



REPUBLIC OF KENYA



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**Republic v Kipchirchir (Criminal Case 70 of 2016)
[2025] KEHC 7754 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 70 OF 2016
RN NYAKUNDI, J
JUNE 4, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

KIPKETER KIPCHIRCHIR ACCUSED

JUDGMENT

1. Kipketer Kipchirchir is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on 5th October 2016 at Kameza area in Keiyo North County within Elgeiyo-Marakwet County, murdered Sammy Kimutai.
2. The subject pleaded not guilty to the Information. The prosecution called four (4) witnesses to establish a prima facie case against the subject who gave his unsworn testimony denying any involvement in the death of the victim. The lead counsel for the state was Mr. Mark Mugun whereas the accused was represented by Mr. Kebenei.
3. In establishing the ingredients of the offence of murder contrary to section 203 as read with section 204 of the Penal code, the prosecution anchored its case on the testimonies of four witnesses whose summary is as hereunder:

The Prosecution's case summary

4. PW1: APC SALEH KIMUTAI testified that he is an officer attached with the Administration Police Service. He was also the deceased's brother. Before proceeding on his furlough on 5th October 2016, he recalled calling a staff at Kessus Forest Station asking whether he could get a permit for collecting firewood. He was notified that he could obtain the permit and could collect it the following day. When he went to collect the permit, he was asked for Kshs. 10,000 which was allegedly the usual fee for a lorry. They agreed that since Saleh was not in possession of a lorry, his tractor would collect the firewood



in two trips. After striking that accord, he was then instructed to go to Kameza Forest to collect the firewood, to which he swiftly dispatched their tractor driver. When he got to the forest, there initially was hesitation in allowing him into the forest but after the forest rangers talked amongst themselves, he was allowed inside to harvest the firewood. They harvested firewood that was not enough to meet the covenanted weight and could be carted away in one trip, instead of the two trips they had covenanted. He asked for a receipt but one of the rangers stated that she would send it through a bodaboda rider. Despite not obtaining the receipt, he directed his workers to load the tractor with the firewood as soon as the foresters left. He directed the workers on where to offload the cargo then called his brother, the deceased, to bring them lunch. The deceased did as was requested and after lunch, went away with Saleh's wife on board a motor cycle. Shortly thereafter, the tractor driver came back to the site but because they could not load again (owing to the front tyre running flat and the rear tyre leaking) they agreed to postpone the exercise to the following day. The rest of the loaders boarded the tractor and headed home.

5. On their way home, they bumped into two forest rangers in uniform (one of whom was the accused and the other DW3) who inquired about a tractor that had accessed the forest illegally. He admitted that he deceived the forest rangers that he had only seen a tractor belonging to a Mr. Awindos. The forest rangers went their way and shortly thereafter, his tractor driver came back again. The driver wanted to stop the tractor but as soon as he noticed this, this witness (PW1") ordered him not to stop. He tried to go but noticed that the accused was ordering the tractor driver not to move. He admitted that the accused was forced to point his gun at the driver when the driver became uncooperative. One of the forest rangers drove their vehicle and blocked the tractor from moving. The deceased, who was riding a motor cycle was then sandwiched between the tractor and the ranger's cars. He then saw the accused approach his deceased brother and his pillion passenger, take the deceased's helmet off. San argument ensued shortly thereafter between the deceased and the accused. The accused then took several steps back and fired the round in the air. He then saw the accused fire the second round at the deceased after the deceased failed to pull back. As soon as he realised that his brother was shot, Swaleh jumped at the weapon and threw down the magazine. They then struggled for the gun and as they were doing so, he was shot on the inner thigh. The accused then left the gun with him and ran away. Members of the public who had by that time started assembling at the scene of crime wanted to assault the accused but Swaleh intervened. The rest of the rangers who had taken off after the shots were fired were then called back. They came back in the Ranger's van and took him and the deceased and Swaleh for treatment. The deceased had by then died.
6. In cross examination, he admitted that when they were in the forest and were stopped by the accused and his uniformed colleague, they had carried pangas and a power saw. He admitted that they had cut down massive trees and that the tractor had already carted away the first load. As a police officer himself, he said that he was very much aware of the need to comply when a uniformed police officer stops you. The deceased was hesitant in complying with the accused person and his colleague's order to stop. He admitted that he had not been issued with neither a receipt for the money he gave out to a KFS staff nor an actual permit to lumber trees and harvest firewood.
7. The session judge Hon. E. Ogola was transferred at this stage and for that reason I took over the proceedings and explained the provisions of section 200 of the CPC to the accused, who elected not to recall witnesses. The remaining witnesses testified as follows:
8. PW2: PHYLLIS KIMUTAI testified that she attended the post-mortem and identified the body of the deceased.
9. PW3: EDWIN KANDIE told the court that on 05/10/2016, he was at home when Saleh Kimutai (PW1) asked whether he could hire him to drive a tractor. He agreed to do it at a fee of Kshs. 400



and then drove the tractor to Kameza Forest station. On board, he carried 5 young men. PW1 then joined them later, riding a motor cycle and immediately went to the forest station. When he came out, he directed that the tractor be taken to Kessup forest area at a site known as pine sitter. When he eventually got to the site, he found PW1 in the company of two uniformed forest rangers, his (PW1's) wife and brother, the deceased. The forest guards showed them where to harvest wood and they then immediately embarked on the mission. After the trees were felled, the young men loaded the wood on to the tractor. He had been instructed on where to offload the cargo and he did as was instructed.

10. After offloading the cargo, the tractor tyres developed a puncture and notified PW1. He was then directed to drive the tractor to PW1's place before the tyre got fully deflated. About ten minutes later, they encountered a Forest Ranger vehicle coming from the opposite direction. He was ordered to stop the tractor and the driver of the ranger's vehicle asked what he was carrying on board the tractor. He admitted to the driver of the ranger's vehicle that whereas the tractor was not carrying any load, they had already carried and emptied another load. As they were conversing, the deceased came riding on a motor cycle. He (the deceased) impolitely asked the Forest ranger why he had stopped the tractor yet it was empty. He (the deceased) then boarded the tractor and drove it away for about 30m and the forest rangers went the opposite direction. On seeing this, the deceased stopped the tractor and asked that Kandie (this witness) get in and drive it away. He complied and drove the tractor for about 500m before he met PW1 coming from the opposite direction. The forest ranger's vehicle intercepted them and was parked right in front of the tractor so as to block it from moving. He noticed that the accused, who was in uniform, was pointing a gun at him. 3 forest rangers including the accused, a uniformed female ranger and the driver they had encountered a short while ago, alighted from the ranger's vehicle demanding that the tractor should not be moved. The deceased then came back to where they were and an argument ensued concerning a licence or permit. Kandie (this witness) then decided to stay at a safe distance from the accused and the deceased who was demanding that he stops and produces the documents. After a brief moment, he heard something like a gunshot and the deceased lying down with blood oozing from his stomach. He then saw PW1 struggling to disarm the accused before another shot was fired. He saw PW1 holding the magazine and the officer holding the raffle. He had noticed that when the first shot was fired, the uniformed female ranger and the driver sped off leaving the accused by himself. He also saw PW1 pleading with members of the public not to harm the accused. The accused called his colleagues to come back, which they did, and carried PW1 and the deceased on their vehicle.
11. He admitted that at the time they were in the forest, they had pangas and other crude weapons.
12. PW4: VINCENT KIPROP KOLAL testified that on 05/10/2016 at around 0900HRs, PW1 called to ask if he could help in loading firewood from Kessup forest. He agreed and then went to PW1's home. He met other loaders and they were directed to board the tractor and head to the forest. PW1, riding a motor cycle, joined them at Kameza Forest station, had a conversation with the forest rangers stationed there. They were then asked to proceed to Kessup forest and cut pine trees that had fallen down then load them to the tractor's trailer. When the trailer was filled up, the driver went with others to offload the cargo at a designated point. The tractor was to come back for a second trip. He was aware that the tractor tyres got a puncture on the way back. On their way out of the forest, they encountered a Forest Ranger's vehicle being driven in the opposite direction towards the forest. They were ordered to stop, which they did. The driver of that ranger's car, who was then by himself, demanded to know where they had come from. The deceased, riding a motor cycle found the driver engaging them for answers on what they were doing within the forest and what they had carried. The deceased got into an altercation with the driver and then commandeered the tractor. He then alighted from the tractor and ordered the tractor driver to continue driving. They left him going back for his motor cycle. After driving for about 100-300m away, he saw the deceased riding the motor cycle towards then. In hot pursuit was the ranger's vehicle. The ranger's driver overtook them and he noticed that whereas he was initially by



himself, he had come back with two uniformed forest rangers, one of whom was the accused. As the vehicle was overtaking their tractor, he saw the accused ordering that the tractor driver should stop. The tractor driver obliged and the rangers' vehicle was parked ahead of the tractor to block them from moving. The deceased then placed his motor cycle between the tractor and the rangers' vehicle. The accused got out of their vehicle and headed towards the deceased. A heated argument ensued with the deceased refusing to surrender or exit the scene. The ranger moved from place to place while cautioning the deceased to steer clear. The witness then heard what he believed was a gunshot, which caused the deceased to fall down. He also saw PW1 moving towards the accused and pull out the magazine. During the struggle for the rifle, PW1 was also shot. The accused's colleagues had by this time, taken off in the Rangers' vehicle. A mob had already started gathering at the scene and wanted to harm the accused. PW1 pleaded with the mob not to harm him. Shortly thereafter, the Rangers' vehicle came back to carry the deceased, PW1 and the accused.

13. Prosecution closed its case at this point ushering in the defence to answer to the charge. The defence called three witnesses in an attempt to establish his innocence.
14. DW1: KIPKETER KIPCHIRCHIR told the court that he was a forest ranger who, prior to this incident, had served for 9 years. He recalled that on 05/10/2016 he reported on duty and was assigned duties together with Forester Sheila Jelimo and Erickson Langat. They changed into their uniforms and he was assigned firearms. His fire arm was en chambered with 9 rounds of ammunition of 7.62 x 39mm. Erickson was the station driver and was not assigned any arm because he was to go for supervision of saw millers. Eric came back from those duties and they were ordered to go on patrol. He received a tip off that there were people within Kessup forest who were felling down trees and loading them onto a bluish tractor. He passed on this information to his colleagues Sheila and Ericson and they decided to head to the scene to investigate the report.
15. When they got to the forest, they noted that there were tyre tracks on the road suggesting that the tractor was still within the forest. They followed the tyre tracks and saw a tractor heading their way while hauling a trailer. The trailer had been filled with freshly lumbered logs with about 15 people sitting on the logs. From his vantage position, he noted that their driver stopped the tractor but the occupants alighted and advanced towards them menacingly while making war chants. He then jumped out of their vehicle and ordered that the tractor driver stops. He demanded to be shown a permit or licence allowing the people to harvest the trees but was not shown any. Instead, the occupants of the trailer and a motor cyclist moved towards him in a menacing way. He asked them to freeze but they defied this order. They kept advancing towards him and one of the people pelted him with something. He fell down and when he got up, he cautioned the crowd not to move closer to him failing which he would be forced to fire his weapon. The people defied this order yet again and kept advancing towards him. He then felt compelled to fire his weapon because the people had pangas. Someone (PW1) grabbed the gun from behind him, pressed the magazine catch then removed the magazine. He struggled with the man and in the course of the struggle, he accidentally pulled the trigger which caused PW1 to be shot in the thigh. The man had already pulled out the magazine but after being shot, he released the rifle. By this time, he had noticed that his fellow forest rangers had left him behind. According to him, he was pleasantly surprised to hear the voice of Ericson ordering him to board the Rangers' vehicle, which he did. He heard people screaming but fainted before he established who were crying. He came back to his complete senses when they got to Iten DCI's office. He testified that he handed over his rifle to one of the officers and was escorted to the hospital for treatment. His testimony remained steadfast in cross-examination.
16. Next in line was EVANSON LAGAT who testified as DW2 and stated that he is a forest ranger working with Kenya Forest Service. He has been engaged by the service as a driver. On 05/10/2016 he reported



for duty and was ordered to go for supervision duties together with forester Sheila. He complied, came back from that task and went on patrol duties. When they came back to the camp, the accused told him that he had been tipped off about illegal loggers within Kessup forest. He then left the camp together with forester Sheila and forester Kipketer, the accused herein to investigate the accuracy of that tip off.

17. When they got to the forest, they noticed tyre tracks on the road leading deep into the forest. They then observed a tractor hauling a trailer that was being driven towards them. The trailer was full of what he believed was freshly lumbered logs. He indicated for the driver to stop the tractor but instead of stopping, the occupants alighted from the vehicle and advanced towards them while making what sounded like war chants. The accused jumped out of the vehicle and ordered that the tractor is stopped and that people stop advancing towards them. He saw the people start pelting him with stones, one of which hit the accused on the head. Sensing that things may get out of hand, both he and forester Sheila took off. While still in hiding, he heard two gunshots. They went back to the scene and found a man lying unconscious and another bleeding from the leg. The accused was bleeding from the head and his gun did not have a magazine. He was informed that one of the crowd members had taken the magazine. He assisted the deceased, accused and PW1 by placing them inside the rangers' vehicle and took them to the hospital. En route, they passed by the police station where the accused handed over his rifle as he rushed the other two to the hospital. In cross-examination, he stuck to this version of events save for clarifying that he believed that the crowd became charged up after the accused asked what they were doing in the forest and then demanded to be shown a permit or licence.
18. DW3: SHEILA JELIMO testimony was similar to her colleagues DW1 and DW2 in that they reported for duty in the early hours of the morning. The accused and her were issued with rifles but Dw2 declined to take one. In the late afternoon, the accused notified them that he had been tipped off on an illegal logging exercise within Kessup forest. They rushed to the scene and observed a tractor being driven towards them hauling a trailer full of freshly lumbered logs. DW1 directed that the tractor stops but that order was defied. When the accused saw that the tractor was still being driven towards them despite the order to stop, he jumped out of the vehicle to order that they stop. The occupants of the trailer numbering about 15-20 people started jumping off the vehicle while armed with pangas and rungas. They rushed towards the accused while making war chants. The occupants then pelted the accused with stones which hit him on the head. Sensing danger, both she and DW2 took cover. She heard two gunshots and when it appeared to be calmer, she notified other colleagues to come to her rescue. She was taken back to Kessup forest station where she noted that the station had been vandalised. She maintained in cross-examination and stated that she believed that the occupants of the trailer became charged up when the accused demanded to know what they were doing in the forest and to be shown a licence or permit.
19. The defence closed their case at this point.

Analysis and determination.

20. After thorough examination of all evidence presented by the prosecution and the defense arguments offered by the accused, I conclude that the prosecution bears the full responsibility of proving its case beyond reasonable doubt. This fundamental principle regarding the standard and burden of proof is clearly established in Article 50(2)(a) of *the Constitution* and further articulated in Sections 107(1), 108, and 109 of the *Evidence Act*. As Lord Sankey articulated in *Woolmington v DPP* (1935) AC 462:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...No matter what the charge



or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law..."

21. The burden of proof invariably rests with the prosecution and never transfers to the accused. This fundamental principle is anchored in the constitutional doctrine of presumption of innocence under Article 50(2)(a) of *the Constitution*, which establishes that an accused person is presumed innocent until proven guilty. The *Evidence Act* further elaborates on this burden through specific provisions. This obligation requires the state to present compelling evidence whether physical, oral, or documentary that satisfies the court regarding disputed issues alleged against the accused. Specifically, the prosecution must establish both that the offense occurred and that the accused committed the unlawful acts through either commission or omission. This legal requirement in criminal proceedings places a clear obligation on the state to meet the standard of proof beyond reasonable doubt for all contested facts. Consequently, the responsibility to prove the accused's guilt in Kenyan criminal law consistently remains with the state. Even in the exceptional circumstances outlined in Section 111 of the *Evidence Act*, this burden maintains its full weight and is never diminished under any circumstances. (See *Semfukwe and others v Republic (1976-1985)*, *Republic v Nyambura and four others (2001) KLR 355* and *Mbuthia v Republic (2010)*).
22. The evidential burden test vested with the prosecution is as formulated by the learned author in Cross and Tapper on Evidence 12th Edn (Oxford: OUP, 2010 (reprint 2013)) thus:

“The test is to determine whether there is sufficient evidence in favour of the proponent of an issue, is for the judge to inquire whether there is evidence that, if untainted and uncontroverted, would justify men of ordinary reason and fairness in affirming the proposition that the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue. This test is easy to apply when the evidence is direct, for unless their cross examination were utterly shattering, the question whether witnesses are to be believed must be left to the jury, but it is necessarily somewhat vague when circumstantial evidence has been considered. In that case, little more can be done than inquire whether the proponent's evidence warrants an inference of the facts in issue, or opposition itself is itself conjectural his application must be dismissed. At this stage, the submission should succeed only if the circumstantial evidence raises no hypothesis consistent with guilt.”
23. For the prosecution to secure a conviction on the charge of murder contrary to Section 203 of the *Penal Code*, it must prove the following four essential elements beyond reasonable doubt:
 - a. the death of the deceased occurred
 - b. the death was caused by unlawful acts;
 - c. that the accused committed the unlawful act which caused the death of the deceased; and
 - d. that the accused had malice aforethought. (see *Anthony Ndegwa Ngari v Republic [2014] eKLR*)
24. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
25. On the first element regarding proof of death, this is not in dispute. The ingredient has been proved by direct evidence. It is crystal clear from the prosecution's case that Sammy Kimutai sustained fatal injuries on 5th October 2016. PW1 Saleh Kimutai, the deceased's brother, testified that he witnessed



his brother being shot and subsequently dying. PW2 Phyllis Kimutai confirmed attending the post-mortem and identifying the body of the deceased. The medical evidence on proof of death has not been rebutted by the defence, rendering this element proven beyond reasonable doubt. (See *Nyamhanga v Republic* (1990-1994) EA 462, *Ndiba v. Republic* (1981) KLR 103 and *Felix Nthiwa Munyao Nairobi HCCR No. 43 of 1999*).

26. Regarding the second element on whether the death was unlawfully caused, it is a presumption in law that any homicide is unlawful unless that presumption is rebutted by an accused person providing sufficient evidence that the homicide was excusable or justified. See the guidelines in *R versus Gusambizi S/o Wesonga* (1948) (15 EAC 65). The accused has raised the defence of self-defence and accidental discharge during a struggle. He contends that he was under attack from a menacing group armed with pangas and other crude weapons, and that during a struggle with PW1, the weapon accidentally discharged. This Court must therefore carefully examine whether this defence is tenable under the circumstances.
27. The third element requires the prosecution to prove that the accused committed the act causing death. This element is not in dispute, as the accused admits to being present at the scene and in possession of the firearm that caused the fatal injury. All witnesses, both prosecution and defence, agree that the accused was the forest ranger holding the firearm at the time of the incident. The Court notes that there is conflicting testimony about whether the accused deliberately aimed and shot at the deceased (as per prosecution witnesses) or whether the discharge was accidental during a struggle with PW1 (as per defence witnesses).
28. The final element that the prosecution must prove beyond reasonable doubt is that of malice aforethought under section 206 of the [Penal Code](#), which defines it as follows;
 - a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
 - b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may be caused.
 - c. An intent to commit a felony.
 - d. An intention to facilitate the escape from custody of a person who has committed a felony.
29. In the landmark decision of *Rex v Tubere s/o Ochen* (1945) 15 EACA 63, the East African Court of Appeal provided authoritative guidance on determining malice aforethought in homicide cases. The Court established a three-pronged analytical framework, holding: "In determining the existence or non-existence of malice aforethought, the court must conduct a comprehensive examination of three critical factors: the nature of the weapon employed, the precise manner in which such weapon was utilized, and the specific region of the body that sustained injury." This judicial test remains a cornerstone for courts when assessing whether the mental element of murder has been established beyond reasonable doubt.
30. In *Hyam v DPP* (1974) A.C. the Court held inter-alia that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm”



31. The main defence advanced by the accused was that of self-defence which means the offence was justified and excusable as contemplated under section 17 as read with section 207 and 208 of the Penal Code. In the first instance, the law on self-defence envisages that the accused must have been justified in using some force to defend herself against an attack, real or reasonably apprehended from the deceased; that the accused must have honestly believed that he was justified in using the force that he did against the deceased; that the force used by the accused was only excessive because it exceeded what the accused could reasonably have considered necessary.
32. The classic test of our application of self-defence under section 17 of the Penal Code is traceable to the English law jurisprudence as stated in the case of *Palmer v Republic* (1971) AC 814
- “The defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. ... Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have [to] avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence... If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken.”
33. Similarly, in *R v Beckford* (1988) 1 AC 130 the court stated:
- “A defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property..... It must be reasonable.”
34. The common law position as regards the defence of self-defence was well articulated by the Court of Appeal in Nairobi in *Cr App No 414 of 2012 Ahmed Mohammed Omar & 5 others v Republic* [2014] eKLR as follows:
- “25. The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in *DPP v Morgan* [1975] 2 ALL ER 347, the view was that it was an essential element of self-defense not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds.”
35. In the case of *Mungai v. Republic* (1984) KLR 85 the court held:
- “1. It is a doctrine recognized in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not



as murder but as manslaughter – R v Ngolaile s/o Lenjaro (1951) 18 EACA 164; R v Shaushi (1951) 18 EACA 198.

2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered – Palmer v Reginam [1971] 1 ALL ER 1077.” (See also Mokwa v Republic [1976 – 80] 1 KLR 1337)
36. The law recognizes self-defense as a complete defense under Article 26(4) of *the Constitution* and Section 17 of the *Penal Code* when an accused employs necessary, reasonable, and proportionate force to protect themselves from an imminent attack. This Court must approach such claims with appropriate judicial scrutiny to ensure this defense is not improperly invoked. The assessment must be fundamentally objective; it is insufficient that the accused merely believed his actions were reasonable under their subjective perception. Rather, the Court must evaluate all relevant circumstances, including the nature and severity of the threat, the psychological pressure experienced by someone under attack, and the potential harm posed by the aggressor. In the present case, these considerations must be applied to the forest ranger’s situation confronted by multiple individuals, some carrying pangas and other implements, who by admission of prosecution witnesses themselves were hesitant to comply with lawful orders. While the mere possession of weapons by the deceased and his associates is not dispositive, their conduct and the entire context of the confrontation must be carefully examined to determine whether the accused’s response was proportionate to the threat he reasonably perceived in those critical moments.
 37. Having established the legal framework for self-defence, I must now scrutinize the evidence presented to determine whether the accused’s actions fall within the ambit of justifiable self-defence or whether they constituted an unlawful killing with malice aforethought. The testimonies from both prosecution and defence witnesses reveal sharply contrasting accounts of the critical moments leading to the deceased’s death.
 38. The prosecution witnesses portray the accused as having deliberately aimed and fired at the deceased after an argument regarding forest permits. According to PW1, the accused approached the deceased, removed his helmet, engaged in an argument, stepped back, fired a warning shot in the air, and subsequently fired directly at the deceased. PW3 and PW4 similarly testified to hearing gunshots and seeing the deceased fall with blood oozing from his stomach.
 39. Conversely, the defense witnesses paint a scenario of imminent danger to the accused. They describe approximately 15-20 individuals, some armed with pangas and rungas, advancing toward the accused while making threatening war chants. They testified that the accused was pelted with stones, one striking his head, before any shots were fired. DW1 specifically claimed that the fatal shot occurred accidentally during a struggle with PW1, who had grabbed the firearm from behind.
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43. In evaluating these conflicting accounts, I must consider several critical admissions by prosecution witnesses that lend credibility to the defense narrative. PW1, a police officer himself, admitted they had no valid permit for harvesting forest products despite claiming to have paid Kshs. 10,000. He acknowledged they were carrying pangas and a power saw, had cut down massive trees, and that he personally deceived forest rangers about their activities. Most significantly, he conceded that the deceased was hesitant in complying with lawful orders from uniformed officers.
44. PW3 corroborated that they were carrying crude weapons and that the deceased had acted confrontationally, commandeering the tractor and impolitely questioning why it had been stopped. PW4 similarly testified to an altercation between the deceased and forest officials, with the deceased "refusing to surrender or exit the scene" despite repeated cautions.
45. Upon review of the prosecution's submissions, I note several important concessions that substantially weaken the State's case. The prosecution has explicitly acknowledged that:
- a. The post-mortem report was not produced;
 - b. The cause of death was not properly established;
 - c. The alleged murder weapon was not produced;
 - d. The arms movement register was not tendered;
 - e. No ballistic expert's report was presented; and
 - f. Crucial witnesses who might have controverted the self-defence theory did not testify.
46. Most significantly, the prosecution has conceded that the suggested impression is that the deceased may have become uncooperative and somewhat unruly when asked to produce a permit and that it is doubtful that PW1 had taken out a permit for the logging. Their presence in the forest and any ensuing activities were illegal. These concessions fundamentally undermine the prosecution's ability to disprove the accused's claim of self-defence beyond reasonable doubt.
47. The physical evidence, though limited on record, indicates two discharged rounds; one apparently fired as a warning shot and another that struck the deceased. The accused himself sustained a head injury consistent with the defense claim of being struck by a stone. PW1 sustained a gunshot wound to the thigh, which occurred during what both sides agree was a struggle for the weapon after the deceased had already been shot.
48. Particularly revealing is PW1's intervention to prevent a gathering mob from assaulting the accused. This action suggests that even in the immediate aftermath of his brother's shooting, PW1 recognized some degree of legitimacy in the accused's position, behaviour inconsistent with witnessing a cold-blooded, deliberate murder.
49. The context of this confrontation cannot be overlooked. The accused was a uniformed forest ranger with nine years of service, lawfully engaged in enforcing forest protection regulations. He had received



- specific intelligence about illegal logging activities and was investigating pursuant to his duties. Upon encountering individuals engaged in unauthorized harvesting (by their own admission), he attempted to exercise his lawful authority to stop them and verify their permits.
50. The prosecution has not adequately explained why, if the accused harboured malice aforethought, he would first fire a warning shot rather than immediately targeting the deceased. This intermediate step strongly suggests an attempt to de-escalate the situation without causing harm, a behaviour inconsistent with an intention to kill.
 51. When evaluated comprehensively, the evidence supports the defence contention that the accused faced a genuine threat from multiple individuals who had demonstrated non-compliance with lawful authority and were armed with implements that could cause serious harm. The physical positioning with the accused alone facing multiple individuals after his colleagues had retreated—placed him in a vulnerable situation requiring split-second judgment.
 52. The prosecution has failed to present critical forensic evidence that might have clarified the precise circumstances of the shooting. Without the post-mortem report, the Court cannot make definitive findings about the trajectory of the bullet, the distance from which it was fired, or other ballistic details that might have indicated whether the shooting was deliberate or accidental. This evidentiary gap creates reasonable doubt that must be resolved in favour of the accused.
 53. Even the prosecution, in its own submissions, has conceded that it might be unsafe to convict based on the evidence adduced in court. This candid acknowledgment by the State reinforces my assessment that the evidence presented is insufficient to sustain a conviction for murder.
 54. I find particularly significant the fact that prosecution witnesses themselves substantiate key elements of the defence narrative; the presence of weapons, the lack of permits, the deceased's confrontational behaviour, and the refusal to comply with lawful orders from a uniformed officer. These admissions, coupled with the prosecution's explicit concessions, create reasonable doubt about whether the accused acted with malice aforethought rather than in response to a perceived immediate threat.
 55. Accordingly, I find that the prosecution has failed to negate the defense of self-defense beyond reasonable doubt. The evidence supports a conclusion that the accused, confronted by multiple non-compliant individuals armed with crude weapons who had already demonstrated aggression, responded with force that, while resulting in the tragic death of Sammy Kimutai, was justified under the circumstances as he reasonably perceived them.
 56. Having meticulously examined the evidence presented, I find that the prosecution has failed to discharge its burden of proving the accused's guilt beyond reasonable doubt. The evidence as presented creates significant doubt regarding the critical elements of murder, particularly malice aforethought and whether the shooting was unlawful rather than justified by self-defence.
 57. The key deficiencies in the prosecution's case include: absence of forensic evidence establishing precise cause of death; lack of ballistic analysis connecting the accused's weapon to the fatal injury; contradictions in witness testimony; admissions by prosecution witnesses that undermine their credibility; and the prosecution's own concession that a conviction would be unsafe based on the evidence presented.
 58. The evidence instead supports the conclusion that the accused, a forest ranger with nine years of service, was lawfully executing his duties when confronted by individuals engaged in unauthorized forest activities. The deceased and his associates, by the prosecution witnesses' own admission, were carrying dangerous implements, had no valid permit, and failed to comply with lawful orders from uniformed officers. When faced with escalating resistance, including physical aggression, the accused



employed a graduated response; first verbal commands, then a warning shot, and only discharged his weapon directly when the threat persisted.

59. The answer to this question as to whether the Accused committed the offence of murder as prosecuted by the state can easily be answered by the principles in *re Winship* 397 U.S 358 which states as follows: “ ... In a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what probably happened. The intensity of this belief-the degree to which a fact finder is convinced that a given act actually occurred-can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases “preponderance of the evidence” and “proof beyond a reasonable doubt” are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.’ 5
60. The accused before court was charged with an offence of murder contrary to Section 203 of the Penal code. It was the duty of the prosecution to prove beyond reasonable doubt the elements of the offence with a high degree of certainty by leaving no room for reasonable doubt on the mind of the court. This means the evidence adduced must be convincing enough to exclude any other plausible explanation for the events which occurred on the 5.10.2016 except the guilty of the accused person. That has not been discharged by the prosecution. The gaps cannot be filled by this court or the accused person. The evidence so far relied upon is neither credible nor persuasive.
61. In accordance with the fundamental principle that any reasonable doubt must be resolved in favor of the accused, I find Kipketer Kipchirchir NOT GUILTY of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The accused is hereby acquitted of all charges.
62. The accused, Kipketer Kipchirchir, is acquitted of the charge of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The accused person shall be set at liberty forthwith unless otherwise lawfully held.

DATED SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF JUNE, 2025

In the Presence of

Accused Person

M/s Sidi for the State

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R. NYAKUNDI

JUDGE

