



REPUBLIC OF KENYA



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**Republic v Kipruto & 2 others (Criminal Case 57 of 2023)
[2025] KEHC 6816 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL CASE 57 OF 2023**

RB NGETICH, J

MAY 22, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

MAXWELL KIPRUTO 1ST ACCUSED

SIMON KIBET KIBOS ALIAS MUSTAFA ISMAIL ALI 2ND ACCUSED

BONENGRERS KIPRUTO SALGONG ALIAS ABUBAKAR 3RD ACCUSED

JUDGMENT

1. The accused persons herein have been jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that the accused persons on the 2nd day of May, 2015 at Perkerra river in Shauri village in Koibatek Sub- County within Baringo County jointly with others not before court murdered Edwin Khamala Barasa.
2. The accused persons denied the charge and the matter set down for hearing. The prosecution in proving the charges against the accused availed 5 witnesses to testify in court.

Prosecution's Evidence.

3. PW 1 Calistus Wanjala testified that the deceased is his elder brother and that on the 2nd May, 2015 at 6-7 P.m, he was coming from work at Eldama ravine Karen Roses heading home when on reaching Mwisho wa Lami area, he found the accused Maxwell and his late brother the deceased herein seated at a shop verandah. He said he asked the deceased to join him in going home but the deceased told him he will go home after finishing his conversation with Maxwell.
4. Pw1 said he reached the deceased's house first and met his wife who asked about the whereabouts of the deceased. Pw1 then called the deceased twice but he was not answering calls. The following day, he



- tried calling the deceased at 6.30 a.m. but his phone was switched off. He went to ask the deceased's wife to report the matter to the police. He further said he met Maxwell the following day who informed him that he left the deceased at 8.00 p.m. They went to the police station on 3rd May,2015 with the deceased's wife.
5. Pw1 said on 8th May,2015, he received a call from number 072283XXX03 and the caller told him "Wewe ndiyo umebaki, yule ameenda." Meaning "you are the one remaining the other has gone". He said together with friends, deceased's wife and uncle, they tried to trace their brother between 2-8th May, 2015 and when they failed to find him, he went to their home at Bungoma and informed the family that his brother had disappeared and they could not trace him. Later while in Bungoma, he received a call from deceased's wife who informed him that his brother had been found dead.
 6. Pw1 said he informed his parents and the next day, he went with his father and elder brother to Eldama Ravine District Hospital where he identified his brother's body for Post mortem. He also identified his late brother's phone and earphones. He also ide the phone from its faded control button and from the ear pieces which were white. He said he knew Maxwell for about 2 months who is the 1st accused.
 7. PW2 Wilfred Shikuku Wakuchwe testified that he works at Karen Roses, Eldama Ravine and that the deceased herein was his nephew and that he went to see his body at the mortuary and together with Pw1, they identified the body to the doctor for postmortem. He said he saw cut on the head, shoulder and all over the body.
 8. PW3 Dr. Arafa Saleh who worked at Eldama Ravine Sub- County Hospital at the material time testified that he conducted postmortem on the body of the deceased on 13th May,2015 at Eldama Ravine mortuary on the body of Edwin Khawala Barasa. He said that on examination, the body was severely decomposed and the approximate time of death was around 2 weeks and the body had a foul odour. He said that the body had multiple deep cut wounds with fracture of the bones of the face and the skull had fractures which caused massive internal bleeding into the brain.
 9. He proceeded to state that the neck was cut and only a few muscles were attaching the head to the neck. That he had fractures of the small bones of the fingers of both hands and had multiple cut wounds on both ankles approximately 7 inches in diameter and as a result, he formed opinion that the cause of death was severe head injury, multiple fractures and severing of the neck. He said that nail chippings for both fingers and toes, head hairs and part of the skin were taken for further analysis but were unable to draw blood sample due to the decomposition of the body. He produced post-mortem report in court as exhibit.
 10. PW4 Elizabeth Waithera Oyengo a government chemist attached to Government Chemist Kisumu testified that that on 19th May,2015, at the Laboratory of the Government chemist Nairobi, they received the following items from PC James Mangondu of Eldama Ravine police station and the items were accompanied by an exhibit memo form and were;- A1- Finger nails in a khaki envelop, A2- Dry skin in a khaki envelop, A3- Hair in a khaki envelop.
 11. She said the three items were indicated as belonging to the deceased Edwin Khamala Barasa. That they had another item labelled B which was a panga with a wooden handle in a khaki envelop which was indicated as recovered from the house of an accused called Maxwell Kipruto. That there was another item labelled C which was another panga with a rubber handle in a khaki envelop and indicated as recovered from the house of accused called Simon Kibet Kibos. She said that other items were:-
 - i. D1-a cap in a khaki envelope and it was indicated as recovered from crime scene.



- ii. D2-a green jacket with white stripes in the hands in a khaki envelope also indicated as recovered from the crime scene.
 - iii. E1- oral swab in a khaki envelope indicated as of accused Maxwell Kipruto.
 - iv. E2- Nails in a khaki envelope indicated for accused Maxwell Kipruto.
 - v. F1- an oral swab in a khaki envelope indicated as of accused Simon Kibet Kiboss
 - vi. F2-Nails in khaki envelop indicated as of accused Simon Kibet Kiboss
 - vii. G1- a pair of blue jeans trouser in a khaki envelope indicated as from accused Simon Kibet Kiboss' house.
 - viii. K2- a pair of blue jeans trousers recovered from the house of accused Simon Kibet Kibos.
 - ix. H-a panga with a rubber handle in a khaki envelope recovered from accused Bonengers Kipruto Salgong's house.
 - x. J1- a pair of black jeans trousers in a khaki envelope recovered from the house of accused Bonenger Kipruto Salgong.
 - xi. J2-an orange but torn mattress cover in a khaki envelope also indicated as recovered from the house of Bonengers Kipruto Salgong.
12. She said that on 11th September,2015, she received an additional item from Pc Douglas Musyoki item labelled K which was a mouth swab on a swab stick belonging to accused Bonengers Kipruto Salgong and it was desired to examine the items and determine the presence and origin of any blood stains and these were the findings:-
- a. The pangas which were items B, C and H and cap being item D, pair of trousers being item G1 were all not stained with blood. The jacket being item D2 was slightly stained with human blood. The two pairs of trousers being items G2 and J1 and mattress cover being item J2 were moderately stained with human blood. She said that on doing DNA analysis to determine the origin of the blood the conclusion was:-
 - i. The DNA profile generated from the blood stains on the two pairs of trousers marked item G2 and J1 and also the mattress cover item J2 matched the DNA profile generated from the oral swab item F1 which was the oral swab of accused Simon Kibet Kiboss and its probability of match 100%.
 - ii. The blood stains on the jacket which is item D2 did not generate DNA profile. She compiled the report and signed it on 1st August,2019 and produced in court as exhibit.
13. PW5 No. IPOAXXX73 who is Principal Investigating Officer testified that he was working with DCI as an investigator and Intelligence collector from 2015 upto 2022 when he joined IPOA. He said that on 10th May,2015 at around 1: 00p.m, he received a call from OCS Eldama Ravine police station CIP Victoria Mutuku who informed him that he had received information from members of public that there was a body floating at river Perkerera.
14. That upon getting information, he went back to station and met C.I.P Mutuku together with 3 officers and at around 13:30 hours, they left the station to the scene and upon arrival, they found the terrain was not friendly and it was not possible to easily penetrate to the river. He said with the help of members of public, they retrieved a body of male adult which was partially to decomposed. They examined the body and found it had multiple injuries all over the body. At about 10 meters from the river point, they



- recovered a light green jacket and a black cap and thereafter, they took the deceased's body to Eldama Ravine Mortuary.
15. He said the deceased's wife Joan Cheptoo identified the body of the deceased Edwin Khamala Barasa. He further stated that the deceased's wife informed him that the deceased was last seen with Maxwell Kiptoo on 4th May, 2015 at Mwisho wa lami in Kapdeni area and that the said Maxwell was within the mortuary vicinity and was identified by members of public and he arrested and escorted him to Eldama Ravine police station and he was wearing a light green jacket.
 16. He said together with CPL Chebus they were assigned the case to investigate and they commenced investigation. He said on 12th May, 2015 in company of the accused herein Maxwell Kiptoo they proceeded to his house, conducted search and recovered a blood-stained panga. They went back to station and kept the panga and continued retaining the suspect.
 17. He said that on 13th May, 2015 they got a tip off from members of public that the lost jacket and white cap belonged to Simon Kibet who resided at Timon Village. They proceeded to Timon village and found Simon Kibet Kipruto alia Mustafa with visible fresh injuries all over his body. They searched his house and recovered a panga with rubber handle with blood stains, a faded blue jean trouser with blood stained and blue jeans with blood light stains and a Mobile make GT/E2222 with Imei No. 351830056554650.
 18. He said after the recovery, they escorted Simon Kibet to Eldama Ravine police station where he was booked in and the exhibits were kept at exhibit store. They recorded statement of Joan Cheptoo who said she was married to one Kiptoo in the year 2011 but they separated in the year 2014 with one child and upon separation, she started a new relationship with Edwin Khamala Baraza in the year 2014. That on 13th May, 2015 they recorded the statement of Simon Kibet where initially he said he had injuries from motor accident and later he changed and said the injuries were as a result of incident on 10th May, 2015 at around 19:30hrs together with Bonengers Kipruto at Kapdening when they encountered the deceased and without provocation accosted deceased and attacked him with a panga and he suffered injuries due to scuffle.
 19. That Simon Kibet stated that mobile phone GTE222 belonged to the deceased and he was given as a gift by Bonengers Kipruto to ensure that he does not reveal to anyone what happened to the deceased. Upon getting the information, he recalled Joan and brother to deceased who went and identified the phone as that of the deceased.
 20. Pw5 further stated that a team led by CPL Chebus on 14th May, 2015 proceeded to homestead of Accused 3 Bonengers Kipruto Salgong and the following exhibits were recovered.
 - Black trouser with blood
 - Panga with blood light stain
 - Mattress cover with blood light stain.
 21. He said that Accused 3 Bonengers was not present during recovery and on 19th May, 2015, he prepared an exhibit memo and forwarded all the exhibits including DNA specimen extract from deceased and accused 1 and accused 2 plus all exhibits in exhibit store and forwarded to Nairobi for DNA forensic analysis.
 22. He said he was also given court order obtained by CPL Chebus compelling Safaricom to give data of phone numbers of the 2 suspects and suspect still at large and the deceased's call data which were delivered on 19th May, 2015. He said CPL Chebus prepared a full investigation file and he was able to establish that Maxwell Kiptoo (Accused 1) was last seen with deceased, accused 2 Simon had deceased's



- phone and they recommended that the 2 be charged with murder together with the suspect still at large. They forwarded the file to DPP who agreed with their investigation and the 2 were charged.
23. Pw5 testified that he attended post-mortem on the body of the deceased which was conducted by Dr. Arafa at Eldama Ravine mortuary. He said together with other officers, they escorted the 2 suspects to Eldama ravine hospital where DNA samples were extracted after the 2 suspect filled consent forms. He forwarded the samples to Nairobi. He said in September the 3rd suspect Bonangers was arrested by team led by CPL Chebus and samples were extracted from him at Eldama Ravine hospital and he took Government Chemist for cross reference analysis and Bonangers was jointly charged with the other 2 accused persons.
 24. Pw5 said they arrested Accused 1 Maxwell on 10th May,2015, accused 2 Simon on 12th May,2015 and accused 3 Bonengers was arrested in September 2015. He positively identified the light green jacket they recovered and produced the same as exhibit 5, Black cap for Simon Kibet marked Exh.6, Blood-stained panga with black handle No. 7, Panga with rubber handle marked Exh.8, Blue jeans trouser with blood stains marked Exh. 9, Blue jeans with blood stains marked Exh. 10, Mobile phone marked Exh.1. He said that on 12th May,2015 at Simon Kibet's house, they recovered mobile and earphones, Earphones marked Exh.2, Black jeans trouser marked Exh. 11, panga with wooden handle marked Exh. 12, Mattress cover (orange) marked Exh. 13 and Memo marked Exh.14.
 25. PW6 No.68925 CPL Bonface Chebus based at DCI Machakos testified that formerly he was with DCI Koibatek upto 2016 and that he worked in Koibatek from 2008 to 2016. He said he investigated this matter together with PC James Magondu. He said on 5th May,2015, a report of missing person was made at Eldama ravine police station by one Joan Cheptoo under OB No. 20 of the same date who reported that her husband Edwin Khamala had gone missing from where they stayed at Kapdening after receiving a phone call from one Maxwel Kipruto.
 26. He said that on 10th May,2015 following information from members of public, the deceased's body was found at River Pakera and the scene was visited by OCS Eldama Ravine CIP Victoria Mutuku together with PC James Magondu and other officers where they retrieved body of the deceased which had injuries on head, neck and other parts of the body. He said PC Magondu recovered light green jacket and a cap and the same were recovered as exhibit.
 27. He recorded witness statement among them Joan Cheptoo who was cohabiting with deceased, Calestus Barasa and Geoffrey Wanjala and while in the course of investigations, he established that on 2nd May,2015, while deceased was at home with Joan Cheptoo, he received a phone call from Maxwel Kipruto accused 1 herein at 18:30 hours and the deceased did not return home that day.
 28. Further that he established from PW1 Calistus Barasa that he met the deceased with accused 1 at a place called Mwisho wa Lami at Kapdening and at around 19:50hrs, the deceased was also seen with accused 1 by PW1 and he went missing that day until his body was recovered on 10th May,2015.
 29. He said that on 13th May,2015 following a tip off from members of public, accused 2 Simon Kibet alias Mustafa was arrested at Kamkoech village by PC Mogondu and other police officers where PC Mogondu recovered a mobile phone where accused 2 was found. That Accused 2 who had multiple injuries on the head and other parts of the body was escorted to Eldama ravine police station where he was placed in custody. That upon upon interrogation of accused 2, he alleged that on 2nd May,2015, accused 3 inflicted the injuries on him when he tried to rescue the deceased from being attacked by accused 3. He said Pc Magondu recovered a panga and mobile phone and light blue jeans trouser with blood stains from Accused 1 and accused 2 house.



30. He said that he swore an affidavit to investigate mobile phone number of deceased and those of accused persons and call data from Safaricom indicated the Imei number of the mobile phone Imei No. was 351830056554650 was paired with mobile phone number of deceased 0708618412.
31. That the Imei number paired with phone of the deceased which is No.351830056554650 corresponded with Imei number of mobile phone make Sumsung recovered from accused 2 house (Exh.1). That the mobile phone was positively identified by the brother of the deceased Calestas Barasa.
32. He said that the 1st and 2nd accused consented to DNA profile to be done and were escorted to Eldama ravine Sub- County hospital for sample to be taken. He confirmed that following a tip off by an informer together with PC Magondu, they arrested accused 3 on 4th September,2015 while Accused 1 was arrested by PC Magondu on 10th May,2015 and accused 2 was arrested on 13th May,2015 by PC Magondu.He produced the court order to obtain call data vide Misc. Application No.19/2015 which was marked P.Exh. 16 and call data record with phone number of deceased marked Exh.17, Call data for accused 3 marked PExh. No. 18, Call data for accused 1 marked Exh.19. He said that they did not get data for accused 2 who registered using ID of Charles Odongo andData call for Charles Odongo Exh. 20.
33. He said that the phone number of the deceased was given to them by his brother Calestas Wanjala while the Phone number of accused persons were given to them by accused themselves during interrogated.
34. Upon the close of the prosecution's case by ruling delivered on 18th July 2024 the court found that the accused persons had a case to answer and were placed on defence.

Defence Case.

35. Accused testified as DW1 Maxwel Kipruto. He gave sworn statement. He said that he was working as a mason at Karen Roses flowers where he had worked for 7 years and that he was a close friend to deceased and used to play football with him and on the 2nd May,2015, the deceased had arrived from leave and he had gone to work at Mumberes. He said that he called the deceased at 10:00a.m while he was at Mumberes and he requested the deceased to wait and asked that they meet when he arrived home. He said that they used to meet at a football club in Members.
36. He said that at 6:30p.m, he arrived at Eldama Ravine from Mumberes and they were to meet at Mwisho was Lami. That they met at around 6:30p.m, and they had a game to play the next day. He said that they were with his brother and other players and after talking, they all left and he remained with the deceased and his brother. That shortly, his brother went home and he remained with the deceased and at around 7:30/8P.M, he parted ways with the deceased and went home and they agreed to meet the next day at 2p.m to play. That the next day on the 3rd May,2015, at 2p.m, the deceased did not show up. He said the called him but he was unreachable and they continued playing and in the evening at around 6 p.m., he tried calling him again but he could not be reached.
37. He said the deceased's wife called him and informed him that the deceased had not been seen and he informed her that they had parted ways the previous day at 2 p.m. He said the deceased's wife requested him to go and check where he used to work at the bakery but he did not find him.
38. He said on 4th May,2015, the deceased had not been seen and he advised his wife to report to the police. He said on 10th May,2015, at 10P.M, the deceased's wife said that someone had called from her rural home and said he had dreamed seeing a body in the water and they found the body floating at Perkerra river. They called the police who visited the scene and the body was removed and was identified as



- the body of the deceased Edwin Baraza. He said they took the body to the mortuary and recorded his statement.
39. He said the panga which PW 5 and PW 6 said was found in his house was a panga which he used to cut stones and was his tool of trade. He said that the panga was not stained with blood and that he was living alone in the house as his family lived in his rural home. He said that the deceased's brother used to play football also and had also registered as a member of the football club. He said that the deceased was a close friend to him and he was shocked and saddened to learn that he had died. He said he was not involved in the death of the deceased and he does not know what killed him. He said that he was also in the search team and his brother was also present but he left shortly.
 40. Accused 2 Simon Kibet alias Mustafa Ishmael testified as DW2. He gave unsworn statement. He said he was doing contractual manual work. He said he came to learn later why he is in court. He said that he was a resident of Eldoret and on 2nd May,2015, he was in Eldoret and that he travelled to Eldama Ravine on the 4th May,2015 to work for Francis Ndungu at Eldama Ravine as a shamba boy in his farm at Tumori area. He said he started working on 5th May, 2015; that he was slashing and at 5p.m, he went to Eldama Ravine town to find where the mosque is located as he is a muslim and at around 6:30p.m, he took a motorbike home as it was raining and he was involved in an accident in the motor bike and lost his phone. He said he lost consciousness and found himself in hospital where he stayed up to 8th May,2015 then he went to the farm by motor bike.
 41. Accused 2 said on 13th May,2015, he was arrested in the morning by three people who found him basking in the sun and asked for Abubakar and when he told them he did not know they asked him how he could fail to know yet he was a Muslim. He said they asked him why he had injuries and he informed them that he fell in a motorbike. He said that they informed him that he colluded with Abubakar to kill and entered the house and took a panga. He said the clothes he wore when he was involved in the motorbike accident were in the house which they took.
 42. He said that at 2 p.m, they went and showed him a mobile phone and earphones and he said he did not know. He said the lady said the phone belonged to her husband and the man said it was for his brother. He said he came to learn they were wife and the brother of the deceased and the police had informed them that they arrested him with the phone. He said that after 2 days, police officers went again and asked him if he knew Abubakar and one said that it seemed he did not know the issue and the other said they could not release him as they had been given money by the other that they released and they asked him to record statement. Accused 2 said he was new in the area.
 43. Accused 2 said on 24th May,2015, they went for him with many documents and asked him to sign but he refused but they threatened him and put pressure on his legs where there were injuries and forced him to sign the documents. He said he was taken to court the next day the 25th May,2015 for plea. He said that he has been in custody for 9 years 4 months. That he was informed that the owner of the land he was taking care of left and he has not been able to reach him. He said that the clothes found in the house he was living in were his and were stained with his blood and nothing relating to this case was found in the house he lived in. He said that he did not know the deceased.
 44. Accused 3 Bonengers Kipruto Salgong alias Abubakar gave unsworn statement. He said at the time he was arrested, he was living with his wife Saumu Yusuf and 3 children in his mother Susan Salgong's plot at Bondeni village in Eldama Ravine town where he had he had lived from August,2013. He said that he was employed by Royal Media in 2014 where he worked as sub-editor at Public Relations department. He said he had not known the deceased and he does not know the 1st accused and the 2nd accused and he came to know them when he was arraigned in court. He said that he was arrested in September,2015 by pw6 Corporal Bonface Chebuss. He said that the police officers used excessive force while arresting him



and that they were inhuman. He said none of the witnesses were known to him save for Joan Jeptoo who was prohibited from testifying by a ruling delivered on the 20th June, 2019 by Justice Murithii. He denied the charge and said the allegations against him were malicious.

Analysis And Determination.

45. The offence of murder is defined under Section 203 of the penal code and from the definition, the prosecution are required the following elements beyond reasonable doubt: -
- a. proof of death,
 - b. the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and
 - c. that the unlawful killing was with malice aforethought.

(a) Proof of death

46. The death of the accused is not disputed as the prosecution witnesses testified that the deceased's body was found floating in river Perkera with visible injuries. This was confirmed by PW4 Dr. Arafa Saleh who conducted a postmortem on the 13th May, 2015 at Eldama Ravine Sub-County Hospital mortuary on the body of the deceased Edwin Khawala Barasa and found that the body was severely decomposed with foul odour and the approximate time of death was around 2 weeks. He said that the body had multiple deep cut wounds with fracture of the bones of the face. That the skull had fractures which caused massive internal bleeding into the brain, the neck was cut and only a few muscles were attaching the head to the neck, he had fractures of the small bones of the fingers of both hands and multiple cut wounds on both ankles approximately 7 inches in diameter. He concluded that the cause of death was severe head injury, multiple fractures and severing of the neck. In view of the above, there is proof beyond reasonable doubt that the deceased died.

(b) Whether the accused persons committed the unlawful act that led to the death of the deceased.

47. None of the witnesses herein saw the accused persons kill the deceased. The prosecution, relied on circumstantial evidence to prove that the accused persons killed the deceased. For this court to base a conviction on circumstantial evidence, the prosecution must prove the following element as stated in *Abanga Alia Onyang Vs Republic Criminal Appeal No. 32 of 1990*: -

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests

- i. The circumstances from which an inference of guilt is sought to be done must be cogently and firmly established.
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused.
- iii. The circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by accused and no one else.



48. Further in the case of Deepok Sarna Vs Republic the court of Appeal stated that: -

“In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand inference of facts to be drawn from them on the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused shows be considered.

In dealing with this aspect of the problems the doctrine of benefit of doubt applies. Although there should not be any missing link in the case yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences, the court must have regard to the common cause of nature events and to human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of proved facts. In deciding the sufficiency of circumstantial evidence, for that purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt.”

49. PW 5 who was one of the Investigations Officer testified that he received information from the members of the public that the deceased was last seen with Maxwell the 1st accused herein on the evening he disappeared. on 12th May,2015 in company of the 1st accused Maxwell Kiptoo the police proceeded to Accused's 1s where they conducted a search in his house and recovered a blood-stained panga which was produced in court as exhibit.
50. Further on 13th May,2015 they got a tip off from members of public that the lost jacket and white cap belonged to accused 2 Simon Kibet alias Mustafa; they went to his home and found him with fresh visible injuries all over his body. Upon search in his house, they recovered a panga with rubber handle with blood stains, a faded blue jean trouser with blood stained and blue jeans with blood light stains and a Mobile make GT/E2222 with Imei No. 351830056554650 which was confirmed to belong to the deceased. on 13th May,2015 when Accused 2 recorded statement he said he sustained injuries from motor accident and later said he sustained injuries from an incident which occurred on 10th May,2015 at around 19:30 hrs when tried to intervene after the accused 3 Bonengers Kipruto at accosted deceased Kapdening area without provocation and attacked him with a panga and he sustained injuries during the scuffle.
51. And accused 2 confirmed that mobile phone GTE222 belonged to the deceased and he was given as a gift by Bonengers Kipruto to ensure that he does not reveal what happened to the deceased. Further at team led by Pw6 CPL Chebus proceeded to the home of accused 3 Bonengers Kipruto Salgong on 14th May,2015 and recovered a Black trouser with blood, a Panga with blood light stain and Mattress cover with light blood stain.
52. He said that Bonengers was not present during recovery and on 19th May,2015 he prepared an exhibit memo and forwarded all the exhibits including DNA specimen extract from deceased and accused 1and accused 2 plus all exhibits in exhibit store and forwarded to Nairobi for DNA forensic analysis.
53. From evidence adduced, the 1st accused Maxwell Kiptoo (Accused 1) was last seen with deceased. Accused 2 Simon Kibet had deceased's phone.



54. Mobile phone with Imei No. was 351830056554650 recovered from the 2nd accused's house was paired with mobile phone number of deceased 0708618412; further, that mobile phone was positively identified by the brother of the deceased Calestas Barasa while the Phone number of accused person were given to investigation by accused persons themselves while being interrogated.
55. The prosecution relied on last seen in respect to accused 1 where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide any explanation as to what happened. Before doing so, the court must ask the following questions:-
- i) Are the facts of this case compatible with the innocence of the accused?
 - ii) Are the facts capable of explanation upon other reasonable hypothesis than the guilt of appearance?
56. The Nigerian Case *Achie Vs State* (1993) In Nigerian case of *Ismeni Vs State* (2011) Kuktan JSC said of the latest seen doctrine:-
- “In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death and the accused is expected to provide an explanation of what happened.”
57. In the absence of any explanation by the defendant as to how the deceased met his death, the court can allow an inference that the defendant killed the deceased.
58. In this case, the evidence of PW 1 confirmed that the 1st accused was the last person seen with the deceased alive. pw1 confirmed that he left the 1st accused and the deceased having a conversation. The 1st accused did not deny that he was with the deceased that evening. Though he said they parted, he did not demonstrate by evidence that they parted while he was still alive. Further, upon search in his house, a blood-stained panga was recovered. The finding of blood-stained panga is inconsistent with his claim of innocence.
59. The evidence connecting the 2nd and 3rd accused to the murder is the evidence of PW5 and PW6 who were the investigations officers. Pw 5 and PW 6 testified that they recovered a light green jacket and a black cap a few metres from the river where the deceased's body was recovered and from the information from the members of the public, the items belonged to 2nd accused. They arrested the 2nd accused who had visible injuries which he stated on interrogation that he sustained after a scuffle between the deceased and the 3rd accused and he tried to intervene but sustained injuries in the process. Further, Accused 2 was found in possession of a mobile phone and ear piece which were confirmed to belong to the deceased. That upon interrogation he stated that he received the items as a gift form the 3rd accused so as not to reveal what happened and this information led to the arrest of the 3rd accused. In view of the foregoing, I find that the 2nd and 3rd accused persons participated in the killing of the deceased herein.

(c)Proof of malice aforethought

60. Section 206 of the *Penal Code* provide as follows: -

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.
61. PW3 Dr. Arafa Saleh who performed postmortem on the body of the deceased found that serious injuries were inflicted on the deceased which resulted in the death on the deceased. From the serious injuries inflicted of the deceased, there is no doubt that the accused persons knew that the injuries would cause the death of the deceased. Beside inflicting serious injurious on the deceased, the accused persons went further to conceal the act by dumping the body in river Perkerra. From the foregoing, there is sufficient proof that the three accused persons intended to kill the deceased and they proceeded to execute the act of inflicted fatal injuries on the deceased.
62. In view of the above, I find that the prosecution proved the three ingredients for the offence of murder contrary to Section 203 of the Penal Code and to find each accused person guilty and I convict each accused accordingly.

Final Ordres.

63. Accused 1,2 and 3 are jointly found guilty and convicted of the offence of murder contrary to section 203 as read with section 204 of the penal code
64. Right of appeal 14 days

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 22ND DAY OF MAY 2025.

RACHEL NGETICH

JUDGE

