



REPUBLIC OF KENYA



**Republic v Kamau (Criminal Case 37 of 2018)
[2023] KEHC 2416 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 37 OF 2018**

TM MATHEKA, J

MARCH 22, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

DANIEL MUGO KAMAU ACCUSED

JUDGMENT

1. Daniel Mugo Kamau is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. It is alleged that on 22nd July 2018 at Banita Farm Solai in Rongai Sub-county within Nakuru County murdered Musa Kiprop Chirchir.
2. The accused person denied the charge. He was represented by Ms. Odande and the State by Ms. Murunga.
3. The case for the prosecution is that on the night of 22nd July 2018, the deceased Musa Kiprop was in the company of the family herdsman one Samuel. His brother PW1 Simon Kiprotich Chirchir was sleeping at home when about 10:30 pm that herdsman went and called him and told him that Moses had been cut on the roadside. Pw1 left for the scene and found that Moses had been cut and was dead.
4. He left the herdsman to guard the scene and went to call his two brothers. The three went back to the scene and raised alarm. According to PW1 very many people responded and came. At that time the OCS was rang and informed about the incident.
5. Before the arrival of the OCS, PW1 testified that five young men came on a motorbike. He said they were armed with pangas and knives. He said he identified accused person as one of them. That they alighted from the motorbike, and threw the pangas at him and those he was with, and one panga caught him in the neck - (he showed a scar). He said it was not the accused who threw the panga that cut him. He was shown the panga exhibit in court and he said it was not the one. The five young men abandoned the motorbike and ran away.



6. He said Moses was wearing a striped shirt – and a pair of jeans. A blood stained shirt was produced in court which he said could be his brother’s as he could not recall very well. He said when the police came they carried away his brother’s body together with the abandoned motorbike.
7. He said that when the accused was arrested he was not present. However, he knew when the accused was arrested. He testified that he was told that it was a son of the home near where the body was, who had cut his brother.
8. On cross examination he said that it was the herdsman who told him that Kamau cut Musa, that he did so with his parents (mother and father). Put to task he confirmed that in his statement to the police he never mentioned Kamau by name but mentioned five young men. Asked to confirm that in his statement to the police he said they entered the homestead near there and there was no one at home – he said nothing.
9. PW3 No.88793 Jackson Mutula testified that on the material night, he was at Solai police station when at 11:00pm he received a call from the OCS to inform him of a report of creating disturbance from one Everlyne Achieng at Banita. Together with the OCS, PC Chilumo, the station driver, they proceeded to the scene only to find no one in the homestead. While there, they received a call from Cpl Richard Mwangi, the officer in charge of Banita PPB (Police Patrol Base) that one Benson Kamau had reported that his brother Daniel Mugo had told him that one Musa Kiprop had attempted to rape their mother at their farm.
10. They proceeded to the PPB and found a group of Kikuyu youth including Benson Kamau who told him that when Daniel called him, he organized a group of young men to go to the rescue of his mother but that when this rescue team neared the home they were met by a group of Kalenjin youth who restrained them from reaching the home – they ran away abandoning the motorbike.
11. The police officers proceeded to the scene and found a group of Kalenjin youth and the body of Musa at the roadside near some bushes. The body had injuries on head, legs, abdomen, hands – appeared to have been cut with a panga. Near the body was the abandoned motorbike. Some of the youths identified themselves as brothers of the deceased.
12. The police then proceeded to the home of Felista Wanjiru the mother to the accused. PW2 testified that they found blood on the gate posts, there were signs of ‘vurugu’ or mayhem and there was blood at the gate, then on the path leading to the homestead and on the wooden gate into the homestead. There were two houses in the home and in between them there was a blood stained checked shirt which he said was identified by brother of the deceased. That one Jacob Chege identified himself as the owner of the motorbike. They took the body to the mortuary.
13. The following day about 10:00 am the accused presented himself together with his mother, his brother Benson and Jacob Chege the owner of the and members of the public. He said accused’s clothes were blood stained. He claimed the accused told him that deceased attempted to rape his mother and he went to stop him and cut him. He said upon noting the blood stained clothes he asked the family to bring the accused fresh clothes and took the ones he was wearing. took his clothes and told members of the family to bring him others. The witness also told the court that accused directed them to where he had kept the panga- and they went and recovered it in the house of the accused company of the mother to the accused.
14. On cross examination, he said that the body of Musa was removed from the homestead to the roadside. He said panga was recovered in the house of accused. He said the blood on the floor, foot path and gate in the home of Felista was not examined by forensics. He said the body of the deceased had a vest and a jacket.



15. PW5 No. 107109 PC Silas Chilumo was in the company of PW3. He confirmed that there was no inventory for the recoveries made i.e the exhibits. He testified that they did not arrest the owner of the motorbike because he was one of the reportees. He said he recorded statements of the parents of the accused person. He claimed that the deceased had used his shirt to tie his hand after he was cut. He did not say who told him that. He could not explain why the other clothes of the deceased were not taken for forensic examination.
16. The government analyst Dalmas Kibet Kisang testified that he examined the specimens from the body of the deceased, a shirt said to be the deceased's, the accused's jumper, innerwear, t-shirt and trouser and the panga said to have been recovered from his home. These he described as heavily stained with blood. He testified that the DNA from all the clothes was the same as that of the deceased Musa Kiprop – the DNA of the suspect was not found on the clothes. On cross examination he said the DNA of the accused was not found on the panga or the clothes of the deceased person.
17. PW4 Dr. Titus Ngulungu conducted the postmortem on the body of the deceased. The body had 12 cuts on the head caused by sharp object, 8 cuts on the trunk 4 cuts on the legs cuts on arm, blood vessels of the neck had been cut and there had been blood loss – injuries on head fracture and spine injuries on brain. Cause of death, loss of blood due to injury of blood vessels, injury to brain. He said injuries were caused by a machete.
18. In his defence, the accused made a sworn statement of defence and did not call any witness. His testimony was that on the material night he was sleeping. He was woken up by knocking on his door by his mother at around midnight. He said this was abnormal. He feared that his 72-year-old father who was suffering from malaria and whom he was taking care of had died. He opened the door for her. She told him that his father was ok. However, she told him to listen – there were loud screams by two people on the road, the kind of screams he said that raise alarm –they were shouting – wameua! wameua! (They have killed! They have killed!) He saw torches in the shamba leading to their home like they were looking for something. Two of them reached the home – one of the persons was Simon Kolelei, a neighbour and another person who spoke in Kikuyu. Simon was saying that his brother had been killed. They began talking about revenge against the Kikuyus. They raised what he described as nduru ya hatari among the Kalenjins. He could hear people responding.
19. He went and told his father what was going on. His father demanded that they leave the home for their safety as he was a victim of a previous incident where his home had been burnt. He said he left with both his parents. He said he told his mother to go ahead and hide while he followed with his father passing through the maize shamba to the next village. As they were leaving he said he saw the police motor vehicle arriving. At the next village he told his brother what had happened.
20. The following day his father got worse however he thought it not safe to return home. He decided they go to Solai Police Station to see whether 'those people had been arrested'. The OCS told them about the fracas between the Kikuyu and Kalenjin youth he had stopped. He also told them that a herdsman of Musa's family had run away. He said he was surprised when 30 minutes the OCS called officers who surrounded him and arrested him, placed him in cells pending investigations.
21. He testified that for some reason the police were beating him saying he was a Mkale meaning Kalenjin but his parents brought his identity card. He said the fact that he was a Kikuyu appeared to settle some issue because thereafter a lot of Kalenjins came in m/vehicles. They said two Kikuyus had attacked their person. He said that the OCS removed him from the cells saying that two people could not cause a tribal clash. That one had been arrested. The OCS showed them his ID that he was a Kikuyu. That Simon was at the police station and did not say that the accused attacked him.



22. It was his position that his arrest was meant to appease the brewing tribal conflict between Kikuyu and Kalenjin, which was common at Banita due to land disputes – and that the police used his arrest to quell the tension. He denied any involvement in any fight. He said when his mother woke him up there was no blood in the homestead. He said he knew Musa but did not see him or the herdsman that night.
23. He said the blood on his clothes was his own blood. That he had wiped with his sleeve because he had a flu and had a nose bleed. He said he did not know the person who was with Musa when he was killed.
24. On cross examination, he said he did not go to the road. That he knew Musa Kiprop. He denied being in any fight with Musa. He said they ran away from home for fear of revenge. That the police took his clothes. He said his clothes did not have Musa’s blood.
25. Counsel for the accused person filed submissions. The prosecution chose to rely on the evidence on record.
26. It is the position of the defence that in this case there is neither direct or circumstantial evidence to support the ingredients of the offence.
27. The only issue for determination is whether the prosecution has proved beyond a reasonable doubt that the accused person committed the offence.
28. The fact of death of deceased is not in dispute.
29. The fact that the cause of death was unlawful is also not in dispute – he was found dead with machete cuts on his body.
30. As to who committed the offence;
31. The prosecution relied on the evidence on record. Counsel for the accused person submitted that there was no evidence to connect the accused with the murder. She relied on *Chiragu & Anor v R* [2021] KECA 342(KLR) where the court cited *Stephen Harun v the AG of the Federation* [2010] 1 iLAW/CA/A/86/C/2009 on the doctrine of ‘last seen’ to argue that it is the herdsman who disappeared who knew what had happened to the deceased and was indeed the key suspect. That absent of any explanation the court could draw the conclusion that the said herdsman killed the deceased.
32. Counsel also argued that the circumstantial evidence fell short of the standards set in *Abanga alia Onyango v R* Cr App no. 32 of 1990(Unreported) cited in *Chiragu*: the cogent establishment of the circumstances unerringly pointing at the guilt of the accused leaving no escape from the conclusion that within all human probability the crime was committed by the accused and none else.
33. The circumstantial evidence before me is that the deceased attempted to rape mother of the accused and the accused attacked the deceased. It is also true that the police recorded her testimony but she did not testify neither was there evidence that she had she made any report/or complaint against the deceased.
34. There is no eye witness other than the evidence of PW1 that he was told by the herdsman who disappeared that the killer was a son of the home near where the body was. He did not state which son, he did not mention the accused person.
35. The defence of the accused that his mother simply woke him up because of the screams and as a result they ran away from the home stead is not consistent with his other part of he defence where he says that he and his parents went to the police station to see whether those people had been arrested. He did not state which people and why his family would be interested in their arrest unless it was the people who had raided his home at night.



36. While it is true that the police did not present any blood samples from the home of the accused for forensics, the evidence of the government analyst placed the accused person at the place where the deceased bled. This is because according to the government analyst the clothes of the accused were heavily stained with human blood. The DNA report clearly rules out the accused person's version that the blood on his clothes was his blood. The report was clear the DNA profiles from the stains on his clothes matched the profiles of the deceased.
37. According to the police officers, when accused went to the station the following day with his parents – his clothes were blood stained – they took possession of all his clothes: a yellow jumper, t-shirt, inner wear, a fact admitted to by the accused. These were sent to the Government analyst as per the exhibit memo dated 15th August 2018.
38. Evidently something happened that led to the heavy staining of the accused person's clothes with the blood of the deceased. The only conclusion that the court can draw from this is that the accused was involved in the killing of the deceased. Why? Because there is evidence of a dead person near his home, and the dead man's blood on the accused's clothes, and the dead man is said to have entered the home of the accused with ulterior motives. The only logical conclusion is that the accused and the deceased had a confrontation and the accused cut the deceased causing him fatal injuries. The kind of injuries inflicted bring the matter within the purview of s. 206 of the Penal Code.
39. It is on the basis of this that I make a finding that the accused person is guilty of the murder of Musa Kiprop Chirchir c/s 203 as read with 204 of the Penal Code. He is convicted accordingly.
40. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF MARCH 2023.

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MUMBUA T. MATHEKA

JUDGE

CA Wanjohi

Ms. Murunga for State

Ms. Odande for accused

Accused present

