



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Kirui (Criminal Case 2 of 2018)  
[2023] KEHC 18235 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 18235 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL CASE 2 OF 2018**

**RL KORIR, J  
MARCH 20, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JACKSON KIBET KIRUI ..... ACCUSED**

**JUDGMENT**

1. The Accused was charged with Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the charge were that on the December 16, 2017 at Kitoben village of Kitoben location within Bomet County murdered Daisy Chepngetich.
2. The Accused took plea on January 29, 2018 and pleaded not guilty. The trial commenced before Muya J who heard 5 witnesses. I took over the case and heard the final Prosecution witness.
3. On March 31, 2022, this court ruled that the Prosecution had established a prima facie case against the Accused and put him on his defence.

**The Prosecution's Case.**

4. The Prosecution Case was that the accused tied up and assaulted his daughter (the deceased) causing fatal injury. Robert Kiprono Malel (PW1) testified that he was the Accused's brother and that he operated a canteen. That on the material day, Brian the deceased's brother came and informed him that the Accused requested his presence at home. That when he arrived at the Accused's home, he found the Accused, the deceased's siblings and deceased tied with a rope on both hands. He stated that the Accused told him that the deceased had deserted home and required counselling.
5. According to PW1 both the Accused and the deceased were in a bad mood. PW1 then briefly left to his canteen and when he returned he found the deceased and the Accused talking but observed that the deceased was still tied with ropes and had sustained injuries on her hands.



6. It was PW1's testimony that he left for lunch and came back around 4 pm and he found that the deceased's hands had been untied. That the deceased then locked herself in her room. He said that he then returned to his canteen and at around 6 pm he heard screams from members of the public who were angry and he went into hiding when he became aware that the deceased had died.
7. John Kipkoskey Malel (PW2) was also a brother of the Accused. He learnt from one of the tea pluckers that the deceased had returned home and that the Accused wanted to beat her. That he went to the Accused's house and found the deceased tied on a chair with bruises on her swollen hands.
8. PW2 testified that he requested that the deceased be untied and when she was untied she went and locked herself in her room. PW2 further stated that he requested her brother (Ronald) to go and check whether there was a rope or other items that she might use to commit suicide. That Ronald came back holding a neck tie.
9. It was PW2's testimony that he went out briefly and then the deceased's brother Ronald came running towards him and informed him that the deceased had fallen from the bed and fainted. That after a while, the Accused arrived with a Motor Vehicle and he was informed that the deceased had succumbed to her injuries. That he subsequently members of the public gathered at the scene and the Accused went into hiding. It was his evidence that the Accused and his daughter used to quarrel.
10. Alice Kirui (PW3) testified that she was the wife of the Accused and mother of the deceased. That on the material day, she left for Kaplong for some celebrations and when she returned home the following day, she found people had gathered in her compound and learnt that their daughter had returned home and died in the house. She said that her husband was not at home when she returned. She told the court that the deceased had given them a lot of problems.
11. Nickson Rotich (PW4) testified that on the material day, he decided to pass by the Accused's house and found PW1, PW2, Stanley, the Accused and the deceased seated in the sitting room. It was PW4's testimony that the deceased had been tied with ropes, that she was crying and had bruises on her swollen hands.
12. PW4 stated that after a while, the deceased was untied and later went to her room where she locked herself in. That PW2 dissuaded her from locking herself in and when she opened the door, he (PW4) went away. It was PW4's further testimony that later in the evening he accompanied the Accused to get transport and that they found a Probox in which the Accused returned to his house. That after a while he (PW4) heard screams and saw people armed with sticks at the Accused's home and he decided to go away.
13. Dr Ronald Kibet (PW5) testified that he was a physician working for Bomet County. He produced a Post Mortem Report that was marked as P Exh 1 which was filled by Dr Mutai. It was his testimony that Dr, Mutai conducted a Post Mortem Examination on the body of the deceased on December 20, 2017 at Longisa Hospital.
14. PW5 stated that the cause of death was cardio-respiratory arrest secondary to brain oedema following blunt trauma to the head.
15. No xxxx Cpl Joseph Ngumbi (PW6) testified that he was attached to DCI Bomet Central and that he was the Investigating Officer in this matter. That on the material day he was assigned a murder case at 2300hrs at Mulango Kitobei area at the home of the Accused. He stated that members of the public informed him that the Accused had killed his daughter. On reaching the home he found the deceased lying on the floor inside her bedroom. He observed that she had bruises on the head and both hands. That the witnesses told him that the deceased had been tied by the Accused with a rope on both hands



and caned with a stick which he found on the table. It was PW6's testimony that he was told that the Accused was disciplining the deceased for disappearing from home without permission.

16. PW6 produced the rope marked as P.Exh 2 and a wooden stick marked as P Exh 3. He testified that they moved the body to the Mortuary on December 16, 2017 and that on December 29, 2017, the Post Mortem was conducted in his presence.
17. PW6 testified that the Accused surrendered himself at Bomet Police Station on January 11, 2018 fearing that he would be assaulted or lynched by the public. He further stated that the Accused had gone into hiding.

### **The Defence Case**

18. In his defence the Accused (DW1) testified that the deceased had been sick for a while. That her school Principal informed him that the deceased disappeared from school sometimes and was suspected to be using drugs and that she had been disciplined in school by her teachers. The accused further stated that the deceased was a troublesome child and would regularly disappear from home and that on one occasion she quarrelled and beat up her mother (PW3) and also threatened to burn the house.
19. The Accused testified that on the material day, his son assisted him to tie the deceased up while he send his other son Ronald to go and call his brothers PW1, PW2 and Stanley to come and assist him in talking to the deceased. That they took the deceased inside and tied her next to the cupboard and they tried to talk to her.
20. It was the Accused's testimony that the deceased talked back to them and later on refused to speak. That this led him to hit her with a stick on her arm and shoulder. The Accused further testified that when the deceased failed to listen, they untied her and she went to bed. They told her brother Ronald to follow her to her room and ensure that she did not harm herself and he reported that there was no rope or poison in her room but that the deceased had refused to eat. It was his further testimony that he decided to take the deceased to hospital because she was not looking well.
21. The Accused denied having used the stick produced in court to beat the deceased as it was not the kind of stick that he would use to beat either his wife or child. The Accused further stated that he was trying to discipline his daughter the way he disciplines all his children.
22. It was the Accused's testimony that he went to get a motor vehicle to take the deceased to hospital and when he brought the motor vehicle, his son (DW2) informed him that the deceased had fallen from the bed and died. That he was informed that members of the public were baying for his blood and he therefore disappeared.
23. The Accused concluded by stating that he was not involved in the death of the Accused as he did not assault her except on her arm and shoulder. That once they untied her, he did not follow her to her room. He further stated that it was his son who informed him that she had died.
24. The Accused called 2 witnesses in support of his defence. His Son Ronald Kipkoech Bett (DW2) testified that when he got home on the material date Aaron had already assisted his dad in getting hold of the deceased. He testified that he was sent to call his uncles, PW1, PW2 and Stanley and when they returned he found his father outside holding the deceased by her arm. That they went inside and were instructed to tie the deceased on the sofa.
25. DW2 testified that his father and uncles talked and counselled the deceased but she was very rude in her responses and that was when she was beaten. That when she was released, she went and locked herself



in her room. DW2 further testified that his uncles told him to go and check on her as they feared that she might harm herself.

26. It was DW2's testimony that he gave her food which she ate and afterwards requested him to cover her. That he got concerned and went outside to inform his father and uncles. DW2 further testified that when he went back to her room, he found the deceased having fallen down near the door. That he then rushed outside to inform his uncles and found that his father had gone to get a motor vehicle.
27. DW2 stated that his uncle poured cold water on the deceased but she was unresponsive. That when the Accused came back, he was informed what had happened. DW2 further stated that the stick that the Accused used to beat the deceased was about a meter long and its width was the size of a finger stating that the same could not endanger the life of a person. DW2 concluded by stating that the Accused only beat the deceased on the shoulder and arm and that it was not the beating that caused the death of the deceased.
28. Stanley Kirui (DW3) testified that he was the brother of the Accused. That on the material day, DW2 came and informed him that the Accused wanted him to go and counsel the deceased. That when he reached the Accused's home, he found PW1, PW2 and DW2. He further testified that he found the deceased tied with an old rope and upon inquiring why she was tied, he was informed that they did not want her to run away.
29. DW3 stated that after asking the deceased why she was loitering, the Accused moved close to her and started beating her but she just looked at him. That after a while, she left for her room. DW3 further stated that they left together with the Accused and went outside and that DW2 was left with the deceased.
30. DW3 concluded by stating that the stick that the Accused used to beat the deceased was comparable to the size of a radio aerial. That the Accused wanted the deceased to continue with her education and wanted the best for all his children. It was DW3's testimony that the death of the deceased was unfortunate.

### **The Law**

31. The offence of murder is provided for under section 203 of the Penal Code which states:-  

' Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'
32. The Court of Appeal of Kenya in the case of *Johnson Njue Peter Vs Republic (2015) eKLR* listed the three elements that must be proven for a Murder charge to be sustained:-
  - a. The death of the deceased and the cause of that death.
  - b. That the accused committed the unlawful act which caused the death of the deceased.
  - c. That the accused had the malice aforethought.
33. For the offence of murder to be proven, like any criminal offence, the onerous task of proof falls on the Prosecution by way of direct or circumstantial evidence. Such proof must be beyond reasonable doubt. In the case of *Bakare V State (1987) 1 NWLR (PT 52) 579*, the Supreme Court of Nigeria explained the phrase 'proof beyond reasonable' in the following words:-  

' Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the



evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.'

#### **i. Fact of death and cause thereof**

34. Having set out both the Prosecution and the defence case and the relevant laws and principles I now examine the evidence on each ingredient to reach a finding whether or not the prosecution proved the charge against the accused.
35. No xxxx Cpl Joseph Ngumi (PW6) testified that he was attached to DCI Bomet Central and that he was the Investigating Officer in this matter. That upon being assigned the case, he proceeded to the Accused's home where he found the deceased lying on her bedroom floor. It was his testimony that the body was moved on December 16, 2017 to the Mortuary at Longisa Referral Hospital. There was evidence from the family members PW1, PW2 and even the accused himself that the deceased died on December 16, 2017. The Post-Mortem report PExh 1 was yet the clearest confirmation of death. The death of the deceased was therefore proven.
36. Dr Mutai conducted an autopsy on the deceased on December 20, 2017 at the Longisa Hospital Mortuary. His finding on the cause of death was cardio-respiratory arrest secondary to head injury following blunt trauma to the head. His findings were contained in the Post-Mortem report [Prosecution Exhibit I] produced on his behalf by Dr Ronald Kibet (PW5).
37. There was no contestation that the cause of death was head injury following blunt trauma to the head. The defence however strongly contested that the injury to the head was caused by the assault visited on the deceased by her father the accused. It was the position of the defence reflected in the cross-examination of the prosecution witnesses and in the defence testimony of the accused and his witnesses DW2, DW3 and DW4 that the head injury sustained by the deceased resulted from her falling from her bed after she was untied and released from the sitting room.
38. The Prosecution submitted that there were eye witnesses in this case and that there was direct evidence that the Accused intentionally caused the death of his daughter when he tied and beat her up. That the evidence on record clearly proved that the four ingredients of murder were proved beyond reasonable doubt. They relied on Sections 203 and 206 of the Penal Code, Cap 63, Laws of Kenya.
39. It was the Prosecution's submission that there was no doubt that Daisy Chepngetich died. That there was ample evidence from PW1, PW2 and PW4 that the Accused was the one who committed the heinous act by tying his daughter and beat her using sticks and runigus intending to cause her death.
40. The Accused on the other hand submitted that the death of the deceased was confirmed by PW1,2,3,4,5 and 6 who saw the deceased's body in her room and that the Post Mortem Report confirmed that the deceased died of cardiac respiratory arrest secondary to head injury following a blunt trauma to the head. That there were no fractures found on the deceased's body and the possible reason for the head trauma was the fall. It was the Accused's further submission that the injury on the frontal part of the head could not have been caused by caning as it was consistent with a fall.
41. It was the Accused's submission that PW1, PW2 and PW3 confirmed that the accused was just a mere witness to the death of the deceased. That he was informed of the death after they had left the deceased in her room when she was alive and healthy. It was the Accused's further submission that the



corroborated evidence did not prove beyond a reasonable doubt that he did the unlawful act which caused the death of the deceased.

42. The Accused submitted that there was no requirement in the Penal Code that one must have motive for Murder. He relied on the case of *Roba Galma Wario Vs Republic (2015) eKLR*.
43. It was the Accused's submission that there was no evidence to prove that the caning and the deceased's hands being tied led to her death. The Accused further submitted that the Prosecution failed to show that the murder weapon produced in court was used by the Accused. That the Defence's witnesses corroborated his testimony that the stick used to discipline the deceased was thin and about one meter in length.
44. The Accused submitted that the stick could not have caused the death of the deceased as the discipline was mild and interplayed with counselling.
45. It was the Accused's submission that the Post Mortem Report supported the Accused's claim that he did not murder the deceased because the Report stated that the head injury might have been occasioned by a fall. That none of the witnesses stated that they saw the Accused assaulting the deceased on the head and that the way the Accused caned his daughter was the same as that of every concerned parent to their children.
46. I have considered the Prosecution evidence alongside the accused's defence. In doing this I am conscious that the burden of proof rests throughout the trial on the prosecution and never shifts to the accused. In the converse, I am equally conscious that the accused bears no duty to prove his innocence. In the South African Court of Appeal case of *Rex Vs Difford (1937) SA*, it was stated that:-

' It is equally clear that no onus rests on the accused to convince the court on the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.'
47. From the prosecution evidence, there was no contestation that the accused tied up his daughter on the material day and beat her for reason that she had disappeared from home for 2 weeks. According to both the prosecution and defence witnesses, this was a culmination of a history of disobedience by the deceased.
48. PW1, PW2 and PW4 all told the Court that the accused was tied to a chair using ropes. The Investigating Officer PW6 produced the ropes (Prosecution Exhibit 2) which he collected at the scene. PW6 also produced a wooden stick (Prosecution Exhibit 3) identified as the stick that the accused used to beat the deceased. The accused while admitting that he caned the deceased to discipline her, denied that he used the wooden stick (Exhibit 3). He told the Court that he used a small stick or cane which he has always used to discipline his children.
49. The defence witnesses DW2 and DW3 also contested that the wooden stick exhibited in court was used by the accused to beat the deceased. DW2 Ronald Kipkoech Bett who is the deceased's brother testified that the father beat his sister using a stick which was a meter long and whose width was the size of a finger and that such a stick was incapable of endangering the life of a person. He said that what his father used was the same stick that he used to discipline all his children.
50. The accused's brother Stanley Kirui (DW3) while admitting that the accused beat the deceased, described the stick used as being the size of a radio aerial.



51. I have considered the prosecution evidence that the accused was annoyed with his daughter for having disappeared from home and that with the assistance of one Aaron, he tied her to a chair and beat her. There is evidence that he was furious. His beating could not therefore have been gentle and harmless. She remained tied to the chair for the better part of the day and had swollen hands as a result. I accept the prosecution evidence that the assault caused her harm.
52. The post mortem form (Exhibit 1) detailed the injuries as minor bruises on upper arms; forearms; right hand swollen with minor bruises; right forehead swelling measuring approximately 4cmx5cm; slight bleed beneath swelling on right frontal region; swelling on the frontal and right hemisphere of brain; and concussion of the frontal lobe. The assault was therefore not limited to the arm and shoulder as alleged by the accused. He must have hit her on her head causing her blunt trauma to the head.
53. In the post-mortem report (Exhibit 1), Dr Mutai formed the opinion that the cause of death was 'cardio-respiratory arrest secondary to head injury (Brain Oedema due to contusion) following blunt trauma to head possible fall.'
54. The defence submitted that the finding pointed to a fall as the cause of the head injury. While the prosecution maintained that the head injury was caused by the beating by the accused. I have looked carefully at the pathologist's finding stated above. He did not make a conclusive finding that it was a fall but rather that there was a possibility of such injury being caused by a fall.
55. The post mortem report (Exhibit 1) is an expert report receivable under Section 48 of the *Evidence Act*. It must therefore be considered alongside other evidence. PW5 was an expert witness and his evidence was therefore receivable by the court under Section 48 of the *Evidence Act*. In the case of *Kimatu Mbuvi T/A Kimatu & Bros vs Augustine Munyao Kioko Civil Appeal No 203 of 2001 (2007) 1 EA 139* the Court of Appeal, held that:-
- ' Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.'
56. I have therefore considered the post mortem report alongside other evidence. As already set out the prosecution witnesses PW1, PW2 and PW4 stated that the accused tied up the deceased and beat her. The accused himself admitted that he beat her. The defence witnesses also made the same admission while denying that the stick used was too tiny to cause any harm.
57. I therefore find that the cause of death was cardio respiratory arrest secondary to brain oedema following blunt trauma to the head as found and documented in the PW3 Form (Exhibit 1) by Dr Mutai.
58. It is my finding too from the evidence analysed above that the blunt trauma to the head was occasioned by the accused when he tied and assaulted the deceased using a stick. I dismiss the testimonies of the defence that the stick was the size of a finger or aerial incapable of causing injury.
59. There can be a supervening cause of death. Section 213 of the Penal Code provides that:-
- ' A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—



- (a) If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;
- (b) If he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;
- (c) If by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;
- (d) If by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;
- (e) If his act or omission would not have caused death unless it had been accompanied'

60. In *Rex v Okule s/o Kabect (1941) 8 EACA 78*, the Court of Appeal stated that:-

' A person who inflicts injury on a person who is already in a weak state, whether by reason or illness or a previous assault by another is guilty of murder if death results from such injury, supervening upon the weakness of the victim, even though, the last injury would not by itself have killed a healthy person.'

61. In this case the accused may have fallen from her bed after being untied and hurt herself. Her fall however must have been as a result of body weakness caused by the day long assault. Further the accused told the court that the deceased had a history of sickness. If this be true, it would go further to give weight to the fact that she was already weak by the time she fell.

## **ii. Whether the Accused committed the unlawful act that led to the death of the deceased.**

62. It was clear from the evidence already analysed above that the death of the deceased was unlawful. In the case of *Republic V Boniface Isawa Makodi (2016) eKLR*, Nyakundi J aptly stated that:-

' Under section 203 of the Penal Code the prosecution must prove the element that the death was unlawfully caused to constitute the offence of murder. It is settled law that all homicides are unlawful unless they fall under the exceptions of the law like self-defence or defence to property. This was well stated in the classic case of *Gusambizi Wesonga v Republic (1948) 15 EACA 65*:

'Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.'



63. There was no dispute that the accused was the person who assaulted the deceased. The Accused's brothers, Robert Kiprono Malel (PW1), John Kipkoskey Malel (PW2) together with the accused's neighbour Nickson Rotich (PW4) all testified that on the material day, they found the deceased tied up for discipline and counselling and that she had bruises on her swollen hands.
64. The Accused (DW1) admitted having beaten the deceased. He testified on the material day, with the help of his son, tied the deceased on a seat. It was his testimony that he beat up the deceased with a stick on her arm and shoulder. That his intention was to discipline her as she had disappeared from home for over two weeks.
65. The Accused's son, Ronald Kipkoech Bett (DW2) testified that when he got home on the material day, he found his brother had already assisted his father in tying up the deceased. It was his testimony that when the deceased was being counselled by his father and uncles, she was very rude and this led to the Accused beating her on the shoulder and arms using a stick. Stanley Kirui (DW3) who was the Accused's brother corroborated the evidence tendered by DW1 and DW2.
66. The evidence above, coupled with the post-mortem findings prove beyond reasonable doubt that it was the accused and no one else who fatally assaulted the deceased leading to her unlawful death.

**(iii) Whether the Accused had malice aforethought.**

67. The final issue is whether the accused acted with malice aforethought.
68. Section 206 of the Penal Code of Kenya sets out the circumstances which constitute malice aforethought. It states thus:-

' 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.'
69. Murder therefore comprises actus reus (the act itself) and mens rea (the criminal mind or intention). The actus reus in this case is the unlawful taking of another's life. Mens rea on the other hand denotes malice aforethought which is a condition of the mind in which one unlawfully and voluntarily does a serious bodily injury to another. (See *State vs Wetter, 11 Idaho 433, 83 Pac 341, 346 (1905)*).
  70. According to Burdick in *The Law of Crimes*, malice aforethought can be evidenced by bad feelings towards someone but does not necessarily mean personal hatred or revenge against the person killed.



71. In the case of *Republic V Silas Magongo Onzere Alias Fredrick Namema (2017) eKLR*, the court held that:
- ' Malice aforethought is a technical term associated with the state of mind of the accused charged with the offence of murder. The distinct state of mind and circumstances the state must prove on any one of them is clearly stated under section 206 of the Penal Code.'
72. In the celebrated case of *Tubere S/O Ochen VS Republic EA (1945) 12 EACA 63* the Court of Appeal of Eastern Africa said as follows:
- ' The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack'.
73. The Prosecution submitted that in killing his daughter, the Accused acted with malice aforethought as he knew exactly what he was doing and that there were no excuses for his actions. They argued that punishment must be reasonable. That the evidence on record showed that the deceased succumbed to merciless beatings by use of rungs and sticks. The Prosecution further submitted that the fall was a result of the injuries that she had sustained.
74. It was the Prosecution's submission that the disappearance of the Accused for over three weeks angered the accused and was a testament that he was guilty of the offence. They urged the court to return a verdict of guilty of Murder and failure to that, return that of Manslaughter.
75. The Accused submitted that if the chastisement occasioned any injury, the same was never premeditated or intended. That this Honourable Court should reach a finding of Manslaughter and not Murder and even with that temper it with humanity as the demeanour and character of the Accused depicted him as a man who kept his family and brothers together as a unit.
76. The Accused concluded by submitting that there is a presumption that mens rea is an essential ingredient in every criminal offence, but it may rebutted by the express words of a statute creating the offence or by necessary implication.
77. The Accused testified that the deceased had given them (he and PW3) problems. That she had disciplinary problems in school which led her to be disciplined. The deceased's mother, Alice Kirui (PW3) and brother, Ronald Kipkoech Bett (DW2) corroborated the same.
78. The Accused stated that all he did was discipline the deceased the way a normal parent would discipline an errant child. It is not disputed that the Accused occasioned the deceased injuries on her shoulder and arms as a result of the beating. It emerged from evidence that the deceased while tied up was being counselled by her uncles and being beaten by the Accused. That upon the intervention of the uncles, the Accused released the deceased from the rope after which she headed to her room.
79. There was no evidence to indicate that the Accused or anybody followed the deceased to her room to continue with the beating.
80. It is my conviction from the above facts that though the Accused chose a barbaric way to discipline his daughter the deceased, he neither had malice aforethought nor an intention to kill her.



81. In the case of *Roba Galma Wario Vs Republic (2015) eKLR*, the Court of Appeal held that:-

' 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.'

82. Section 202 of the Penal Code provides that:-

' (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.'

83. In this case I have found the accused guilty of causing the unlawful death of the deceased. As the element of mens rea is not proved to the required legal standard, I apply the provision of Section 179(2) and substitute of the offence of murder with that of manslaughter.

84. I find the Accused guilty of the offence of Manslaughter contrary to section 202 as read with section 205 of the Penal Code. He is accordingly convicted.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 20<sup>TH</sup> DAY OF MARCH, 2023**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Judgement delivered in the presence of the Accused Mr. Njeru for the State, Mr. J.K.Koech for the Accused and Susan (Court Assistant)**

