



**Republic v Kirui (Criminal Case E032 of 2020)
[2025] KEHC 8639 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E032 OF 2020
HI ONG'UDI, J
JUNE 19, 2025**

BETWEEN

REPUBLIC STATE

AND

JOHN KIPLANGAT KIRUI ALIAS GILBERT KIRUI ACCUSED

JUDGMENT

1. John Kiplangat Kirui alias Gilbert Kirui hereinafter referred to as the accused is charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars being that the accused on 19th September, 2020 at Chikamba Village in Emitik location, Kuresoi South sub-county jointly with others not before court murdered Faith Rono.
2. The accused denied the charge and the case proceeded to full hearing with the prosecution calling four (4) witnesses. The accused gave a sworn statement of defence without calling any witnesses.
3. Dickson Kipngeno Mutai – PW1 testified that on 19th September, 2020 at around 7.30-8pm while in Chikamba he heard his in-law screaming saying:

“Usiniuwe unisamehe Gilbert”

He went to the scene which was at Gilbert’s gate and met the accused, Shadrack and Ben. It is Shadrack who was assaulting the deceased while Gilbert stood beside her. Shadrack was armed with a panga and a stick. He told Shadrack to stop beating the deceased. As he bent to pick the deceased, Gilbert hit him and he took off to his home and informed his wife.

4. The next morning, he went to the home of Bernard Mutai (deceased’s brother) where he found the deceased in a bad state, with injuries all over her body and she was not talking. She was taken to Olenguruone hospital but was pronounced dead on arrival.



5. In cross examination he said the accused is called Gilbert, and he is a neighbor and a police officer. He further stated that Shadrack Korir was beating the deceased for messing with his maize. He gave further names of Kipngetch Samuel Chepkwony, Heborn Langat and Joel as people who were at the scene just standing.
6. Bernard Chemjor Mutai PW2 stated that on 19th September, 2020 8-9 pm he was woken up by his wife because of noise from the neighbourhood. Accompanied by his wife they went to the scene where they met Samuel assaulting the deceased with a cyprus stick while Shadrack and the accused (Gilbert) just stood by. She asked them to stop beating her. His wife took the deceased to his house. She had injuries all over her body with torn clothes.
7. The same people followed them asking where the deceased was going to sleep. Reaching the house, the deceased told them she wanted to sleep. Later at 1.00am she informed them that she had been beaten by Sammy, Shadrack and Gilbert. The next morning, they arranged and took her to hospital accompanied by Winnie, Dickson and Purity. They were later informed of her death. The witness also told the court that the accused is known as Gilbert.
8. In cross-examination he said he had used the D-light carried by his wife to see what was going on that night. He insisted that the accused was among those present at the scene but he did not see him assault the deceased.
9. Wesley Kipkemoi Langat – PW3 stated that on 19th September, 2020 around 9.30pm he heard screams and went to the scene and found people assaulting the deceased. The scene was not far from the house of Shadrack: The person assaulting the deceased was Samuel Chepkong while Shadrack and Gilbert Kirui were present. They took the deceased to Bernard Mutai's (a neighbor) house. The witness was with Dominic. The next morning, he went to check on the deceased who was talking though she had injuries. She was even asking for food. Later he found her bleeding from her mouth and her state had worsened. She was taken to hospital and later died. He explained that Samuel was assaulting the deceased with a Cyprus stick while Shadrack was saying he had beaten her till his hands were in pain. He identified the accused as Gilbert Kirui.
10. In cross examination he said he did not see the accused beat the deceased. He however knew Samuel Chepkong Kipngetch who is his neighbor before this incident. He confirmed seeing him at home the morning he came to court to testify. He said Samuel used a Cyprus stick and not walking stick to beat the deceased.
11. Dr. Titus Ngulungu – PW4 who conducted the post mortem stated that he did the same on 5th October, 2020 at Olenguruone hospital. The body was identified by Charles Rono (husband to the deceased) who never testified. PW4 found several injuries on the deceased's brain, face, hands, legs, thighs, back of head; collapsed lungs, swelling on the entry to the vagina canal. The cause of death was therefore head injury, brain contusions as a result of blunt head trauma. The pubic hair, stomach contents and finger nail samples were handed to the police but he never received any results. The probable weapon used was a blunt object.
12. In his sworn statement of defence the accused stated that he is an Administrative Police Constable Force No. 2005019729, and before this incident he was based at Kabartoyo town Baringo North East HQ. He gave his ID Card No. as 24394518 in his names as stated above. Its his evidence that Gilbert Kiprotich Kirui is his elder brother who lives in Chikamba Village Emitik Location Olenguruone division. Further that he lives in Kipkongor Village Ararwet location in Kiptangich. Further that Chikamba is 35 km from Kipkongor village.



13. He denied the charge, nor being at the scene of incident. It was his evidence that during the time of incident he was actively involved in the Government's implementation of the Corona virus policies and was based in Kabartonjo town. He denied knowing the deceased nor being Gilbert, Kirui.
14. He stated that he was arrested from his home in Kipkongor village when he was off duty and taken to Kiptangich police station. He produced the document dated 25th October, 2020 (DEXB1) granting him leave. He said he learnt of the incident on 25th September, 2020 from someone at the station and when he inquired from his brother he never gave him any response.
15. In cross examination he insisted that his official name is John Kiplangat Kirui and he has never used any other name. He had been in the Police Force since 2005 but is now on interdiction. He had only visited his brother Gilbert in 2005 after his pass out parade. He denied knowledge of PW1, PW2 and PW3. He did not have any document/documents to show that he was on duty on the date of incident. He said Gilbert ought to have been his witness but the said Gilbert changed his mind on the hearing date.
16. At the close of the defence case, counsel for both parties elected not to file any submissions. They both relied on their earlier submissions after the close of the prosecution case.
17. The prosecution's submissions were filed by M/s Emma Okok and are dated 13th August, 2024. Counsel submitted that from the evidence of PW1, PW2 and PW3 the accused had been placed at the scene. She thus requested the court to invoke the doctrine of common intention as provided for under sections 20 and 21 of the *Penal Code* and section 10 of the *Evidence Act*.
18. In support thereof she relied on the case of Republic V Francis Muturi & another [2021] eKLR where it was stated:

“It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused person, their actions, and the omissions of any of them to disassociate himself from the assault. It can develop in the course of events, though it might not have been present from the start. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death”

19. It was her further submission that the deceased made a dying declaration to PW2. On this she relied on section 33(a) of the *Evidence Act* which provides:

Section 33: Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible in the following cases:

- a. “Relating to the cause of death

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted to his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question”.



20. Counsel referred to PW2's Evidence where he said the deceased had told him that she had been beaten by Sammy, Shadrack and the accused. PW2 is a brother to the deceased. Counsel thus submitted that the accused participated in assaulting the deceased which led to her death.
21. On whether the accused had malice aforethought counsel contended that the evidence shows that the accused and his accomplices had an intention of killing the deceased. That they did this by causing her serious injuries which led to her death.
22. Mr. Kipkoech B. Ng'etich filed the accused's submissions dated 16th August, 2024. In his introduction he referred to the case of Republic V Silas Magongo Onzere alias Fredrick Namema [2017] eKLR where it was stated:

“In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused's guilt rests solely on the prosecution throughout the trial”.

Also see Abdud Ngobi V Uganda S.C Criminal Appeal No. 10 of 1991.

23. He outlined the ingredients required in proving a charge of murder. On this he referred to the case of Anthony Ndegwa Ngari V Republic [2014] eKLR. He confirmed that the defence has no issue with the fact of the death of the deceased (PEXB1)
24. On whether the accused committed the offence counsel referred to the evidence of PW1, PW2 and PW3 none of whom said they saw the accused assaulting the deceased. It was their evidence that the accused was only standing on the side at the scene and never assaulted the deceased.
25. On whether the accused had any intention of killing the deceased counsel referred to section 206 of the Penal Code which defines malice aforethought and when it can be said to have been established. He also relied on the following cases on the same issue.
 - i. Republic V Juma Kituko Mwambegu [2020] eKLR
 - ii. Rex V Tubere s/o Ochen (1949) IZ EACA 63
 - iii. Hyam V DPP [1974] A C
 - iv. Ernest Asami Bwire Abanga alias Onyango V Republic (CACRA No. 32 of 1990).
26. Relying on the above provisions and decisions counsel submitted that the evidence on record does not show that the accused exhibited any intention to kill the deceased person.
27. Lastly that failure by the prosecution to call the Investigating Officer to testify did a blow to its case. Reference was made to the case of Beumazi Ngoro Chaila V Republic [2016] eKLR where the court stated inter alia as follows:

“In *Bukenya & others V Uganda* [1972] E.A 49 the former East Africa Court of Appeal held that, the prosecution has a duty to call all witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had a duty to call any witness whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference (sic) that if their evidence had been called, it would have been adverse to the prosecution case. This proposition which we agree with entirely was, however, espoused in the context where the evidence was barely adequate. These propositions must also be seen in light of section 143 of the Evidence Act which provides that, in the absence of any requirement by provision



of the law, no particular number of witnesses shall be required for the proof of any fact. In this case, there was no paucity of evidence”.

28. He further submitted that the exception to section 143 of the *Evidence Act* was enumerated in the case of *John Gaiti Wangari V Republic* [2013] eKLR where the court quoted the case of *Michael Kinuthia Muturi V Republic* [2011] eKLR and stated that

“There will be instances, of course, when the failure to call some witnesses will attract adverse inference and that is when the evidence on record is barely sufficient to prove the case”.

Counsel argued that the prosecution failed to produce exhibits, and call crucial witnesses in this case. That the evidence adduced was severely lacking and barely adequate to prove a case as grave as murder.

Analysis and determination

29. Having carefully considered the evidence on record, submissions by both counsel, the law and cited decisions I find the issue for determination to be whether the charge of murder has been proved against the accused. Section 203 of the penal code defines murder as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

The sentence for murder is provided under section 204 of the penal code which states:

“Any person convicted of murder shall be sentenced to death”

30. From the definition of murder, the prosecution has a duty to prove the following key ingredients for the charge to stand:
- i. The death of the victim and the cause of death
 - ii. That the accused committed an unlawful act which caused the death (actus reus)
 - iii. That the accused had intention/malice aforethought (mens rea) to kill while committing the murder
31. I now proceed to assess the evidence and submissions to satisfy myself as to whether or not the above ingredients have been proved by the prosecution

The fact and cause of death

32. From the evidence of PW1-PW4 it is not disputed that the victim herein ‘Faith Rono’ is deceased. Before the postmortem was conducted her brother (PW2) identified the body to the pathologist (PW4). PW4 found the cause of death of the deceased to be a head injury, brain contusions as a result of blunt head trauma. This was supported by the evidence of PW1 and PW2 who said the deceased had serious injuries all over the body. I therefore find that the cause of the deceased’s death was not a natural one.

Whether it is the accused who committed the unlawful act which caused the deceased’s death.

33. The evidence pointing out to the accused as having been involved in the murder is that of PW1, PW2, and PW3. They also refer to him as “Gilbert Kirui” a name the accused has refuted belongs to him. None of the 3 witnesses identified him as John Kiplangat Kirui. The charge sheet bears the name Gilbert Kirui as his alias name. In his defence the accused denied being known as Gilbert Kirui and gave



- an I.D number for his known names. The ID Card was not availed in court but he instead produced an original copy (DEXB1) of a document he called “Marching order” showing his names as John Kiplangat Kirui. Does this rule out his having an alias name?
34. The accused further said the name Gilbert Kirui belongs to his elder brother who had initially agreed to come and testify on his behalf but changed his mind at the last minute. Apparently, this issue of names not only came up during the defence hearing. In cross examination the issue came up and the witnesses (PW1, PW2 and PW3) who claimed to be the accused’s neighbours said they knew him as Gilbert Kirui.
 35. In his defence the accused said his elder brother Gilbert Kiprotich Kirui is the one who lives in Chikamba village Emitik location of Olenguruone division. His evidence is that he is a resident of Kipkongor village Aramwet location Kiptangich, which is 35 km from Chikamba.
 36. This issue remains a mystery because the police who arrested the accused and even the investigating officer never testified, despite the several opportunities availed to them to do so.
 37. PW1 testified that when he heard screams he rushed to the scene which was at the house/gate of the accused. There he met three (3) persons namely accused, Shadrack and Ben. That the person he found assaulting the deceased was Shadrack, while the accused stood beside the deceased. Further that Shadrack was armed with a panga and a stick. He did not say what Shadrack was using to assault the deceased. He did not also state whether the accused was armed with anything though he said the accused hit him on the head.
 38. In cross examination he said he also saw Joel, Hesbon Langat at the scene and they were just standing by.
 39. PW1 testified that the scene was at the house/gate of the accused while PW2 and PW3 said the scene was near Shadrack’s house. It is not clear where the actual scene was from the evidence of the witnesses.
 40. PW1 also said the person who was beating the deceased was Shadrack while Ben, accused, Joel and Hesbon Langat only stood by doing nothing. On the other hand, PW2 said it was Samuel who was assaulting the deceased while Shadrack and accused stood by. Further it was PW3’s evidence that when he went to the scene he found people assaulting the deceased. Later he said it was Samuel Chepkwony Kipng’etich who was assaulting the deceased, while the accused stood by. He further stated that Shadrack was saying that he had beaten the deceased until his hands were in pain.
 41. All these witnesses PW1 – PW3 said they did not see the accused assault the deceased at all. That he just stood there as did Joel, Ben and Hesbon Langat. It is therefore not clear neither was it explained why Nelson Langat, Joel, Ben and Hesbon as by standers were never arrested as their fellow by stander (accused) was arrested and charged. Furthermore, thy were never called as witnesses.
 42. Secondly the prosecution did not explain why Shadrack and Samuel Chepkwony have never been arrested nor charged, yet PW1, PW2 and PW3 clearly said they witnessed them assaulting the deceased. Was the accused only arrested and charged as a cover up to show that the police had done something? In his evidence PW3 (Wesley) told the court he knew Samuel Chepkwony Kipng’etich who is one of those alleged to have assaulted the deceased. He further stated that the said Samuel was his neighbour and he had left him at his home on the day he testified in court. He had also seen Shadrack Korir at his home that morning of the day he testified in court. The question still lingering in the court’s mind is why Samuel and Shadrack have never been arrested and charged if the evidence of PW1 – PW3 is anything to go by.
 43. Under the *Evidence Act*, it is clearly stated on whom the burden of proof lies. The following provisions of the said Act state as follows:



Section 107: Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

Section 108: Incidence of burden

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person

44. The accused raised an alibi defence and also said the alias name used in the charge sheet belongs to his elder brother. With the contradictory evidence by the prosecution witnesses, I find that the accused's alibi defence has not been displaced. Secondly the prosecution has not rebutted the defence that the accused's name is not Gilbert Kirui but John Kiplangat Kirui. Who then is the Gilbert Kirui who according to the prosecution committed this offence? Is it true that Gilbert Kirui is an elder brother to the accused? Did the police ever do anything on this claim to rebut the accused's claims? The answer is NO.
45. The above being the position plus the many loopholes already pointed out above I find the charge against the accused not proved beyond reasonable doubt. For my part I find him not guilty and acquit him under section 322(1) of the *Criminal Procedure Code*. He shall be released unless lawfully held under a separate warrant.
46. Orders accordingly

DELIVERED, DATED SIGNED THIS 19TH DAY OF JUNE, 2025 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

