Republic v Chepkwony (Criminal Case 28 of 2018) [2025] KEHC 7167 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 7167 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL CASE 28 OF 2018

RL KORIR, J

APRIL 24, 2025

BETWEEN

REPUBLIC .... PROSECUTION

AND

BERNARD CHEPKWONY .... ACCUSED

JUDGMENT

The Charge:

1. Bernard Chepkwony (Accused) is charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge are that on 6th October 2018 at Besiobei sub-location in Konoin sub-county within Bomet County, he murdered Joseph Kimutai Koech.

2. The Accused took plea on 1st November 2018 before Muya J. and pleaded not guilty to the charge. The case went to full trial and which the Prosecution called seven (7) witnesses who testified in support of their case.

The Prosecution's Case

3. The Prosecution's case was that the Accused Bernard Chepkwony fatally assaulted the deceased Joseph Kimutai. Bernard Okenyi Nyakundi (PW2) testified that he was at Tinga Moja when he witnessed Bernard(Accused) and Joseph (deceased) quarreling. That Bernard got angry and punched Joseph on the head and as Joseph fell, Bernard walked away. Joseph Yegon (PW1) found the deceased already injured and assisted him onto a motor cycle which ferried him to hospital. Patrick Bett (PW3) and David Koech (PW4) respectively son and brother of the deceased identified the body of the deceased at Litien Hospital Mortuary on 18th October, 2018.

4. Dr. Mutai Nickson Kiplagat (PW4) inadvertently stated in the record as (PW1) conducted the post-mortem on 18th October 2018 and formed opinion that the cause of death was severe head injury due to assault.

5. No. 6XX20 P.C Abdi Ali PW5 (inadvertently stated in the record as PW6) was the Investigating Officer. He summed up the evidence of the witnesses and added that his investigations revealed that the deceased was first taken to Itare Dispensary where he was given first aid and taken home. That the following day when his condition deteriorated, he was taken to Kapkatet sub-county hospital from where he was referred to AIC Litein hospital where he underwent surgery and later succumbed.

6. Dr. Philip Blasto, Consultant Surgeon (PW6) testified that he performed surgery on the deceased's head and removed a metallic object (Exhibit 3) but the patient succumbed the following morning. Dr. Blasto produced his medical report dated 5th March 2019 [Prosecution Exhibit No.2].

7. Upon review of the Prosecution evidence above, this court made a finding that the prosecution had established a prima facie case and placed the Accused on his defence.

Summary of the Defence Case

8. The Accused made an unsworn statement and did not call any witnesses. He denied the charge. He stated that he was at home on 6th October 2018 and was weeding with his wife, mother and child. That in the evening he proceeded to milk his cattle.

   That he was shocked when he got arrested upon concluding his chores. The Accused told the court that he was put in a vehicle and taken to Mogogosiek Police Station and charged. He stated categorically that he did not kill Joseph Kimutai Koech.

The Prosecution's Submissions.

9. The learned Prosecution Counsel Mr. Njeru filed submissions dated 16th July 2024 at the conclusion of the Prosecution's case. He submitted that all the ingredients of the offence had been proved. With respect to the cause of death, he submitted that Dr. Philip Blasto (PW6) had testified that the deceased was admitted in hospital with a metal object imbedded in his scalp and the same was removed through surgery. That the Pathologist Dr. Mutai (PW5) found the cause of death to be severe head injury due to assault.

10. On the identification of the Accused, the Prosecution submitted that the witnesses and in particular PW2 witnessed the assault. On malice aforethought, the Prosecution submitted that by forcibly implanting a dangerous weapon into the head of the deceased, the Accused intended to kill or cause grievous harm.

Accused's Submissions.

11. Learned Defence Counsel Mr. Koske filed submissions dated 25th November, 2024. He submitted that the evidence of identification given by PW2 was inconsistent and contradictory and cannot be relied on. He further submitted that no identification parade was conducted and therefore what remained was dock identification which could not also be relied on. He concluded that the charge of murder was not proved beyond reasonable doubt and urged the court to discharge the Accused.

The Law

12. The offence of murder contains two elements, the actus reus encapsulated in Section 203 of the *Penal Code* and the mens rea is provided for in Section 206 of the *Penal Code*. Section 203 of the *Penal Code*

provides that 'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder' while Section 206 of the *Penal Code* provides the circumstances in which malice aforethought shall be deemed to be established.

13. For the offence to be established, the Prosecution must prove the above elements beyond reasonable doubt. The Court of Appeal in Chiragu & another vs Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (17 December 2021) (Judgment) held:-

> " The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the accused and that the accused had malice aforethought as he committed the said act."

14. The standard of proof is one beyond reasonable doubt. This standard was aptly explained by Lord Denning in the celebrated case of Miller vs. Ministry of Pensions,(1947) 2 ALL ER 372 thus:-

> " 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 a 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."

15. I now consider the evidence against the ingredients of the offence.

Death and Cause of Death:

16. There was unassailable evidence that Joseph Kimutai Koech breathed his last on 8th October 2018. From the evidence of PW2 he was punched on the head on 6th October 2018 at around 6.45 pm. PW1 found him on the road and assisted him onto a motorbike to take him to hospital. Dr. Blasto (PW6) operated on him on 7th October 2018 at AIC Litein hospital, while Dr. Mutai conducted a post-mortem on his body on 18th October 2018. The post-mortem report was produced as Prosecution Exhibit No.1. All these evidence proved the fact of the deceased's death beyond reasonable doubt. Indeed, the death was not contested by the defence.

17. With respect to the cause of death, as already stated above, the Prosecution called Dr. Mutai Nickson (PW5) who conducted the post-mortem examination on the body of the deceased at AIC Litein Mission Hospital on 18th October, 2018. Dr. Mutai testified that the deceased was 50 years old. He found a surgical incision on the left side and head injury on the left side of the head. The skull was fractured exposing the brain. Dr. Mutai formed the opinion that the cause of death was severe head injury due to assault.

18. I accepted the pathologist's professional opinion on the cause of death. It was expert evidence and it also accorded with the eye witness' testimony that the deceased had been injured on the head. It is my finding therefore that the deceased died from severe head injury secondary to assault.

Whether the Accused was the person who cause the death of the deceased

19. The identification of the Accused as the person linked to the death of the deceased was strongly contested by the defence. They submitted that the incident took place around 7pm at night and therefore the witnesses could not have identified the assailant. That there was no identification

parade and the only identification was dock identification which was worthless. The defence further faulted the prosecution evidence of identification by PW2 stating that it was contradictory and uncorroborated. That PW2 was not within the scene and could not have seen the Accused.

20. On the other hand the Prosecution submitted that the Accused was properly identified by PW2 who was an eye witness.

21. For a conviction to ensue, the Prosecution must prove beyond reasonable doubt that it was the Accused who attacked the deceased leading to his death. I therefore proceed to analyze the identification evidence with circumspection bearing in mind that the assault was committed at dusk. This caution was succinctly stated by the Court of Appeal in the case of Cleophas Wamunga vs. Republic(1989) eKLR in the following terms:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

22. PW2 Bernard Okenyi Nyakundi told the court that he was a tea plucker at KTDA Besiobei in Konoin. That on the material date i.e 6th October, 2018 he was at a place called Tinga Moja when he saw Bernard (Accused) and Joseph (deceased) quarrelling and Bernard punched Joseph on the head and he fell down and started bleeding and was taken to hospital. On cross-examination, PW2 stated that it was about 6.45 pm and he heard people quarreling as he was abit far. When referred to his statement where he named the suspect as Nickson Kipkoech Rono, he denied knowing Nickson and was emphatic that he was not the one who recorded the statement. He reiterated in re-examination that it was Bernard who hit the deceased. He said that he was on the side of the road about 10 metres away.

23. According to PW2 he stated in cross-examination that the time of the incident was 6.45 pm. Pressed, he admitted that it was dark but he could still see. PW1 on the other hand stated in examination in chief that he arrived at the scene around 6pm when he found the deceased lying on the ground already injured. He said that he found a gathering of people among them Julius and Okenyi (PW2).

24. From the testimonies of the PW1 and PW2 it is clear to this court that the incident took place at dusk between 6.00pm and 6.45 pm. I believe the witnesses that it was not yet too dark for them to see. Further, PW1 knew the deceased quite well. He identified him by name said he was a neighbor. He also knew that the deceased worked in the home of Julius.

25. For PW2, he clearly saw the Accused and the deceased quarreling and he saw Bernard (Accused) punch Joseph (deceased) on the head. He said that he was close enough to see but did not see the weapon used. He only saw Joseph fall down after being hit.

26. I am satisfied that the PW2 was able to identify the Accused. He was a person known to him and he recognized both the Accused and the deceased when he saw them quarreling. He recognized the Accused when he saw him strike or hit the deceased who immediately fell down. It was a case of recognition at the scene and not dock identification as submitted by the defence. I disagree with the defence that the Accused was not properly identified as no identification parade was held. An identification parade was not necessary since the witness knew the Accused prior to the incident.

27. The circumstances of the Accused's arrest corroborate the identifying evidence. The Accused stated in his unsworn statement that he was arrested from his homestead while going about his farm work

and tending his cattle. That he had no idea why he was arrested. On the other hand, the Investigating Officer (PW6) testified that the Accused disappeared after the incident and was traced to Kaptebengwet market on 26th October, 2018 from where he was arrested and bought to Konoin Police Station.

28. The disappearance of the Accused after the incident was conduct suggestive of a guilty mind. This conduct corroborates the prosecution evidence that he was the one who injured the deceased. From my analysis of the Prosecution evidence, I have no doubt that the Accused was properly identified as the person who assaulted the deceased leading to his subsequent death.

Whether the Accused in causing the unlawful death of the deceased acted with malice aforethought

29. Section 206 of the *Penal Code* provides:-

> " 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."

30. In Roba Galma Wario vs Republic (2015) eKLR, the Court of Appeal held that:-

> " 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."

31. In this case, the evidence has shown that it was the Accused who assaulted the deceased. The eye witness PW2 testified that he saw him hit the deceased on the head. He did not see the weapon but only saw the deceased fall to the ground bleeding.

32. As earlier stated, the deceased did not succumb immediately. He was treated and discharged from the local Itare Dispensary. His condition deteriorated overnight and he was taken to Kapkatet Sub-County hospital the next morning. He was subsequently referred to Litein Hospital where an X-ray showed a metallic object lodged in his head.

33. Dr. Blasto (PW7) testified that he operated on the deceased and removed a sharp metallic object measuring 12 cms from the deceased's head. That by the time of the surgery, there was an infection in the deceased's head evidenced by the presence of pus and cerebral spinal fluid. Dr. Blasto produced his Medical Report (Exhibit 2) to that effect.

34. The metal retrieved from the Accused's head was produced by the Investigating Officer as Prosecution Exhibit 3. It was a sharp metal. It was evident that the accused by driving a 12 cm long sharp metal into

the scalp of the deceased intended to kill or cause him grievous harm. He had no lawful cause to drive a sharp metal into the deceased's head. He was also reckless on the consequences of his action.

35. I have considered the Accused's defence. He persisted in his innocence and only stated that he was arrested at home for an offence he knew nothing about. In essence he made no defence to cast doubt on the Prosecution case linking him to the fatal assault which I have already found proven. I must add that it was within his constitutional right not to say anything or defend himself in any particular manner. This is because the burden of proof remained with the Prosecution throughout the trial.

36. Malice aforethought was defined and explained by the Court of Appeal in Waw*eru vs Republic (Criminal Appeal 98 of 2020*) [2023] KECA 622 (KLR) (26 May 2023) (Judgment) in the following terms:-

> " In the case of Nzuki v Republic [1993] eKLR, this court defined malice aforethought as:
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> > " ...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result.
>
> ....Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:
>
> i. The intention to cause death;
>
> ii. The intention to cause grievous bodily harm;
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> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.
>
> It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.
>
> Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder...." (Emphasis mine)

37. In the present case, there was scanty evidence from the Prosecution as to whether the Accused and deceased had any sour relationship before. It was not even clear what the quarrel and fight was about or who was the aggressor. The Investigating Officer (PW5) gave evidence on a quarrel over money which no witness testified to. The evidence given in that manner amounted to hearsay. While it was clearly proven that the Accused implanted the metal object in the deceased's head, there was no apparent explanation or evidence on what had transpired before. From the scanty evidence, it was as likely as it was not that the Accused had malicious intent to end the life of the Accused. Upon review of the evidence, it is my finding that the element of mensrea was not proved beyond reasonable doubt. As the law demands, I must grant the benefit of the doubt to the Accused.

38. Consequently, I apply the provisions of Section 179 (2) of the *Criminal Procedure Code* and substitute the charge of murder with one of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. The Accused is accordingly convicted under section 215 of the *Criminal Procedure Code*.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 24TH DAY OF APRIL, 2025.

....

R. LAGAT-KORIR

JUDGE

Judgment delivered virtually in the presence of the Accused, Mr. Koske for the Accused, Mr. Mwangangi holding brief for Mr. Njeru for the State, Siele and Muriuki (Court Assistants).