



REPUBLIC OF KENYA



State v Kiptoro (Criminal Case 8 of 2020) [2025] KEHC 10188 (KLR) (15 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA**

CRIMINAL CASE 8 OF 2020

RPV WENDOH, J

JULY 15, 2025

BETWEEN

STATE PROSECUTOR

AND

EDWIN KIPTOO KAPTORO ACCUSED

JUDGMENT

1. By the information dated 11/9/2020, Edwin Kiptoo Kiptoro was charged with the offence of Murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the charge are that on the night of 16th July, 2020 and 17th July, 2020, at Tartar Location, Keringet Sub-location, West Pokot County, murdered VC.
3. The accused denied committing the offence, the case proceeded to trial. The prosecution called two witnesses in support of its case.
4. The accused was called upon to defend himself and he testified on oath but called no other witness.
5. PW1 Faith Chelimo, a minor in class 7, underwent voire dire examined and was affirmed and stated that in July 2020, her mother was returning home when she met the father, (the accused), and they started to fight. When they reached home, the accused took a wooden frame which was shown to the court and hit the mother with it several times on the head and legs. PW1's younger sister and brother told the father not to, but he continued to hit her on the head and legs. Nobody came to intervene; that when they stopped fighting, PW1 and her siblings went to sleep at their grandmother's house at about 11.00p.m. when at the grandmother's house. At 11.00p.m. the accused came to ask her to go help feed the breast-feeding child but she declined. Accused returned to the grandmother's house at 5.00a.m. and requested for sugar, was given the sugar and left.
6. The next morning, they woke up and went to their house and called out their mother who was on the bed but she did not respond. She called the uncle called Peri who observed the mother and said she



- was dead and he called Chief Kapello (PW2). PW1 stated that the accused disappeared till after the deceased's funeral and it was for a long time and she learnt that police arrested him.
7. PW1 admitted that both her parents used to take changaa and also beers from the bar.
 8. PW2 Joachim Kapelo, an Assistant Chief of Tartar Sub location recalled the morning of 17/7/2020, about 8.45.a.m., a village elder informed him that there was a dead body in a certain house and that shortly after that, one Samuel Peri informed him that his neighbour, a woman had died and the man was not home. PW2 called the police who came and took the deceased's body away. PW2 knew that accused and deceased were a couple.
 9. On 8/12/2020 a consent was recorded by the Prosecution Counsel and Accused's Counsel Mr. Lowasikou, that the post mortem report and mental assessment report be produced in evidence as P.Exh.1 and 2.
 10. The accused was called upon to defend himself. Despite several adjournments, some of the witnesses expected to testify did not attend court and the Prosecution closed the case.
 11. In his statement on oath, the accused (DW1) stated that on 16/7/2020, he left for work in the morning where he worked with a power saw. He returned home at 6.00p.m. and did not get his wife and the children were alone. He was informed that she had gone to drink changaa and he went to look for her at Tartar, but did not get her and went back home. He went to stand on the road. He asked the wife where she was and she told him that she had been beaten by his wife; that the deceased suspected that accused had another wife. She quarrelled till 9.00p.m. and the accused went to stand on the road till 10.00p.m. He came back home and found the deceased asleep and he too slept and the next day, he left when she was well and went to work. He denied ever fighting with the deceased.
 12. He admitted that the night the deceased died, they were in the same house and nobody else slept in the said house. In cross examination, the accused stated that PW1 was not at home but had visited her other grandmother by name Emily. He also stated that 'Lapai' is done for a person who has admitted killing but that in his case, partial Lapai was done when he was in custody but he was not forced to accept Lapai.
 13. Mr. Lowasikou, Counsel for the Accused submitted that there was no evidence to corroborate PW1's testimony; that the Investigating Officer did not testify and so were not the other witnesses called; that no murder weapon was produced in court to support the findings of the Doctor in the post mortem report; that though Lapai was done there is no evidence to prove the guilt of the accused; that the prosecution failed to prove its case beyond reasonable doubt and he should be acquitted of the charge.
 14. I have now considered the evidence on record and submissions of Counsel. The accused faces a charge of Murder. This being a criminal case, the standard of proof which has to be discharged by the prosecution is beyond reasonable doubt.
 15. The term beyond reasonable doubt was aptly defined in the English case of Woolmington -V- DPP 1935 AC (462) where the court held, "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 prisoners' guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. 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 of England and no attempt to whittle it down can be entertained."



16. The Court of Appeal in *Moses Nato Rapheal -V- Republic* (2015) eKLR, dealt with what amount to 'reasonable doubt' and expressed itself as follows "what then amounts to 'reasonable doubt?'" This issue was addressed by Lord Denning in *Miller -V- Mistry of Pensions* (1947) 2 ALL ER 272 where he stated "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".
17. Proof beyond reasonable doubt does not mean proof beyond a scintilla of doubt but the court should determine whether the case raises reasonable doubt that the offence may not have been committed at all or may not have been committed by the Accused. If any doubt arises, it must be resolved in favour of the Accused.
18. Under section 203 of the PC, for a charge of murder to be proved, the prosecution needs to prove, beyond reasonable doubt;
 1. The death of the deceased;
 2. That the death was caused by the unlawful act of omission of the accused;
 3. Proof that accused had malice aforethought.

Proof of death.

19. The death of the deceased is not in dispute. PW1 and 2 saw the deceased's body lying dead in bed. Their testimony is supported by the findings of the Doctor in the post mortem (P. Exh.1) that the deceased died of severe head injury due to trauma from a blunt object. The accused does not deny that the deceased died. The deceased did not die of natural causes but succumbed from injuries inflicted on her.

Whether accused caused the death;

20. The Accused's Counsel submitted that PW1's evidence was not corroborated. However, the law is clear. Section 143 of the [Evidence Act](#), is explicit, that no particular number of witnesses in the absence of any provision of law, to the contrary, is required to prove any fact.
21. In the case of *Benjamin Mbugua Gitau -V- Republic* (2100) eKLR it was held "this court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires. See section 143 of the [Evidence Act](#). Cap 80 Laws of Kenya. In the circumstances therefore, we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys".
22. In this case, the prosecution had a challenge getting all the witnesses. However, PW1 was the only eye witness together with her younger siblings aged 10 and 7. She testified that she did not know how the Accused and deceased started their quarrel (fight) but when they arrived home, PW1 saw the accused assault the deceased several times with a wooden frame. Although she identified the frame in court, it was not produced in court as an exhibit because the Investigating Officer did not testify. There is no requirement that an exhibit must be produced. Sometimes the weapons are not recovered. She said that at about 11.00p.m. PW1 left the accused and deceased outside as they went to sleep at the grandmother's house. The next morning, the deceased's clothing were changed and she lay in bed, dead. PW1 last saw the accused about 5.00a.m. when he came to get sugar from the grandmother's



house but after that, he disappeared. He was not even present at the deceased's funeral because PW1 said he was arrested after the deceased's burial. PW2 corroborated PW1's testimony that the accused disappeared after deceased's death. That evidence was not challenged or dislodged.

23. PW1 had seen the Accused assault the deceased. PW1 left the deceased with accused. The next morning the deceased was dead and the accused was nowhere to be found. The law is clear. The burden of proof always rests on the prosecution to prove their case against the accused beyond reasonable doubt. No duty or burden is imposed on the accused to prove his innocence but there are instances when the law places a duty on the accused to explain certain facts particularly those peculiarly within his own knowledge. Section 111(1) of the *Evidence Act* casts an evidential burden on the accused person to prove any facts that are especially within his knowledge. It provides as follows

“111(1) when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: 40 [Rev. 2023] Evidence CAP. 80.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence”.

24. Since the accused was the last person to be seen with the deceased, it is up to him to give a reasonable explanation of what could have happened to the deceased when she was left with him and why did he disappear.
25. In his defence, the accused claims to have come home, did not find the wife but she came later and they then went to bed. He steered clear of any explanation as to how the deceased may have sustained the fatal injuries.
26. Further, in the defence, the accused claimed that PW1 was not at home on the 16th and 17th/07/2020. However, PW1 testified in court and the accused had the opportunity to cross examine PW1 on her whereabouts on 16th and 17th July, 2020 but he never alluded to PW1 being away from home. Accused's allegation that PW1 was not at home is an afterthought and not believable. There was no reason given by the accused why PW1 would lie. PW1's evidence was candid and consistent. The accused did not give any plausible explanation as to how the deceased got injured. This court is satisfied that it is the accused who fatally assaulted the deceased when he beat her and fled thereafter.
27. Although the defence Counsel submitted that PW1 told the court that her parents were drunk, that is not the case. PW1 said that her parents used to consume alcohol both local and that sold in bars. She did not say that they were drunk on that particular day. In any event, the accused has not pleaded the defence of intoxication.
28. It was the defence Counsel's submission that failure to call the Investigating Officer, leaves many unanswered questions and that failure to call the Investigating Officer and other witnesses raises an inference that their evidence may have been adverse to the prosecution case.



29. The court was not told what the other witnesses would have told the court, had they been called. They were not eye witnesses. I have already alluded to the provisions of Section 143 of the [Evidence Act](#). In *Mwangi -V- Republic* (1984) KLR 595, the court stated

“whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with the discretion unless it may be shown that the prosecution was influenced by some oblique motive”.

30. The prosecution is not bound to call all persons involved in a transaction and failure to call them is not necessarily fatal to the case unless the evidence adduced is barely sufficient to sustain the charge. In *Keter -V- Republic* (2007) 1 EA 135, the court held inter alia

The prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond any reasonable doubt”.

31. As regards the calling of the Investigating Officer, the Court of Appeal in *Horward Shikanga alias Kadogo & Another -V- Republic* (2008) eKLR had this to say in regard to calling of investigating officers in all cases;

“good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e., calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such failure on the entire case for the prosecution.”

32. Again, in [CA 90/1997](#) (UR) *Simon Waiganjo Mwangi -V- Republic* the Court of Appeal sitting in Mombasa said

“... As to the investigation officer not testifying, it was not necessary for him to be called unless his omission would have prejudiced the appellant which it did not”.

33. In this case the defence has not shown what prejudice the appellant has or will suffer by the failure to call the investigation officer as a witness, From the testimony of PW1, they were alone with the accused, deceased and her younger siblings when the deceased was assaulted. There was no other eye witness.

Whether the accused possessed malice aforethought;

34. What constitutes malice aforethought is found in section 206 of the [Penal Code](#) which provides

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;



- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

35. In *Hyam -V- DPP (1974) AC* the court held inter alia;

“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”

36. Malice aforethought can also be inferred from the acts of the accused person as stated in *Ernest Asami Bwire Abang’a alias Onyango -V- Republic CACR A. 32/1990* where the court held

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or do grievous harm upon the deceased.

37. See also *R.V Tubere s/o Ochen (1945) 12EA CA 63*. Where the court said

“In determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it was used, and the part of the body injured”

38. In the instant case, PW1 told the court that despite the children’s pleas that accused stops assaulting the deceased, the accused continued to hit the deceased several times on the head and legs. PW1’s evidence is corroborated by the findings of the doctor that the deceased suffered two fractures on the left and right side of the head, that caused the deceased’s death. The willful act of the accused of repeatedly hitting the deceased with a wooden frame on the head is evidence of malice aforethought because the accused must have known that the wooden frame hitting the head, a delicate part of the body, would result in death or grievous harm.

39. Having considered all the evidence and submissions herein. I find that the prosecution has proved beyond any doubt that it is the accused, with malice aforethought, assaulted the deceased with a piece of wood as a result of which she received serious head injuries from which she succumbed. Accused is found guilty of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) and he is convicted accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 15TH DAY OF JULY, 2025

R. WENDOH.

JUDGE.

Judgment delivered in open court in the presence of:

Mr. Suter for the State

.....for accused

Accused -

Juma/ Hellen - Court Assistant.

