



**Republic v Chebunge & 2 others (Criminal Case 30 of 2023)
[2025] KEHC 5916 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL CASE 30 OF 2023**

**RB NGETICH, J
MAY 8, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

MILCAH CHERUTICH CHEBUNGE 1ST ACCUSED

SIMON LOTER AKENOTU 2ND ACCUSED

DANCAN KIBIWOTT 3RD ACCUSED

JUDGMENT

1. The accused persons Milcah Cherutich Chebunge, Simon Loter Akenotu and Dancan Kibiwott have been 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 on the 20th day of May, 2021 at Mogotio Township, Mogotio Location in Mogotio Sub- County, the accused persons jointly, willfully and unlawfully murdered Charles Keitany.
2. They all denied the charge and the matter was set down for full trial with the prosecution availing a total of 7 witnesses in support of the charge. PW 1 and PW 2 testified that on the 19th April,2023. Thereafter, the prosecution counsel Ms. Ratemo informed the court that they intend to review charges against the 1st accused and sought a mention date which was then fixed for 22nd May,2023.
3. When the matter came up for mention on the 22nd May,2023, the 1st accused could not be availed to court due to her mental health status and the matter was further fixed for mention on the 29th May, 2023. On the 29th May,2023, the prosecution counsel Ms. Ratemo informed the court that they had filed Nolle Prosequere against the 1st accused. She stated that upon the review of the file, they found that they do not have sufficient evidence against the 1st Accused. She prayed that they be allowed to enter



Nolle Prosequere against the 1st Accused. The court allowed the state to enter Nolle Prosequere against the 1st accused and she was thus discharged.

Prosecution Evidence.

4. PW1 David Sitet testified that on 20th May, 2021 at around midnight, he was at home when he heard noises/ screams then heard someone knock on the door calling Cynthia a daughter of 1st accused who was sleeping in his house as she was his daughter's friend and they were neighbor's. He said that Cynthia stepped out and he heard the 1st accused Milka asking Cynthia where her child was. He said he joined people searching the child and followed Milka who went towards the river. He said that when she approached the river she kept quiet suddenly and then he heard screams saying the child has been found. He went to where the screams were emanating from.
5. He said that there were many people who had torches and he saw Milka holding the child and looking excited. He said Milka did not explain to him how she got the child and that he advised her to go to make a report to the police and he assisted her get a bicycle and she went with the child to Mogotio police station and then took the child to Soin Hospital and went home.
6. PW2 Lona Chesang testified that Cynthia who is a child's neighbor used to study and sleep with her in her home and on 20th May, 2021, at around midnight, milka who is Cynthia's mother called Cynthia asking about her 3 year old child Faith. She said Cynthia went out and she later saw people heading to Katorongot and after a short while, she heard screams from the side of Katorongot saying the child had been found. She went there and saw a person bleeding. She said there were security lights but she did not identify the person. She said Milka was already holding the child and there were many people. She said that she only knew Dan and she heard people calling him Dan at that time. She said milka was taken to police station to report and she remained there.
7. She further stated that they were told at police station that the child was okay and she recorded witness statement at Mogotio. She denied knowing a watchman called Simion and said they were informed that watchman had hit the person. She said Dan had a whip and that he hit the person once and stopped after being advised to stop. She said that Dan is accused 3 and that she did not know Simon. She said she inquired at the scene who had hit the person and they said it was watchman. She said she saw the accused Dan hit the deceased once but was asked to stop. She said the people at the scene were about 10 and it was a bit dark.
8. PW3 Gladys Chebet testified that on 20th May, 2021, at night she was asleep in her house when she heard screams from outside. She woke up and peeped through the window and realized that it was her neighbour Milka screaming saying, "my child".
9. She went out and found David and his wife called mama Chepkorir outside near her door and she inquired from them why they were screaming and they said Milka's child called Faith was lost. She said that she went for her phone and came out to assist look for the child and they divided themselves and moved to directions but they did not get the child. She said that each of them was using their mobile torch and that the child was found with the deceased and at the scene David suggested that they take the child and the mother to hospital. She said they went back to the scene and found the deceased bleeding and the watchman said he had attempted to jump over the fence. She said she saw the deceased bleeding and that the watchman threw a whip and the Dan got it and tried to hit the deceased but she stopped him. She identified the whip in court and said that watchman is accused 2 while Dan is accused 3. She said she left the scene as the deceased was being taken to Hospital.
10. She testified that Milka arrived while the deceased was still there and she said that the child will be taken back to hospital the next day. She said that she did not know whether the deceased was beaten after she



had left and that the next day, she saw the deceased being carried with a blanket to a land cruiser and that she had not known the deceased before the incident.

11. PW4 Mathew Elijah Keitany who is deceased's brother attended postmortem at Eldama Ravine Hospital where he identified the body of Charles Kaitany to PW5 to doctor Davis Mangoli who did postmortem examination at Nakuru County referral Hospital and found that the deceased died as a result of head injury with associated subdural haematoma (blood clot) and cerebral oedema (brain swelling) secondary to blunt head trauma. He produced the postmortem report as exhibit 2.
12. PW6 Cynthia Chebet testified that on 19th March, 2021, she had gone to a neighbor's house called Diana Chepkorir to sleep and at around midnight, her mother went to ask her about her sister Faith chepkemoi aged 3 years who her mother had left sleeping in the house and went to a nearby bar.
13. She said as they searched the child, a neighbor informed them the 3rd accused Dan had passed there and they went to Dan's place and found that Dan had not taken the child. That Accused 2 who was a watchman went to check towards the river and he saw a naked person covering himself with a blanket and on going to check, they found the person with the child. She said they used light from torches from mobile phones. She said her mother took the child and rushed her to hospital as she remained where the person found with the child was. She said that the person was removed from where he was by Accused 3 with assistance of other people and taken to where there was light and she saw that the person's trouser was down and that the child had no trouser.
14. He said that there was security light in front of their home and she saw the deceased being beaten by accused 2 with a black electric cable. She said she could not recall where Accused 3 hit the person but she saw him hit the person. She said that she went to sleep and woke up at 6a.m, passed where the person was and found he was still there though he had passed on. She said that she saw accused 2 hit the person then Accused hit him too.
15. PW7 No. 110883 PC Gregory Monari who was attached to DCI Mogotio testified that on 20th May, 2020, at 7: 30a.m, he received report of a person who had been killed near Mogotio Town. They went to the scene and found the body of Charles Keitany which was half naked covered with a green blanket and saw blood at a distance of about 200 metres. He said that the deceased's body had injuries on the head and they took the body to Eldama Ravine mortuary and from there he recorded witness statements. He said from the statements, on 19th May, 2020 Accused 1 Milka left a 3 year old child alone in the house and went to stay with one Simion in Kericho bar 150m away from Milka's house and at midnight, after a search, neighbours found the child with accused and Simon hit the deceased on the head then someone else took the cane from Simon and continued beating the deceased. He said that the witnesses said the 3rd accused and the 2nd accused Simon continued beating the deceased.
16. He said they arrested Accused 1 Milka, Accused 2 Duncan and Accused 3 Simon and they recovered a cane from Milka. He said they arrested Accused 2 Simon from Kericho bar while Accused 3 Dancun was taken to the police station by relatives. He said that Simon was accused 1 while Dancun is accused 2. He said that they found the cane under Milka's bed.
17. Upon close of prosecution case, by ruling delivered on the 16th September, 2024, the court found that a prima facie case had been established against accused 2 and Accused 3 and were placed on their defence in accordance with Section 306(2) of the criminal procedure code.

Accused's Defence Case.

18. The 2nd accused Simon Loter Kenoti in his defence gave sworn statement and denied the charges against him. He stated that in the evening of 19th May, 2021, he reported on duty at 5P.m. He said the bar was



closed at 8 p.m as there was curfew due to corona. He said before the bar was closed, he had ordered customers to pay for their drinks and leave and his boss went to count the money and while getting outside, he found the 1st accused Milka Cherutich chewing miraa. He said that he inquired from Milka why she was not going to her house and she said she should be left to chew Miraa and at 11 p.m., she went to her house to check her child and found the child sleeping. She went back where she stayed up to midnight and went to her house after her miraa got finished.

19. He said he heard the 1st accused scream saying, “soldier my child has been stolen”. He went to her house and found many people and he confirmed that the child was missing. He said that they divided themselves in 4 groups to look for the child and one group found a person who was covered with a blanket with the child and they took the child by force and handed over the child to the mother and he went back to work. He said the person who was found with the child was taken to Milka and he did not know what transpired there. He worked up to 5a.m and then went home and in the morning, he was informed that the person had died. He said the DCI went and arrested him at around 5 p.m. He said the stick produced in court fell at the time they were struggling to get the child from the person. He said that he was at work when milka took the child to hospital. He said he did not see accused 3 as they had divided themselves into groups. He said that Milka had the stick and that he had not seen the deceased. That the deceased was escorted by many people and he had not been beaten by the people when he left. He further stated that the deceased said that he took the child because Milka had his debt. He denied beating anyone and said his stick fell and Milka collected it and that he did not know when the deceased died and he was not present when the police visited the scene. He denied beating the deceased and said he did not see Lona Chesang.
20. Accused 3 Dancan Kibiwott denied the charge and said on 19th May,2021, he went to work during the day, returned at 5:30 pm, and slept at 7 p.m because he was tired. He said at around 1/2a.m, Milka went to knock his door and said her child was missing. He said he ignored her because she used to have mental illness but shortly, he heard screams and he went to check what was happening and he found many people and one person was seated down. He said he was informed the person had taken the child and the child had been taken to hospital and they were waiting for police to take the person. He said the person used to work in a hotel. He said he told people not to beat him and went to work and the next day he went to plough land at Mochongoi and after 3 days, he went to the police station and was placed in the cells. He said the police did not record a statement from him.
21. He said when he woke up in the morning, he did not go to where the deceased was and he did not get any report. He said that Milka’s daughter called Cynthia was there. He said that he did not know Evaline Ekai nor neither Joseph Kutuyi Okutoto. He said he did not see Accused 2 when he arrived at the scene. He said he did not touch the whip/stick produced in court. He said he went to mochongoi police station when police called him.

Submissions By Defence Counsel.

22. The defence counsel submits that the prosecution must prove the following three ingredients of offence of murder beyond reasonable doubt:-
 - i. The death of the deceased and the cause of death.
 - ii. That the accused committed the unlawful act which caused the death of the deceased.
 - iii. That the accused had the malice aforethought, means rea and/or the intention to kill.



23. The defence counsel submit that there is no dispute that the deceased died as a result of injuries he sustained from the assault meted on him by the mob as has been enunciated by the postmortem report that the deceased died as a result of injuries inflicted on him.
24. On whether the accused committed the unlawful act which caused the death of the deceased, the defence counsel submit that it is manifestly clear that the deceased was assaulted by many people and/or a mob. That further, nobody saw the 2nd accused hitting the deceased as all the witnesses arrived at the scene and found the deceased bleeding on the forehead and the 2nd accused explained that he had sustained the injury while trying to scale a fence. They submit that this piece of evidence was not controverted by the prosecution.
25. That the allegation that the 2nd accused hit the deceased at the scene and /or near the river is untenable in that the witnesses did not see him hit the deceased. That it is clear that there were no lights where the deceased was hence the place was dark and it could not have been possible that the witnesses saw him clearly hitting the deceased. That further, the deceased was surrounded by many people hence it could not have been possible for the witnesses to see the accused hitting the deceased.
26. They submit that one wonders how the witnesses were able to see the black electric cane used to hit the deceased in pitch darkness, in essence the circumstance prevailing at the time were not conducive for positive identification this is akin to dock identification.
27. That it is manifestly clear that the evidence against the accused are hearsay in that the witness state that they were informed that soldier had hit the deceased yet none of them saw him hitting the deceased, at any rate, he resumed his guard duties when the deceased was moved near accused 1's house and that is why PW1 did not find him when they came back from the hospital.
28. As regards the 3rd accused, counsel submit that there is evidence that he was drunk and asleep in his house during the search and only came after the deceased had been moved near Milka's house. Hence, the allegation by PW3 that he was the one who ordered the crowd to split into two and/or he went to Posta with her and/or that the 2nd accused threw a whip to him at the river is unfounded.
29. That the assertion that the 3rd accused was not part of the search and/or did not appear at the scene where the deceased was first found is corroborated by the evidence of PW6 who states that the 3rd accused came later after the deceased had been brought near her mother's.
30. Counsel submit that there is material contradictory evidence as to whether the 3rd accused hit the deceased or not, PW2, PW3 and PW6 allege that the 3rd accused hit the deceased once and /or attempted to hit him and they stopped him. PW6 goes ahead to contradict herself and/or controvert the evidence of PW2 and PW3 and herself by stating that the 3rd accused did not beat and/or hit the deceased.
31. That this contradictory evidence raises doubt as to whether the 3rd accused hit the deceased or not and this doubt must be credited to him; that it cannot be said with certainty that the 3rd accused hit the deceased in that he was not at the river where the deceased was found and had also left the 2nd scene when PW1 and Milka arrived.
32. That it is also manifestly clear that PW2 did not positively identify the 3rd accused as she alleges that she was informed that was Dan yet she had not known him before and consequently, her evidence that the 3rd accused had hit the deceased is unfounded as he was not at the river, but in his house asleep. That at any rate, there was no Identification parade carried out to identify those who had assaulted the deceased.



33. That it is apparent from the proceedings that the witnesses assumed that just because soldier had a whip then he must have whipped and/or killed the deceased yet there were overwhelming evidence to the contrary and it is therefore their submission that the accused did not cause the death of the deceased.
34. On whether accused had malice aforethought and/or the intention to kill, counsel submit that this ingredient does not obtain in the present case and relied on Section 206 of the *Penal Code* which gives the instances when malice aforethought is established. He submits that the 2nd accused had responded to the screams of Milka about her missing child and offered to assist in the search and found the child and gave to her while the 3rd accused was woken over the missing child and he went to the 2nd scene later while drunk and recognized the deceased and requested the people to stop beating him.
35. Counsel argues that there is no evidence whatsoever tendered to the effect that the 2nd and 3rd accused met somewhere in Mogotio and planned to murder the deceased and executed it or in other words there is no malice afterthought and/or the intention to kill which has been exhibited herein by the prosecution.
36. Further that there is evidence that the deceased was assaulted by many people and exact number is unknown hence it was a case of mob justice. That the accused did not have any common intention to murder the deceased and did not murder him and relied on the case of NJOGU V REPUBLIC (2007) 2klr,123, where the court of Appeal dealt with the issue of mob justice and reduced the charge to manslaughter.
37. In conclusion, counsel submit that the prosecution have failed to prove that the accused murdered the deceased and urge this court to acquit them under section 215 of the CPC as evidence presented by the prosecution are insufficient to sustain a charge of murder and/or manslaughter.

Analysis And Determination.

38. Section 203 defines the offence of murder and requires proof of the following elements beyond reasonable doubt
 - a. proof of death, the cause of that death,
 - b. 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.
39. The ingredients of murder were explained in the case of *Roba Galma Wario vs. Republic* [2015] eKLR where the court 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.”

 - (a) proof of death
40. There is no doubt the deceased died. From the evidence of PW5, PW6 and the investigations officer PW 7, there is no doubt that the deceased died. Pw5 the doctor who performed the postmortem formed opinion that the cause of death was head injury with associated subdural haematoma (blood clot) and cerebral oedema (brain swelling) secondary to blunt head trauma. He produced the postmortem report as exhibit 2.



- (b) 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
41. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, in criminal cases, the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:
- “The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”
42. Lord Denning in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 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 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.”
43. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness such as an asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence.
44. PW 3 and PW 4 said that they saw the 3rd accused hitting the deceased once with a whip which he picked upon being dropped by accused 2. PW 6 who was also in the scene testified that he saw both accused persons assault the deceased with a whip. The 1st accused admitted in his defence that he had a whip at the scene which he was using in his work as a guard. He said it dropped an it was picked by 1st accused Milka and police recovered from her.
45. Having considered the evidence before me, there is no doubt that the 2nd and 3rd accused whipped the deceased and the deceased succumbed to the injuries inflicted on him.
- (c) Whether the accused had malice aforethought,
46. Section 206 of the *Penal Code* provide that malice aforethought is deemed to be established by evidence when any of the following circumstances are proved: -
- a. An intention to cause the death of another.
 - b. An intention to cause grievous harm to another.



- c. Knowledge that the act or omission causing death will probably cause death or grievous harm to someone, whether that is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
 - d. An intent to commit a felony.
 - e. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.
47. From post mortem report, the deceased sustained severe injuries which caused his death. The beating was as a result of the deceased being found with a child. His act annoyed the people who found him with the child. They suspected he had defiled the child. The people who beat the deceased who included the 2nd and 3rd accused acted out of anger, evidence adduced do not demonstrate premeditation of the act; they acted in the heat of passion to defend the minor child; the prosecution did not therefore prove the element of malice aforethought on part of the accused persons. I find the accused persons guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the [Penal Code](#). It is hereby so ordered.

Final Orders.

48. Accused 2 and accused 3 are hereby jointly convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the penal code.
49. Right of appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 8TH DAY OF MAY 2025.

RACHEL NGETICH

JUDGE

