



REPUBLIC OF KENYA



**Republic v Chirchir & another (Criminal Case 45 of 2014)
[2024] KEHC 2564 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE 45 OF 2014
JK SERGON, J
MARCH 15, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

GILBERT CHIRCHIR 1ST ACCUSED

VITALIS MAINA 2ND ACCUSED

JUDGMENT

1. Gilbert Chirchir and Vitalis Mani, hereinafter referred as “Gilbert” and “Vitalis” being the 1st and 2nd Accused Persons respectively were charged with the information of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The Particulars of the information are that on the night of 27th and 28th day of December, 2014 at Kitait Village in Bureti District within Kericho County, the accused murdered Justice Kibet Koech, hereinafter referred to as “Justice.”
2. The 1st and 2nd accused persons pleaded not guilty to the charge. At the trial, the prosecution called eight (8) witnesses to testify in support of the case against the Accused..
3. Cynthia Cherotich, Pw. 1, a sister to the two accused persons was declared a hostile witness and stood down by the court.
4. Ruth Cheronon, Pw. 2 identified the accused persons on the dock. Pw. 2 testified that on the material day at around 11:00 PM, she heard screams. Pw.2 said that Cynthia (Pw.1) came to the house and told her that it was Gilbert (1st Accused) and Vitalis (2nd Accused). Pw.2 further testified that she heard more screams from Cynthia’s homestead and that she went there and found that Justice Kibet Koech (deceased) was being taken from Cynthia’s home to hospital. She testified that she did not know what had happened to Justice.
5. In cross examination, Pw. 2 confirmed that she did not know what happened to Justice.



6. Gladys Soi, Pw. 3 testified that on the material day, at around 10:30 PM, she heard screams from her neighbours whereof Cynthia was screaming. Pw. 3 also said that she proceeded to the scene where she found several people. She said that she found that Justice had lost consciousness and had blood on his coat. Pw. 3 testified that Cynthia (Pw. 1) informed her that Justice had been beaten. Pw. 3 further testified that she went to sleep and at about 2:00 am she heard some commotion and realized that the police had come with the chief to arrest some young men who had beaten another and subsequently Gilbert and Vitalis were arrested.
7. In cross examination, Pw. 3 confirmed that she did not witness the incident on the material day, rather, she responded to screams at about 10:30PM. Pw. 3 confirmed that she did not direct the police to arrest Vitalis and Gilbert and that her son was the one who spoke to the police.
8. Alfred Bett Pw. 4 the Assistant Chief Mobet Sub-Location was able to identify the two accused persons at the dock. Pw. 4 testified that on the material day, he received a call from Wilson Kosgey who informed him that Justice Kibet Koech had been beaten. He was informed that Justice had been beaten by two young men from Soi's household. Pw. 4 testified that he informed some administrative police and they all proceeded to the scene, where they found one Johnson and the father of the deceased, Joseph Kosgey who informed them of the whereabouts of the two young men who had assaulted Justice. Pw. 4 testified that they were able to trace the two young men who were sleeping in a house built by their father, Sospeter Soi. Pw. 4 further stated that the young men were arrested and taken to Litein Police Station.
9. In cross examination, Pw. 4 confirmed that he did not witness the beating, rather, he was informed by one Wilson, the uncle of the deceased, who did not tell him how he got the information. Pw.4 also said that his caller did not confirm whether he witnessed the incident and why they suspected the accused persons. Pw. 4 confirmed that they found the accused persons sleeping, they did not take anything from their house or take the clothes that the accused persons were wearing. Pw. 4 the Arresting Officer confirmed that they searched their house but they did not find anything connected with the incident.
10. Philip Kipkemoi Mutai, Pw. 5 testified that on the material day he heard screams from a nearby home and that when he opened the door, he heard a child saying that Justice had been beaten. Pw. 5 went to Sospeter Soi's house, which was about 200 metres away, where he found two young men (Gilbert and Vitalis) standing near the main house and someone else lying on the floor in the house. Pw. 5 further stated that one of the young men was holding a *rungu* and the other one was sitting down. Pw. 5 further testified that Justice was bleeding and was unconscious at the time. Pw.5 also stated that other people came and they took the injured person to the road side whereas other people took him to hospital. Pw. 5 testified that he returned to his house to sleep.
11. In cross examination, Pw. 5 confirmed that he did not record his statement at the police station but rather, he recorded his statement at the Assistant Chief's Office. Pw. 5 confirmed that whereas it was dark on the material day, he had a torch and was able to recognize the accused persons. Pw. 5 confirmed that he arrived at the scene after Justice had been injured.
12. Dr. Samuel Lang'at, Pw. 6 a senior medical officer who at the time worked at Kapkatet District Hospital, testified that on 30th December, 2014 he conducted an autopsy on the body of the deceased at Kapkatet District Hospital and formed the opinion that the cause of death was a ruptured spleen and intracranial haemorrhage following an assault. Pw. 6 prepared and signed the post mortem report, which bears the stamp and seal of Kapkatet District Hospital and produced it as P.Exh. 1.
13. In cross examination, Pw. 6 confirmed that based on his observations the external injuries were caused by beatings with a blunt object.



14. Elizabeth Waithera Oyungo, Pw. 7 a government analyst based at the Government Chemist in Nairobi, testified that on 5th January, 2015 she received the following items from PC Wainaina of CID Bureti; Item A - A mobet stick, marked as MFI - 1, Item B - a yellow jacket indicated to be of the deceased, marked as MFI - 2 and Item C - a cushion cover indicated as that of the deceased, marked as MFI - 3. She further testified that on 8th January, 2015 she received an additional item, the item was received from CPL Leonard Otesa of CID Bureti to wit Item D - a blood sample in a vacutainer indicated to be of the deceased. Pw. 7 testified that they were required to examine the items and determine the presence and origin of the blood stains. Her findings were that the mobet stick and the cushion cover were moderately stained with blood of human origin whereas the jacket was heavily stained with blood of human origin. Additional findings were that the blood stains on the stick, jacket and cushion cover matched the DNA profile in the blood sample of the deceased. Pw. 7 stated that she had a memo to confirm she received the samples from the police and she compiled and signed a report dated 7th June, 2016 and produced it as PExh. 5.
15. In cross examination, Pw. 7 confirmed that she did not receive any items from the accused persons and the only DNA profile generated from those items was that of the deceased.
16. PC Benson Chirchir, Pw. 8 police force no. 61566, testified on behalf of Carrey Weke, the investigation officer who was transferred to Wajir. Pw. 8 stated that the file was handed over to him when he reported to Bureti DCIO and consequently took over investigations in the matter.
17. He testified that based on the statements in the file, the incident happened in the nights of 27th & 28th December, 2014, whereby the accused persons are said to have accosted the deceased.
18. The Accused's sister screamed for help and neighbours came and found Justice Kibet Koech (the deceased) unconscious and he was rushed to Kaplong Hospital where he succumbed to the injuries.
19. Pw. 8 further testified that the matter was reported to the Area Chief after which, the accused persons were arrested and following extensive investigations the accused persons were arraigned in court and charged with the offence of murder.
20. Pw. 8 stated that the stick which was used to assault the deceased was recovered and he produced it as PExh. 3. Pw. 8 also stated that he had recovered cushions and bed sheets which were used to lift the deceased when he was taken to hospital and produced them as PExh. 4 & 5.
21. In cross examination, Pw. 8 confirmed that he took over the case after statements were recorded and therefore did not recover any exhibits or investigate the matter further. Pw. 8 reiterated that he was relying on the statement of Carrey Weke.
22. In re-examination, Pw. 8 reiterated that he took over the file from Carrey Weke, therefore he found the file and the exhibits in the office. Pw. 8 confirmed that he did not produce the exhibit memo but if given more time he would produce the exhibit memo.
23. Pw. 8 was recalled at a later date and he produced the exhibit memo of the items taken to the government chemist as P.Exh. 6. On further cross examination, Pw. 8 confirmed that none of the items of the accused were referred to the government chemist and therefore there was no link between the items referred to the government chemist with the accused.
24. The accused persons in their defence opted to give unsworn statements and called no independent witnesses.
25. Gilbert Chirchir, Dw.1 elected to give an unsworn statement. He stated that he was aware that he had been charged with the offence of murder. Dw.1 testified that on the material day he was at home in



- the company of Maina, Enock and Cynthia, they prepared supper, planned for the next day's work and soon after he and Maina retired to sleep. He further testified that Maina woke him up and told him that there were screams from the direction of their father's homestead. He got up and they went to the scene, where he found Justice (the deceased herein) writhing in pain, his father asked them to carry him into the house, he was taken and placed him on a chair. Dw. 1 testified that there were several people who came to the scene. Dw. 1 further testified that they carried Justice to a nearby road and he was transported to hospital in a probox. Dw. 1 stated that himself, Maina, Enock and some of his cousins returned home and slept and that at about 2.00AM, they were woken up by police officers who apprehended them and took them to Sotik Police Station then later to Litein Police Station. Dw.1 confirmed that he knew the deceased and maintained that he did not kill him.
26. Vitalis Maina, Dw. 2 elected to also give an unsworn statement. Dw. 2 testified that on the material day he was at home in the company of Gilbert Chirchir, Enock Kipkoech and Cynthia Cherotich, they prepared supper, planned for the next day's work and soon after went to sleep. Dw. 2 testified that he had stayed up to revise at about 11:45PM when he heard screams which prompted him to wake his brother. Dw. 2 testified that he and his brother proceeded to the scene, which was at their parents' home. Upon arrival their father directed them to carry the injured person and place him inside the house. Dw. 2 further testified that their father directed them to carry the injured person to hospital, they used a mosquito net to transport him to a nearby road. Dw. 2 stated that they went back to sleep, however, at about 3:00 AM they were arrested by the police and subsequently arraigned in court and charged with the instant offence.
27. At the close of the defence case, the defence was given seven (7) days to file their submissions.
28. The Learned Counsel filed written submissions on behalf of both accused. The Learned Counsel contended that out of all prosecution witnesses, none of them were at the scene or witnessed the incident.
29. The Learned Counsel pointed out that the lack of DNA of the accused persons at the crime scene or on items or exhibits collected at the crime scene was proof that the accused persons never came in contact with the deceased. It is the Accused's submission that there was no evidence linking the accused persons to the death of the deceased.
30. The defence faulted the prosecution for their failure to call crucial witnesses to wit the investigating officer who conducted the investigations to inform the court on the circumstances which led him to the arrest of the accused persons and their subsequent arraignment in court for the instant offence. The defence further faulted the Prosecution for its failure to summon one Wilson Koskei to testify.
31. The Learned Counsel relied on the case of *Bukenya & Others v Uganda* [1972] EA 549 the Court of Appeal stated that:
- “(ii) the prosecution must make available all witnesses necessary to establish the truth, even when their evidence may be inconsistent. ”
32. The Learned Counsel reiterated that the prosecution failed to prove their case beyond reasonable doubt and that the totality of the evidence is insufficient to secure a conviction against the accused.
33. The sole issue for consideration is whether the prosecution proved its case against the accused beyond reasonable doubt.



34. The offence of murder is provided for in section 203 of the *Penal Code* that provides as follows;

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

In *Republic v Andrew Omwenga* [2009] eKLR the court held:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- (a) The death of the deceased and the cause of the death,
- (b) That the accused committed the unlawful act which caused the death of the deceased and
- (c) That the accused had the malice aforethought.”

35. The accused persons in this case were charged with the offence of murder contrary to section 203 as read with Section 204 of the *penal code* which defines murder as the unlawful killing of a person with malice aforethought.

(a) Death and Cause of Death

36. In this case the death of the deceased person is not disputed, several witnesses testified that on the material day the deceased was found unconscious, he was rushed to Kaplong Hospital where he succumbed to his injuries. Pw. 6 a senior medical officer at Kapkatet District Hospital, testified that on 30th December, 2014 he conducted an autopsy on the body of the deceased and formed the opinion that the cause of death was a ruptured spleen and intracranial haemorrhage following the assault. Pw. 6 prepared, signed the post mortem report and produced it as P.Exh. 1.

(b) Whether the accused committed the unlawful act which caused the death of the deceased

37. However, the evidence of Philip Kipkemoi Mutai who testified as Pw.5 placed the Accused Persons at the scene of crime. In their defences, both Accused Persons did not dispute the assertion that they were at the scene of crime the night of 27th and 28th December, 2014. Pw.5 stated in part as follows:-

“On 27th December, 2014 at around 11.00 p.m., I was at home. I was sleeping when I heard someone screaming near my home. When I opened the door, I heard a child saying Justice has been beaten. I went to my neighbour’s home. He is Sospeter Soi..... When I got there, I found two young menThe young men were standing near the main house. There was someone else lying on the floor in the house. One of the young men was holding a club (*rungu*) and the other was sitting downThe night was dark but I had a torch. The young men were Gilbert and Vitalis. Vitalis was holding a club while Gilbert was sitting down. I knew the young man who had been beaten. He was bleeding from the head. I asked them why they had beaten him and Vitalis asked

“ why he came to our home?”



The young man who had been beaten was Justice Kibet Koech. He was unconscious. Other people came and we took him to the road.”

38. In Cross-Examination, Pw.5 further stated *inter alia* as follows:-

“I was the first to get to the scene. I saw one weapon (*rungu*) when I got there. There was a lot of blood on the head of the boy lying down, Justice Kibet Koech. It was dark, but I had my torch and was able to recognize the Accuseds.

39. From the evidence of Pw.5 who was the first to be at the scene of crime, it is clear that the Accused Persons were placed at the scene of crime. Pw.5 clearly stated that Vitalis, the Second Accused questioned why the deceased visited their home at night. The Accused Persons did not dispute nor displace the evidence of Pw.5. I am satisfied that the Prosecution presented credible evidence placing both Accused Persons at the scene of crime. I am also convinced that Vitalis Maina, the 2nd Accused was armed with a club (*rungu*). In any case, he did not dispute while testifying in his defence the allegation that he was armed with a *rungu*. The aforesaid *rungu* or club appears to have been produced by PC. Benson Chirchir (Pw.8) as P. Exh.3. PW.8 stated as follows:-

“The stick which was used by the Accused to assault the deceased was recovered. I now produce it as an exhibit”

No objection was raised against Pw.8 producing the stick as an exhibit. In the absence of any contrary evidence, this Court is of the opinion that the stick produced as P. Exhibit 3 is the club Pw.5 saw the 2nd Accused holding when he visited the scene.

40. The evidence of Dr. Samuel Lang’at (Pw.6) is very crucial in corroborating the evidence of Pw.5. It is Pw.6’s evidence that he did the postmortem on the body of Justice Kibet Koech (deceased) and that he noted visible injuries to wit punctured wounds on both legs and in the mid sections of the legs. He also stated that there were bruises on the left side of the stomach and on the right shoulder and on the face. Pw.6 further stated that blood was oozing out from the deceased’s nose and mouth. The Pathologist further noted that the deceased also had two wounds on the left side of the head, the parietal region measuring 5 x 2 cm and the other measuring 2 x2 cm.

41. Pw. 6 also stated that the deceased suffered a linear fracture (crack) of the skull and that there was blood on the chest cavity measuring around 500 ml. It is also pointed out that the spleen was completely ruptured. Pw.6 stated that the injuries were caused probably by beating with a blunt object. It is the opinion of Pw.6 that the cause of death was ruptured spleen and intracranial haemorrhage following assault.

42. The circumstantial evidence clearly lead to the conclusion that the Accused Persons assaulted the deceased using a blunt object namely a club (*rungu*) which Pw.5 had said was in possession of vitalis Maina, the 2nd Accused. This Court is convinced that the duo Namely Gilbert Chirchir and Vitalis Maina jointly fatally assaulted the deceased. They were the only persons found to be with the deceased by Pw.5.

43. Having come to the conclusion that the Accused Persons jointly fatally injured the deceased, the remaining question is whether the duo had malice aforethought. From the evidence tendered by the prosecution, there is no prove of malice aforethought on the part of the Accused Persons. In the absence of malice aforethought, I find that the offence of Murder has not been established. However, this Court is convinced that the offence of manslaughter has been established against both Accuseds. In the end, the Accused Persons are found guilty for the offence of manslaughter Contrary to Sections



202 as read with Section 205 of the [Penal Code](#). They are consequently convicted for the offence of Manslaughter.

Dated, Signed and Delivered at Kericho this 15th day of March, 2024.

J.K. SERGON

JUDGE

In the presence of:-

C/Assistant - Ruttoh

Prosecutor – Mr. Musyoki

Accused 1 – Present in Prison.

Accused 2 – Present in Person

J. K. Kirui holding brief for Koko for the Accused Persons

