accused persons stood beside him. He told the Court that he did not notify anybody.
13. On re-examination, he told the Court that he found the deceased lying down oozing blood and the Accused persons standing besides him but on the way back from the shop they were nowhere to be seen.
14. PW5 Sally Cheruito Katukoi testified that she is a senior government analyst based in Kisumu Government lab and that she was in Court to produce a report. According to her on 28<sup>th</sup> June 2021, she received an exhibit memo escorted by CPL Josiah Rotich of DCI Nyakach. She was also in receipt of samples of the finger nails of the deceased herein in a vacuum tube marked A-I; a purple marvin in brown envelop marked B; blood sample of the 2<sup>nd</sup> Accused person in a vacuum tube marked C; blood sample of the 1<sup>st</sup> Accused person in a vacuum tube marked D; dried leaves and soil sample in a container marked E. She testified that samples marked as B and E were heavily soiled with human blood. She told the Court that on 29<sup>th</sup> September 2022 she did an analysis and DNA profile generated from the item B and the E and the same matched the DNA of the item A-I, the finger nails of the deceased herein. She produced the report in Court marked as PEXH.1.
15. On cross-examination, she told the Court that sample items C and D did not match with the samples provided.
16. PW6 DR. Erick Mugo testified that he is based at Kenyatta National Hospital and that he was in Court to produce the post mortem form of the deceased herein. According to him, on 8<sup>th</sup> June 2021, he conducted a post-mortem at Bethlehem Funeral Home and he made the following observations: the external appearance of the body showed no synopsis, he noted blood clots on the left area of the head, there was a hole on the left side extending from the skull to the brain with the head and nervous systems affected. On internal examination he observed: blood on the left side of the scalp with fracture of the scalp bone and minimal hypobural haemotoma. He concluded that the cause of death was as a result of hemorrhage occasioned by a bone fracture on the left side of the head/skull due to assault using a sharp object.
17. PW7 NO. 47461 Corporal Josiah Rotich testified that he is that he is the investigations officer in this matter and that he is attached to Directorate of Criminal Investigations (DCI) Nyakach. According to him, on 6<sup>th</sup> June 2021, acting on instructions on Inspector Owiti he investigated a murder case at Toll Anti-Theft Unit. He was brief that two suspects were already apprehended and were been held at the Stock Theft Unit. He was able to interrogate the suspects and placed them in custody. He learnt that the body of the deceased was been held at Sikoweti Hospital in Kericho and he proceeded there and had the same transferred to Bethlehem Funeral Home in Nyakach. While in the company of the colleague they proceeded to the scene and found blood stained marvin cap and leaves smeared with blood suggesting that a struggle had ensued. He told the Court that he took a sample of the blooded leaves, soil and followed the blood stains to the spot where the deceased body was discovered. On 28<sup>th</sup> June 2021, he forwarded the collected samples to the Government Chemist. He told the Court that on his investigations he established that the Accused persons and the deceased delivered Chang'aa to the home of PW4 who later confirmed the same and that a payment disagreement arose and the deceased was later seen lying on the ground oozing a lot of blood while the Accused persons stood beside him. At the conclusion of his investigations, he preferred charges against the Accused persons. He produced in Court the sample of bloodied soil and leaves marked E as PEXH.3; the marvin cap marked B as



- PEXH.4; exhibit memo dated 28<sup>th</sup> June 2021 as PEXH.5. He identified the persons in Court as the two Accused persons he charged.
18. On cross-examination he told the Court that he went to the scene of the incident on 6<sup>th</sup> June 2021 and that he did not keep an inventory of what he collected at the scene as there was no Accused person present and that he was in the company of his colleagues. He confirmed that the marvin cap belonged to the 2<sup>nd</sup> Accused person and that he did not recover any weapon.
  19. By a ruling of this Court issued on 15<sup>th</sup> June 2023, the Accused persons were found to have a case to answer and were thus put on their defence.
  20. DWI Geoffrey Kipyegon Mutai denied the charges levelled against him and testified that on 5<sup>th</sup> June 2021, he proceeded to the farm until 11.00 a.m. then went to the deceased's home at 12 noon as the deceased's father was a local brewer. He told the Court that he purchased local brew for Kshs. 100/= which he consumed up to 2.00 p.m. when the deceased's father called him requesting him to accompany the deceased to deliver some local brew to a client. He told the Court that they took a 15 litre jerrycan in the company of others including PW1 and DW2, and on arriving, the deceased gave the client 11 litres and they consumed the rest. He told the Court he was drunk and could not recall how he got back home as he found himself sleeping in his house at night. He was later woken up by individuals, including the father of the deceased, asking him of the whereabouts of the deceased. He told the Court while on their way to the home of the deceased's father they stumbled across the deceased lying on the road and he had bruises. They rushed him to the hospital but he later succumbed to his injuries. The deceased father told him to accompany him to the police station where he was remanded.
  21. DW2 Robert Kipyegon Korir denied the charges levelled against him and testified that on 5<sup>th</sup> June 2021, he woke up early to go to the farm and at 1.00 p.m. he passed by the house of the deceased to drink water and found the 1<sup>st</sup> Accused person and others including the deceased and his father drinking and he indulged. Later, the father to the deceased requested that they take some local brew across the river to sell and out of the given 15 litres they only sold 11 litres and drank the remaining 4 litres. He told the Court after drinking he felt hungry and left for his home at 4.00 p.m. where he ate and slept. The next day on his way to the farm, he met the deceased's father in the company of others who told him that the deceased was found laying on the road and he had been rushed to the hospital. He told them that on the day of the incident he left the deceased drinking and he was advised to accompany them to the police station. He later learnt that the deceased died. He was apprehended and held in remand until he was arraigned in Court.
  22. At the close of the defence case, the Prosecution opted to file their final written submissions while the defence relied on their evidence as submitted before Court. The Court record indicates the Prosecution complied but their submissions are not on record.
  23. This being a charge of murder contrary to Section 203 as read with Section 204 of the penal Code, the following ingredients should be proved by the prosecution beyond reasonable doubt;
    - i. the death of the deceased and the cause of that death;
    - ii. that the accused committed the unlawful act which caused the death of the deceased; and,
    - iii. the accused had harboured malice aforethought
  24. The above ingredients were buttressed by the Court in Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR where the elements of the offence of murder were listed by M. Odero, J as follows: -



1. The fact of the death of the deceased.
  2. The cause of such death.
  - 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly;
  - 4) Proof that said unlawful act or omission was committed with malice aforethought.
25. On the death of the deceased, it is not disputed that the deceased died on the evening in question. The deceased died hemorrhage occasioned by a bone fracture on the left side of the head/skull due to assault using a sharp object.
26. As to whether the Accused persons were responsible for his death, PW4 testified that a fight ensued over payment between the Accused persons and the deceased and that he left them there. Later on, on his way to the shop he spotted the deceased laying on the ground with blood oozing and the Accused persons standing besides him. On his way back from the shop he told the Court that he did not see them. PW1 also told the Court that he was with the Accused and deceased persons herein when they took the chang'aa to PW4's house. He told the Court that he witnessed a disagreement between the deceased and the Accused persons herein. The Accused persons also testified that they did accompany the deceased herein to the home of PW4 to deliver some chang'aa as requested by PW3. I find the Accused persons assertion that they left the deceased while he was still alive and well incredible. DW1 claims that he could not recall what happened as they consumed close to 4 litres of chang'aa, while PW4 testified that they brought him a 10 litre jerrican of chang'aa and PW3 the seller of the chang'aa told the Court that he gave them 10 litres of Chang'aa. There was no evidence that anyone else had assaulted and killed the deceased. The Accused persons explanation to my mind was a poor attempt at creating an alibi. It did not dislodge the Prosecution's evidence that they were with the deceased at the material time when he was assaulted.
27. Looking at the above evidence that the Accused persons and the deceased were together during his assault; and, that his body was found on the roadside naked leads me to the firm conclusion that it is the Accused persons and no one else that killed the deceased. They must have known what happened to the deceased. They were the last person with him and these being facts within their special knowledge; they bore a statutory burden to discharge a rebuttable presumption as envisaged in the *Evidence Act* and they failed to do so in their defence. I find the Accused persons explanation and conduct inculpatory.
28. The Prosecution's case is hinged on circumstantial evidence based on the doctrine of last seen with since none of the witnesses actually saw the Accused persons murder the deceased.
29. In the case of Ahmad Abolfathi Mohammed & another vs. Republic [2018] eKLR, this Court had this to say on circumstantial evidence:
- “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.”
30. Section 111 (1) of the *Evidence Act* states:
1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact,



especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

31. This Court in the case of *Kimani vs Republic (Criminal Appeal 41 of 2022)* [2023] KECA 1390 (KLR) held that:

“The doctrine of ‘last seen alive’ is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened.”

32. The record is unequivocal that the Accused persons were the last persons to have been seen with the deceased a few hours before his death. In particular, after they left PW4’s house they were spotted by PW4, while on his way to the shop, standing beside the deceased who was lying on ground oozing blood. Being the last persons to have been seen with him, the circumstantial evidence pointed inextricably to them and it was thus incumbent upon them to extricate themselves from blame. Given the circumstances, under Section 111 of the *Evidence Act*, the burden now rested upon them to explain what happened to the deceased or how he met his death. In their defence, DW1 claimed that he was too drunk that he did not know how he got home while DW1 claimed that when he got drunk and felt hungry he left the deceased and DW1 and headed home to eat and sleep. He did not proffer any explanation as to how the deceased met his death, and nothing in their evidence pointed to any other person as having been responsible for the death of the deceased other than them.

33. Concerning malice aforethought, Section 206 of the *Penal Code* specifies that:

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

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

34. In the locus classicus case of *Republic vs Tubere S/O Ochen* [1945] 12 EACA 63 it was held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

35. In the instant case, the evidence adduced was that the deceased cause of death was as a result of haemorrhage occasioned by a bone fracture on the left side of the head/skull due to assault using a sharp object. It was obvious that the act of assault on the deceased person’s head was deliberately intended to kill him or cause him grievous harm, so that there can be no question that malice aforethought was established.



36. Consequently, given that the deceased died from haemorrhage occasioned by a bone fracture on the left side of the head/skull due to assault using a sharp object, and that the Accused persons, who were the last persons to have been seen with him did not provide any explanation on how he was assaulted, or absolve themselves from his death, and considering that malice aforethought was established by the manner of assault, I am satisfied, that the Prosecution has proved its case to the required standard, that is beyond any reasonable doubt, that the Accused persons murdered the deceased and I hereby find all the accused persons guilty of murder and I thus convict them accordingly.

37. Sentence will be done upon the after records, mitigation and filing of a pre-sentence report.

**DATED AND DELIVERED AT BUNGOMA THIS 3<sup>RD</sup> DAY OF MARCH 2025**

**M.S. SHARIFF**

**JUDGE**

In the presence of:

Ms Muema For Prosecution

OMondi T For Accused Persons

Dian/David/Juma Court Assistants

