



**Republic v Tonui (Criminal Case E001 of 2020)  
[2025] KEHC 13123 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13123 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL CASE E001 OF 2020  
JK NG'ARNG'AR, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ROBERT KIPKORIR TONU I ..... ACCUSED**

**JUDGMENT**

**The Charge**

1. Robert Kipkorir Tonui (Accused) was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars were that on 7<sup>th</sup> October 2020 at Seanin Village in Toboino Sub-Location, Konoin Sub-County within Bomet County, he murdered Emmy Chepkoech Mitei.
2. The Accused took plea before this court (Korir J.) on 26<sup>th</sup> October 2020. The case proceeded to trial where the Prosecution called sixteen (16) witnesses. Korir J heard the entire Prosecution's case before I took over the case and heard the Accused's defence.
3. I now proceed to summarize the Prosecution case and the Defence.

**The Prosecution Case**

4. The Prosecution stated that the Accused and the deceased were husband and wife who had a rocky and tumultuous marriage. That on the material day, an attempt was made at reconciling the two but it bore no fruit as the said meeting failed to commence. The Prosecution further stated after the botched meeting, the deceased went to her father's (PW1) home with her children (PW1 and PW2) for the night.
5. It was the Prosecution's case that the Accused came to PW1's kitchen where the deceased and PW1 were eating and doused the two with petrol. That the deceased then pushed PW1 out of the house



before setting the deceased on fire. It was the Prosecution's further case that the deceased later on succumbed to her injuries at Tenwek Hospital on 7<sup>th</sup> October 2020.

6. No. XXX Ssgt Christopher Seko (PW16) who was the Investigating Officer stated that he recovered a partly burnt 10 litre plastic jerrican, a 3 litre jerrican with a price tag, a jerrican lid, polyethene paper, match box and several clothes from the scene and presented to the Government Analyst (PW11) for forensic examination.
7. David Kiara Muthoni (PW11) who was the Government Chemist determined that the 10 litre jerrican, the jerrican lid, the polyethene paper and the assorted clothes contained petrol. PW11 further determined that the match box contained white phosphorous which was a chemical that was used to start fire.
8. Dr. Mutai Vincent Kiplangat (PW10) conducted a Post Mortem examination on the deceased and determined the cause of death as multiple organ failure as a result of 90-degree burns.
9. After the Prosecution had wrapped up their case, this court ruled on 16<sup>th</sup> November 2023 that the Accused had a case to answer and put him on his Defence.

### **The Defence Case**

10. The Accused (DW1) gave sworn testimony and denied committing the offence. DW1 testified that on the material day, there was a meeting in his home that was called to attempt to resolve his marital differences with the deceased. DW1 further testified that he objected to the presence of the Assistant Chief and Willy Rotich and asked them to leave.
11. It was the Accused's case that after the Assistant Chief and Willy left, everyone left and he took a motorcycle and rode to Koiwa then to Litein where he went to look for spare parts. It was the Accused's further case that he did not find the spare parts and decided to spend the night at his friend's house in Kisumu Road in Kericho and when he woke up the following day, he saw that his sister-in-law had posted in WhatsApp that he had burnt the deceased and that he should be arrested.
12. It was the Accused's further testimony that he was arrested in his friend's house and taken to Mogogosiek Police Station before he was eventually charged. It was his further evidence that he had not been violent towards the deceased. That he was patient with her and forgave her many times. The Accused's stated that the deceased despised him and would react angrily when she could not have her way. The accused stated that the deceased bought the petrol, poured it on herself, pushed their son out of the kitchen, locked the kitchen door from the inside and burnt herself.
13. Leonard Tonui (DW2) who was the Accused's elder brother testified that on the material day, he received a call from the Accused's son, Alphonse Kipngeno that the Accused had refused to attend a meeting in the absence of his family members. DW2 further testified that he left his home and proceeded to the Accused's home to attend the meeting and when he reached the said home, Alphonse told him that the Accused had left.
14. It was DW2's testimony that he received a call at around midnight and he was informed that the deceased had sustained serious burns and had been taken to hospital. It was DW2's further testimony that together with his siblings, they went to visit the deceased in hospital and the deceased asked him to tell the Accused to take care of the child.
15. DW2 testified that the Accused had not been violent towards the deceased and the deceased was quick to anger and would react whenever she was provoked.



## **Ingredients of the offence**

16. The offence of murder contains two elements, the actus reus encapsulated in Section 203 of the Penal Code and the mens rea provided for in Section 206 of the Penal Code.
17. Section 203 of the Penal Code provides: -  
Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
18. Section 206 of the Penal Code provides: -  
Malice aforethought shall be deemed to be established by evidence proving anyone 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.
19. For the offence to be established, the Prosecution must prove the above elements beyond reasonable doubt. The Court of Appeal in *Chiragu & another vs Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (17 December 2021) (Judgment) held: -

“The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the accused and that the accused had malice aforethought as he committed the said act.”

## **The fact of death**

20. Dr. Mutai Vincent Kiplangat (PW10) testified that he conducted a Post Mortem examination on the deceased's body on 18<sup>th</sup> October 2020. That the body had Riga Mortis when he examined it. PW10 determined the cause of death to be multiple organ failure. Additionally, Esther Chemusiroi (PW8) and Jonah Chepkwony (PW13) testified that they identified the dead body as Emmy Chepkoech Mitei (victim).
21. It is my finding from the above evidence that the death of the deceased was established. Indeed, the fact of death was not contested.

## **Cause of death**

22. Evidence on the cause of death was given by Dr. Mutai Vincent Kiplangat (PW10). He testified that upon examining the deceased body, he found the deceased had 90% degree burns except on her head, lateral right-hand side and the sole of her feet. PW10 further testified that the deceased's eye brows and eye lashes were burn and she had swollen lungs. It was PW10's professional finding that the cause



of death was multiple organ failure as a result of the 90%-degree burns. He produced a Post-Mortem Report as P. Exh 9. I have looked at the Report and it supported PW10's findings.

23. When PW10 was cross examined, he testified that the deceased had kidney, liver and heart failure.
24. Flowing from the above, it is my finding that the cause of death was multiple organ failure as a result of 90%-degree burns. The death was clearly unlawful.

### **Whether the Accused caused the death of the deceased**

25. In their submissions dated 26<sup>th</sup> September 2023, the Prosecution submitted that PW2 narrated how his father came carrying petrol and douses them (PW2 and deceased) with the inflammable liquid, lit a match stick and threw it at them. That PW2 testified that there was electricity and was able to identify the Accused as "daddy". The Prosecution further submitted that on the material day, PW3 heard screams from the kitchen and when she came out, she saw PW2 shouting that he had seen the Accused light a fire. That the kitchen door was kicked open and the deceased came out crawling and on fire and when she asked the deceased who had lit the fire, the deceased told her twice that the Accused did.
26. It was the Prosecution's submission that PW6 testified that while discussing the deceased with him, he informed him that "nimemchoma", which meant I have burnt her. That the Accused knew of the degree of burns he had inflicted on the deceased. It was the Prosecution's further submission that the deceased had confided to her that the Accused had threatened to do something bad in the family.
27. The Prosecution submitted that the Government Chemist (PW10) testified that petrol was the catalyst that was used to start the fire that killed the deceased. That from the totality of the evidence, the identity of the Accused as the perpetrator of the offence could not be in doubt. The Prosecution further submitted that PW2 could not mistake any other person to be her father, that the deceased gave PW3 a dying declaration which was corroborated by PW2 and finally that the Accused admitted the crime to PW6.
28. On the other hand, through his submissions dated 19<sup>th</sup> May 2025, the Accused submitted that the evidence of PW2 who was a minor could not be relied upon as it was uncorroborated. He relied on section 124 of the [Evidence Act](#) and *J. M vs Republic (1983) eKLR*. That no finger prints were provided to place the Accused at the scene, no phone signal was produced to show the Accused's location at the time of the commission of the offence and no phone records were produced to show that the Accused communicated with PW6 admitting to committing the crime. The Accused further submitted that PW2's testimony was subject to influence and manipulation by others.
29. It was the Accused's submission that the Investigating Officer (PW16) confirmed that the deceased's sister had circulated an image on Facebook indicating that the Accused had murdered the deceased. That the deceased's entire family had already formed an opinion that he killed the deceased. It was the Accused's further submission that no witness could speak as to the whereabouts of the Accused at the time of the alleged offence. That he had not been placed at the scene and the alleged murder weapons could not be tied to him as no finger prints were taken.
30. The Accused submitted that none of the deceased's friends who had been told that the Accused threatened the deceased's life reported the same to the Area Chief (PW4). The Accused further submitted that the Investigating Officer (PW16) confirmed that he did not have any burn marks. That considering the high flammability of petrol, it would be impossible for the Accused to splash petrol on the deceased and PW2, push PW2 out of the way and strike a match without getting any burn marks on his hands.



31. It was the Accused's submission that the Prosecution had not sufficiently linked him to the alleged offence.
32. Turning to the evidence on record, Joseph Bii Mitei (PW1) who was the deceased's father testified that on the material day they attempted to have a meeting to reconcile the Accused and the deceased. That when the meeting aborted, he went home and later in the evening, the deceased came to his house with his grandchild (PW2). PW1 testified that the deceased and PW2 were in the kitchen when he heard screams and when he went outside, he saw the deceased on fire. This testimony was uncontroverted upon cross examination.
33. Ivzan Kiplangat (PW2) who was the deceased and Accused's son, testified that on the material day he was in PW1's home together with the deceased when the Accused came and poured petrol on them. PW2 further testified that the Accused removed a matchstick and threw it at them. PW2 identified the Accused in the dock. PW2's testimony was uncontroverted upon cross examination.
34. Allyne Chepngetich (PW3) who was the deceased and Accused's daughter, testified that on the material day she was at her grandmother's home. PW3 testified that she prayed with her grandparents while her brother (PW2) and mother (deceased) stayed in the kitchen. PW3 further testified that she heard screams from the kitchen and when they went outside, they saw the kitchen on fire.
35. It was PW3's testimony that PW2 came out rushing to them saying "nimemwona dad amekuja na ndio hio moto imewaka". It was PW3's further testimony that PW1 kicked the door open and the deceased came out crawling and on fire and when she asked him who was responsible, the deceased told her that it was her father (Accused). PW3 testified that she asked the deceased again and she responded that it was her father who lit the fire. PW3 further testified that on the way to the hospital, the deceased asked her why her father (Accused) was envious of her parents.
36. The Prosecution submitted that this testimony was a dying declaration. The law on dying declarations is found in Section 33 of the [Evidence Act](#) which provides:-
 

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, 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 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 in 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;.....
37. The Court of Appeal in Philip Nzaka Watu v Republic [2016] KECA 696 (KLR) held:-
 

“.....Under section 33(a) of the [Evidence Act](#), a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading



to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ....

.....While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

38. Similarly in *Mwangi vs Republic* (Criminal Appeal 1 of 2015) [2023] KECA 246 (KLR) (3 March 2023) (Judgment), the Court of Appeal held:-

“The learned Judge conducted a substantive analysis of the ingredients necessary for statements to be regarded as dying declarations in the face of section 33 (a) of the *Evidence Act*. The ultimate test arrived at by the judge at page 52 paragraph 1 is that for dying declarations to have full probative value, it must be supported by corroboration. The appellant and the respondent are both in agreement that the learned Judge properly appreciated the law on admissibility of dying declarations. We agree with the learned Judge as to the applicable principles surrounding the admissibility of dying declarations.”

39. In the present case, I have re examined the testimonies of PW3 and PW2 to determine if PW3’s testimony was corroborated. PW3 was emphatic that the deceased told her twice that the Accused had lit the fire which led to her eventual death. PW2 who was the only eye witness in this case, testified that he saw the Accused in PW1’s kitchen that material night and the Accused doused then in petrol before striking a match stick and throwing it at them. Crucially and as already stated above, PW2’s testimony was uncontroverted after cross examination.

40. From the above, it is my finding that PW3’s testimony was corroborated by PW2 and as a result, it is my further finding that the deceased’s dying declaration was admissible.

41. Joyce Chepkirui Koech (PW6) testified that on the material day at around 10 p.m., the Accused called her and as they discussed about the Accused and the deceased, the Accused told him that “nimemchoma” which loosely translated to I have burnt her”. PW6 further testified that when he called the Accused to inform him how badly the deceased was doing in hospital, he responded, “Usinidanganye, mimi nilifanya na najua the degree of burns” which loosely translated to don’t lie to me, I am the one who did it and I know the degree of the burns. PW6’s testimony on the Accused’s admission was uncontroverted upon cross examination.

42. In considering the Prosecution’s evidence, I bore in mind the Accused’s defence. The Court of Appeal in *Ouma v Republic* [1986] KECA 50 (KLR) stated in regard to evaluation of evidence thus:-

“ ..... at the time of evaluating the prosecution’s evidence, the court must have in the mind the Accused person’s defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is doubt, the benefit of that doubt always goes to the accused person.”

43. The Accused’s defence was aptly captured earlier on in this Judgement. He denied committing the offence and testified that on the material night, he was not at the scene of crime as he slept at his friend’s house in Kericho. This was a mere denial and the only witness (DW2) that testified in aid of his defence did not corroborate his testimony.

44. The Accused was placed at the scene of crime by PW2 and the deceased’s dying declaration to PW3. The Accused’s testimony further cemented the testimony of Mo. 93199 PC James Akambo (PW15)



who was the arresting officer. The Accused admitted that he was arrested at Kericho, the same place where PW15 testified that they located and arrested the Accused after he had fled.

45. This court is of the view that the Accused's testimony was untruthful and does not in any way place doubt on the Prosecution case. It is my finding therefore that the Accused caused the unlawful death of the deceased.

#### **Whether the Accused acted with malice aforethought.**

46. I have already set out the circumstances under which malice aforethought may be inferred under section 206 of the Penal Code.

47. The Court of Appeal in *Roba Galma Wario v Republic* [2015] KECA 521 (KLR) held: -

“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.”

48. Similarly, the Court of Appeal in *Waweru vs Republic (Criminal Appeal 98 of 2020)* [2023] KECA 622 (KLR) (26 May 2023) (Judgment) held: -

“In the case of *Nzuki v Republic* [1993] eKLR, this court defined malice aforethought as:

“...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of *Regina v Vickers*, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of *Conliffe v Goodman*, [1950] 2 KB 237.”

In the same case, the court went on to state:

“Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the



act and the intention were aimed at a potential victim other than the one who succumbed.

Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder....”

49. The Prosecution submitted that the Accused designed, plotted and schemed to kill the deceased. That this was not a crime of passion but a cold-blooded plan by the Accused to end the deceased's life. The Prosecution further submitted that the marriage between the Accused and the deceased was tumultuous and on the material day, he doused the deceased with petrol and set her ablaze.
50. On the other hand, the Accused submitted that he had no motive to kill the deceased. That the failed meeting and PW3's testimony did not exhibit any motive. The Accused further submitted that the Prosecution did not prove its case against him and relied on *Peter Gatiku Kariuki vs Republic (2014) eKLR* and *Simiyu & another vs Republic (2005) 1KLR 192*.
51. In the present case, the Prosecution had to prove that the Accused had to prove that the Accused had malice when committing the offence. It was proved by the Prosecution that the Accused committed the offence. The Prosecution through the Investigating Officer produced a 10 litre jerrican as P. Exh 1, a 3 litre jerrican as P. Exh 4 and a match box as P. Exh 5 which they stated were used to commit the offence. The two jerricans were found to contain petrol and the match stick was used to ignite the fire. This was contained in the Government Chemist Report that was produced as P. Exh 10a.
52. It is the view of this court that the Accused must have known that setting the deceased on fire would cause her fatal injuries. His action of dousing the deceased and striking a matchstick leaves this court in no doubt as to the intention of the Accused, which was to cause fatal injuries to the deceased. It is my finding that the Accused possessed the necessary mens rea during the commission of the offence.
53. In the final analysis, I am satisfied that the Prosecution has proved the charge of murder against the Accused beyond reasonable doubt. I find that Robert Kipkorir Tonui (Accused) guilty of the offence of murder contrary to section 203 of the Penal Code and I convict him accordingly.

Orders accordingly

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

.....

**HON. JULIUS K. NG'ARNG'AR**

**JUDGE**

Judgement delivered in the presence of:

Siele/Susan (Court Assistants)

Koech for the state

Langat for the Accused

Accused present in person

